Journal of Legislation

Volume 44 | Issue 2 Article 5

4-20-2018

Sentencing Enhancement for Aggravating Role: The Need for the Numerosity Test as the Legal Standard for the "Otherwise Extensive" Criminal Activity Determination

Nicole Borczyk

SENTENCING ENHANCEMENT FOR AGGRAVATING ROLE: THE NEED FOR THE NUMEROSITY TEST AS THE LEGAL STANDARD FOR THE "OTHERWISE EXTENSIVE" CRIMINAL ACTIVITY DETERMINATION

Nicole Borczyk†

I. INTRODUCTION

The federal sentencing system for criminal cases has garnered much debate and conversation throughout our history. For most of the twentieth century, the discussion concerned the immense discretion and power federal judges had in determining a federal criminal defendant's sentence.[1] Judges relied upon all pertinent information[2] in their sentencing determinations, and that information was "not subject to procedural constraints such as the rules of evidence or standards of proof."[3] Furthermore, judges did not have to explain the reasons or evidence that provided the basis for their sentencing judgments, and the sentences were, for the most part, not subject to appellate review.[4] Until the early 1980s, the only limitation placed on the judge's discretion was the maximum term of imprisonment prescribed by Congress—judges could not impose a sentence that exceeded the statutory maximum penalty.[5] Another point of discussion concerned the indeterminate nature of the sentences imposed.[6] Although the judge imposed a sentence in court, the United States Parole Commission and the Federal Bureau of Prisons largely determined the time actually served by the convicted, not the judge.[7] The Parole Commission also had wide

† J.D. Candidate, Notre Dame Law School, 2019; B.A. in Political Science and International Political Economy, Fordham University, 2016. I would like to extend my thanks to Professor Richard Garnett, for providing his invaluable insight, to the Notre Dame Journal of Legislation, for all of their assistance, and to my family for all of their thoughts and encouragement in pursuing this subject.

1 *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 109 (6th ed. 2016).

2 This consisted of any information the judge thought was relevant in determining a sentence, including the defendant's conduct regarding the current offense, past misconduct, background, history, characteristics, etc.

3 O'SULLIVAN, *supra* note 1, at 109.

4 *See* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1169–70 (2017).

5 *See* O'SULLIVAN, *supra* note 1, at 109; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

6 *See* Newton & Sidhu, *supra* note 4, at 1171; Stith & Koh, *supra* note 5, at 226–27.

7 *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990) ("[S]entences pronounced by the court were, with rare exception, never served: twelve years meant four, eighteen meant six, thirty meant ten."); Newton & Sidhu, *supra* note 4, at 1170; *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice*

discretion in its early release determinations.[8] Due to the wide, seemingly unchecked discretion afforded to both judges and to the Parole Commission, "significant sentencing disparities among similarly situated [defendants]" resulted,[9] and the federal sentencing system for criminal cases was a system of "indeterminate sentencing."[10]

Congress responded by enacting the Sentencing Reform Act of 1984 ("the SRA") that revolutionized the federal sentencing system.[11] The SRA established the United States Sentencing Commission, and one of its tasks was to formulate sentencing guidelines.[12] By establishing clear guidelines, Congress sought to limit judicial discretion and to instill transparency, proportionality, certainty, consistency, and fairness into the sentencing system.[13] Once completed, the Sentencing Commission intended for the Sentencing Guidelines to have two effects: first, to promote uniformity, proportionality, predictability, and certainty in federal criminal sentencing; and second, to assure that the punishment imposed appropriately serves the purposes[14] of sentencing that the SRA set forth.[15] In essence, the Guidelines set the rules and the procedure[16] that judges are to follow in order to determine the

System Is Achieving the Goals of Sentencing Reform, 17 FED. SENT'G REP. 269, 269 (Apr. 2005) [hereinafter *Fifteen Years of Guidelines Sentencing*].

8 *See* PETER B. HOFFMAN, HISTORY OF THE FEDERAL PAROLE SYSTEM 6–7 (2003), https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf.

9 *See* Peugh v. United States, 569 U.S. 530, 535 (2013); *see also* Nagel, *supra* note 7, at 883.

10 *See* Mistretta v. United States, 488 U.S. 361, 363 (1989); *see also* ALLEN, STUNTZ, HOFFMAN, LIVINGSTON, LEIPOLD, & MEARES, CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1498–500 (2d ed. 2016) [hereinafter ADJUDICATION AND RIGHT TO COUNSEL].

11 *See* George L. Blum, Annotation, *Construction and Application of U.S.S.G., § 3B1.1(a), 18 U.S.C.A., Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity—Drug Offenses*, 43 A.L.R. Fed. 2d 365 § 2 (2017).

12 28 U.S.C. § 994(a)(1) (2012).

13 *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 1 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf; *see also* Nagel, *supra* note 7, at 902–04; *Fifteen Years of Guidelines Sentencing*, *supra* note 7, at 269.

14 The purposes of sentencing are retribution, deterrence, incapacitation, and rehabilitation. *See* 18 U.S.C. § 3553(a)(2) (2012).

15 *See* 28 U.S.C. § 991(b) (2012); Dorsey v. United States, 567 U.S. 260, 264 (2012); U.S. SENT'G COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2016) [hereinafter GUIDELINES MANUAL]; *see also* U.S. SENT'G COMM'N, *supra* note 13, at 1.

16 First, the judge determines which Chapter Two offense guideline applies to the case at issue by consulting Appendix A of the Guidelines Manual. Second, the judge calculates the "offense level" from that guideline by considering both the applicable "base offense level" and any "specific offense characteristics" based upon the relevant conduct provisions discussed in Chapter One. Specific offense characteristics are "aggravating and mitigating factors [that are] related to a particular offense type." In example, for unlawful possession of a firearm, offense involved more than three firearms, firearm was stolen, and firearm serial number was altered, to list a few. Third, the judge determines if any additional "adjustments" to the offense level are warranted from the Chapter Three provisions. Adjustments include "general aggravating and mitigating factors that are common across offense types." For example, acceptance of responsibility, use of minor in committing a crime, hate crime, and abuse of position of trust, to list a few. Fourth, the judge calculates the offender's "criminal history points" according to the provisions in Chapter Four and places the offender in a criminal history category. Fifth, the judge identifies the sentencing guideline range in the Chapter Five Sentencing Table by locating the cell in the table where the offender's offense level and criminal history category intersect. Lastly, the judge contemplates all potential grounds for a "departure" or "variance" from

applicable sentencing range set out in the sentencing table.[17] As originally enacted, the resulting guideline range was mandatory—judges were required to sentence within the calculated range.[18]

From 1987 through 2005, the conversation mainly focused on the mandatory nature of the newly enacted Sentencing Guidelines. Judges were required, except in extraordinary cases, to sentence within the narrow range provided after completing the procedure. Arguments surfaced regarding the inflexible nature of the Guidelines, the restriction the Guidelines had on human discretion, the resulting shift in power from the judge to the prosecutor in regards to sentencing, the removal of humanity and individualization aspects of sentencing, and the potential Sixth Amendment violation that resulted from forced sentencing requirements.[19] The Supreme Court responded in *United States v. Booker*[20] and held that the mandatory nature of the Sentencing Guidelines violated the Sixth Amendment.[21] As a result, the Guidelines have become only advisory and a required starting point. [22]

Today, the SRA requires judges to consider the Sentencing Guidelines in conjunction with other sentencing factors to arrive at an appropriate sentence for the applicable offense and defendant.[23] In other words, judges still must follow the procedure set out in the Guidelines to arrive at a range but are then allowed to tailor the sentence based upon other statutory concerns.

Nevertheless, the Sentencing Guidelines are still the subject of considerable discussion over a wide array of issues. Some of the issues arise out of the ambiguity in the language of its provisions and the resulting confusion in its application. This Note will examine the debate that surrounds the Chapter Three aggravating role adjustment provision for serving as either a leader or organizer of "otherwise extensive" criminal activity that raises the base offense level by four levels, or a supervisor or manager of "otherwise extensive" criminal activity that raises the base offense level by three levels. The debate derives from the ambiguity surrounding what constitutes "otherwise extensive" criminal activity, and thus, when the adjustment should apply.

This Note will argue that the numerosity test ought to be the legal standard for determining "extensiveness." Part I provides an introduction to the problems and debate that surrounds the federal sentencing system and a general introduction to the Sentencing Guidelines. Part II provides a brief overview of the Sentencing Reform Act of 1984 and a more in-depth explanation of the Sentencing Guidelines. Part III

the applicable guideline range by consulting the 18 U.S.C. § 3553(a) factors set out in the SRA. U.S. SENT'G COMM'N, *supra* note 13, at 15–16 (emphasis added).

17 *Id.* at 15–20.

18 18 U.S.C. § 3553(b)(1) (2012).

19 O'SULLIVAN, *supra* note 1, at 109.

20 United States v. Booker, 543 U.S. 220 (2005).

21 18 U.S.C. § 3553(b)(1) was deemed unconstitutional, and was severed and excised from the SRA. *Id.* at 245.

22 *See* Diona Howard-Nicolas, Comment, *Negotiated Federal Sentencing Guidelines: A Cure for the Federal Sentencing Debacle*, 65 ADMIN. L. REV. 665, 666 (2013).

23 *See* Barbara J. Van Arsdale, Annotation, *Construction and Application of U.S.S.G. § 3B1.1(a) Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity—Fraud Offenses*, 32 A.L.R. Fed. 2d 445 § 2 (2017).

examines the sentencing enhancement provision for an aggravating role in "otherwise extensive" criminal activity and its context within the structure and purpose of the Guidelines. Part IV discusses two legal standards used to determine "otherwise extensive" criminal activity that currently divide the circuits. In Part V, I will argue that the numerosity test ought to be the legal standard. I will incorporate both the language of the provision, the goals and purpose of the Sentencing Guidelines, and the structure of the Sentencing Guidelines to support my argument. Lastly, the Conclusion will summarize this analysis.

II. SENTENCING REFORM ACT OF 1984 AND THE SENTENCING GUIDELINES

Prior to the enactment of the SRA, the federal sentencing system was largely unregulated.[24] There were no procedural limitations on the evidence considered by judges at the sentencing hearings. Judges evaluated all information deemed relevant to the sentencing determination.[25] Furthermore, judges were not required to provide a justification explaining the reasons for their sentencing decision,[26] and their decisions were virtually unreviewable by an appellate court.[27] The only limit was that the sentence imposed fit within the statutory minimum and maximum established by Congress. Wide disparities among similarly situated defendants resulted—the sentence a defendant received greatly depended on which judge the defendant came before.[28]

This disparity was exacerbated by the wide discretion the Parole Commission and the Federal Bureau of Prisons ("BOP") had in ultimately determining when a defendant would be released from prison. The BOP awarded "good time allowances"—which reduced the length of time served relative to the term of imprisonment imposed by the district court judge—to federal prisoners who earned them for good behavior during their incarceration.[29] These good time allowances had the ability to significantly reduce the prison sentence.[30] In addition, federal prisoners were eligible for parole consideration if they received a prison sentence that exceeded one year and had served one-third of their sentence.[31] If eligible, the Parole Commission reviewed the offender's sentence and file, conducted an evaluation, held

24 Newton & Sidhu, *supra* note 4, at 1169.

25 *Id*. at 1170.

26 *Id*.

27 Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("Once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

28 *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 6, 21–23 (1973). For a study of the judge disparity, see ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974).

29 Newton & Sidhu, *supra* note 4, at 1170.

30 *Id*. at 1170–71 ("[R]anging from reductions of up to five days per month (or 17%) for sentences less than one year to ten days per month (or 33%) for sentences of ten years or more. . . . [P]risoners could earn additional good time allowances—of up to five days per month or even more for 'exceptionally meritorious service'—by working in a prison industry or camp. As a result, for some prisoners, good time allowances resulted in their service of less than half of the sentences imposed by the district courts."); *see* 18 U.S.C. § 4161 (repealed 1984).

31 *See* Hoffman, *supra* note 8, at 6–7.

hearings, and determined whether to release the offender earlier.[32] Until the late 1970s, the parole system largely resembled the federal sentencing system. The Parole Commission did not have uniform guidelines in its review of sentences and each panel was afforded broad discretion in its determinations.[33] Consequently, there was no predictability, proportionality, or uniformity in the prison sentence federal defendants actually served. Nevertheless, the American attitude—that federal prisoners could be rehabilitated through punishment—supported and fundamentally shaped the practice of early release on parole.[34]

The American attitude changed in the 1970s and 1980s due to the dramatic rise in crime and recidivism rates, as the United States was faced with its highest crime rate in history.[35] This change in American sentiment, coupled with Congress' beliefs—that federal sentences were "too lenient" for certain offenses or offenders and did not "reflect the seriousness of the offense," that judges and parole authorities possessed large discretion in issuing a sentence, and that wide disparities in sentences resulted among similarly situated defendants for similar crimes—sparked the movement for sentencing reform.[36] Thus, the sentencing reform proposed by Judge Marvin E. Frankel in 1972[37] and the bill proposed to Congress by Senator Edward Kennedy in 1975 began to gain the support they needed to be enacted.[38] Finally, Congress passed, and President Reagan signed, the Sentencing Reform Act of 1984 ("SRA")[39] after nine years of Congressional deliberation.[40]

Congress sought to create consistency, transparency, predictability, and fairness in federal sentencing through this much-needed sentencing reform. Congress wanted to establish a system that issued sentences that appropriately reflected the seriousness of the offense and that provided the defendants with a definitive timeframe.[41] The SRA enacted six main reforms: (1) it set forth the sentencing factors and purposes of

32 *Id.* at 11.

33 *See id.* at 1, 11, 21–22.

34 S. REP. NO. 98-225, at 38–41 (1983) ("In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model."). *See also* Stith & Koh, *supra* note 5, at 227.

35 *See* Newton & Sidhu, *supra* note 4, at 1182–83 (noting that, the decade before the enactment of the original sentencing guidelines, "between 38.0% and 51.4% of federal offenders were rearrested within three years of their release from federal prison."); FED. BUREAU PRISONS, U.S. DEP'T OF JUSTICE, RESEARCH REVIEW: RECIDIVISM AMONG FEDERAL OFFENDERS 2 (1986), https://www.ncjrs.gov/pdffiles1/-Digitization/1022224NCJRS.pdf.).

36 *See* Newton & Sidhu, *supra* note 4, at 1178, 1182.

37 Judge Frankel, a federal district judge for the Southern District of New York, advocated for sentencing reform, and proposed a National Commission that would study sentencing and develop sentencing factors with a grading system to provide set principles and goals for judges to use at sentencing. *See* Judge Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 41–54 (1972).

38 *See generally* Stith & Koh, *supra* note 5.

39 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987–2040 (1984).

40 In 1975, Senator Edward Kennedy introduced legislation to establish a Sentencing Commission, but it was not until nine years later that the bill had passed both houses by an overwhelming majority. In 1984, President Ronald Reagan signed the SRA. For more information regarding the legislative history, see Stith & Koh, *supra* note 5.

41 Congress believed that current sentences were too lenient and did not reflect the seriousness of the offense or the history of the defendant, and found that "prisoners often did not really know how long they [would] spend in prison until the very day they [were] released." S. REP. No. 98-225, at 49, 56–59, 75 (1983).

sentencing,[42] (2) established the Sentencing Commission,[43] (3) created the Sentencing Guidelines,[44] (4) required judges to provide an explanation for the sentences imposed,[45] (5) permitted appellate review,[46] and (6) abolished parole consideration by the United States Parole Commission.[47] In doing so, Congress hoped to shift the federal sentencing structure from a system of "indeterminate sentencing" to a system of "determinate sentencing" that curtailed judge discretion.[48] This Section will highlight two of these reforms: first, the sentencing factors and purposes, and second, the sentencing guidelines.

A. Sentencing Factors and Purposes

The SRA set forth the sentencing factors and the purposes of sentencing to be considered by the sentencing judges. Specifically, the SRA advanced seven factors that judges must consider before imposing a sentence, which include: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant,"[49] (2) the need for the sentence imposed to achieve the purposes of sentencing,[50] (3) "the kinds of sentences available,"[51] (4) the applicable guideline range,[52] (5) any pertinent policies,[53] (6) "the need to avoid unwarranted sentence disparities . . . ,"[54] and (7) the need to provide restitution to the victims.[55] The purposes of sentencing are retribution,[56] deterrence,[57] incapacitation,[58] and

42 18 U.S.C. § 3553(a) (2012).

43 28 U.S.C. § 991 (2012).

44 *Id.* § 994.

45 Judges must state an explanation for the sentence imposed, which includes any reasons for departure or variance from the Guidelines. 18 U.S.C. § 3553(c) (2012).

46 All sentences are subject to appellate review, *id.* § 3742, to ensure that the Sentencing Guidelines were correctly applied, which in turn, assures that the sentences are reasonable and supported, remain proportional and fair, do not lead to any disparities between similarly situated defendants, and "are sufficient, but not greater than necessary to achieve the purposes of sentencing." *Id.* § 3553 (2012). This transformed the system from being virtually unreviewable to a system that is subject to appeal.

47 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987–2040 (1984); *see* Hoffman, *supra* note 8, at 2. *However*, the SRA continued to allow for good time allowances to incentivize federal prisoners to engage in good behavior but restricted good time allowances to only those prisoners who received a sentence of more than one year, and the credit was capped at 15% of a federal prisoner's sentence. *See* 18 U.S.C. § 3624(b) (2008).

48 GUIDELINES MANUAL, *supra* note 15, at § 1A1.1–1.2.

49 18 U.S.C. § 3553(a)(1) (2012).

50 *Id.* § 3553(a)(2).

51 *Id.* § 3553(a)(3).

52 *Id.* § 3553(a)(4).

53 *Id.* § 3553(a)(5).

54 *Id.* § 3553(a)(6).

55 *Id.* § 3553(a)(7).

56 The sentence imposed needs to impart retribution for the offense by "reflect[ing] the seriousness of the offense, . . . promot[ing] respect for the law, and . . . provid[ing] just punishment for the offense." *Id.* § 3553(a)(2)(A).

57 The sentence imposed needs "to afford adequate deterrence" to both the offender and the public. *Id.* § 3553(a)(2)(B).

58 The sentence imposed needs to incapacitate "to protect the public from further crimes." *Id.* § 3553(a)(2)(C) (2010).

rehabilitation.[59] The judge must conduct an open evaluation of these factors and consider all other pertinent information and policies not covered in the SRA or the accompanying Guidelines before reaching a sentencing decision. Overall, the SRA requires that the sentence imposed be "sufficient, but not greater than necessary" to meet those purposes.[60]

B. Sentencing Guidelines

The Sentencing Commission was tasked with establishing federal sentencing guidelines.[61] Congress intended for the Guidelines to "eliminat[e] unwarranted disparity; [provide] transparency, certainty, and fairness; [afford] proportionate punishment; and [initiate] crime control through deterrence, incapacitation, and the rehabilitation of [defendants]."[62] The Guidelines were to achieve this by taking into account the characteristics of the offense and the relevant defendant.[63] As such, the Commission would be able to ensure that both discrimination and irrelevant differences among defendants did not affect sentence determinations.[64] Furthermore, parties would be in a better position to predict sentences based on an evaluation of the facts of the case.[65]

With those goals in mind, the Sentencing Commission developed the Guidelines by conducting studies of past sentencing practices.[66] The Commission evaluated data on over 100,000 federal sentencing cases.[67] The Commission further examined the corresponding presentence reports, files, and data from the Bureau of Prisons and the United States Parole Commission for 10,500 of those 100,000 cases to determine, or estimate, the actual amount of time served by those defendants.[68] The average prison sentence for each type of crime was calculated and served as a benchmark for the "base offense level" of each generic crime category.[69] Using a multiple regression computer analysis, the Commission identified and analyzed aggravating and mitigating factors for each type of crime that created sentence gradations.[70] These factors provided the basis for each type of crime's "specific offense characteristics," which increased or decreased the "base offense level."[71] Using this data, the Commission then drafted guidelines, received public feedback, and based succeeding

59 The sentence imposed needs to rehabilitate by "provid[ing] the defendant with needed . . . correctional treatment." *Id.* § 3553(a)(2)(D).

60 *Id.* § 3553(a)(1).

61 28 U.S.C. § 994(a)(1) (2012).

62 *Fifteen Years of Guidelines Sentencing*, *supra* note 7, at 269. For an overview of the development of the Sentencing Guidelines, see *id.*

63 *Id.* at 270. Newton & Sidhu, *supra* note 4, at 1186.

64 *Fifteen Years of Guidelines Sentencing*, *supra* note 7, at 275.

65 *Id.* at 276.

66 *Id.* at 269.

67 *Id.;* Newton & Sidhu, *supra* note 4, at 1197.

68 Newton & Sidhu, *supra* note 4, at 1197–99.

69 *See Fifteen Years of Guidelines Sentencing*, *supra* note 7, at 269.

70 *See* Newton & Sidhu, *supra* note 4, at 1198.

71 *See Fifteen Years of Guidelines Sentencing*, *supra* note 7, at 269–70.

drafts on that feedback.[72] The end result was a seven-chapter manual. The manual was made with the understanding that it would be amended and would evolve to reflect the sentencing needs at the current time.[73]

Today, the Sentencing Guidelines is an eight-chapter manual with three appendices and one index. Chapter One provides the Guideline's general application principles; specifically, the rules on relevant conduct and on the information that can be considered.[74] Chapter Two presents the guidelines for each type of "Offense Conduct."[75] There are approximately 155 types of federal offenses. A standard guideline in this Chapter has both a "base offense level"—the offense in its foundational form—and "specific offense characteristics"—aggravating and mitigating factors for that particular offense type. For example, the offense of Kidnapping, Abduction or Unlawful Restraint has a base offense level of thirty-two, while there are various specific offense characteristics that raise or lower that offense level, including, among others, ransom demand, bodily injury, sexual exploitation, and use of a dangerous weapon.[76] Chapter Three contains "Adjustments" that relate to general aggravating or mitigating factors common across all federal offense types.[77] There are approximately twenty adjustments relating to obstruction, multiple counts, acceptance of responsibility, the defendant's role in the offense, and victim-related adjustments. For instance, some adjustments include hate crime motivation,[78] commission of offense while on release,[79] and acceptance of responsibility.[80] This Note discusses the adjustment for the defendant's aggravating role.[81]

Chapter Four pertains to the defendant's criminal history and criminal livelihood.[82] This Chapter contains the rules for computing a defendant's criminal history points, which determine his or her criminal history category on the Sentencing Table. Chapter Five includes the rules for determining each aspect of a defendant's sentence and the Sentencing Table.[83] This Chapter provides the rules for imposing probation, imprisonment, supervised release, restitution, fines, assessments, forfeitures, and other sentencing options. It also includes various policy statements for departures relating to the specific offense characteristics,[84] such as age,[85] mental and emotional conditions,[86] and addictions.[87] Chapter Six provides provisions regarding the sentencing procedure and policy statements on acceptance or rejection

72 Newton & Sidhu, *supra* note 4, at 1199. For an overview of the history of the drafts, see *id.*

73 GUIDELINES MANUAL, *supra* note 15, at § 1A1.2.

74 *Id.* at § 1B.

75 *Id.* at § 2.

76 *Id.* at § 2A4.1.

77 *Id.* at § 3.

78 *Id.* at § 3A1.1.

79 *Id.* at § 3C1.3.

80 *Id.* at § 3E1.1.

81 *Id.* at § 3B1.1.

82 *Id.* at § 4.

83 *Id.* at § 5.

84 *Id.* at § 5H.

85 *Id.* at § 5H1.1.

86 *Id.* at § 5H1.3.

87 *Id.* at § 5H1.4.

of plea agreements.[88] Chapter Seven includes policy statements for violations of probation and supervised release.[89] Chapter Eight provides guidelines on sentencing an organization.[90]

1. Procedure

As mentioned, the Guidelines set out a strict procedure that judges are to follow to calculate the applicable sentencing range.[91] First, the judge determines which Chapter Two offense guideline applies to the case at issue by consulting Appendix A of the Sentencing Guidelines Manual. Second, using that applicable Chapter Two offense guideline, the judge finds the "base offense level" and calculates any modifications[92] in that offense level for any "specific offense characteristics" based upon the relevant conduct provisions included in that guideline. Third, the judge determines if any additional Chapter Three "adjustments" provisions are warranted and adjusts the offense level accordingly. Fourth, the judge, using the Chapter Four provisions, calculates the defendant's "criminal history points" and places the defendant in a criminal history category. Fifth, the judge identifies the sentencing guideline range in the Chapter Five Sentencing Table by locating the cell in the table where the defendant's offense level and criminal history category intersect. Lastly, the judge contemplates all possible grounds for a "departure" or "variance" from the applicable guideline range by consulting the § 3553(a) factors[93] set out in the SRA and policy statements located in Chapter Five. After the judge has adequately gone through this procedure and considered all factors, a sentence is imposed that is sufficient but not greater than necessary.

Despite the seemingly straightforward Guidelines procedure, ambiguity still remains regarding the applicability of the Chapter Two "specific offense characteristics" and the Chapter Three "adjustments," which leads to inconsistent application in practice. As a result, the Guidelines Manual appears to not be as effective as it could be in achieving its goals of uniformity, proportionality, and predictability.

III. U.S.S.G. § 3B1.1: ADJUSTMENT FOR AGGRAVATING ROLE

As mentioned in the preceding section, the third step of the Guidelines application procedure is to determine whether any Chapter Three "Adjustments" apply. The adjustment this Note will discuss is the sentencing enhancement for the defendant's aggravating role in "otherwise extensive" criminal activity. The Sentencing Commission did not define what constitutes "extensiveness" under this provision. In this section, I will examine the provision and the accompanying comments, its purpose within the Sentencing Guidelines, and the provision's context

88 *Id.* at § 6.

89 *Id.* at § 7.

90 *Id.* at § 8.

91 *See generally* U.S. SENT'G COMM'N, *supra* note 13, at 15–16.

92 Any increases and/or decreases in that offense level. *Id.* at 15.

93 *See* 18 U.S.C. § 3553(a) (2012).

within the structure of the Guidelines to provide some direction as to its proper application.

A. Provision and Commentary

The United States Sentencing Guideline § 3B1.1 (a) and (b) for an aggravating role states, in relevant part:

> **§ 3B1.1: Aggravating Role**[94]
>
> Based on the defendant's role in the offense, increase the offense level 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.

It is clear from both of these provisions that the court must make two determinations. First, a role determination in reference to whether the defendant served as a leader, organizer, manager, or supervisor. Secondly, a scope determination in regards to whether the criminal activity meets either the amount of participants requirement or, alternatively, the extensiveness threshold.[95] However, the provision remains ambiguous in regards to what constitutes "otherwise extensive" criminal activity.

The commentary makes several clarifications that are important in the "extensiveness" determination, but it does not resolve it completely. First, a participant is defined as "a person who is criminally responsible for the commission of the offense, but need not have been convicted."[96] Second, this sentencing enhancement only applies to a defendant who was "the organizer, leader, manager or supervisor of one or more other participants."[97] Lastly, "all persons involved during the course of the entire offense are to be considered" when determining "extensiveness."[98] Thus, an organization that involves less than five participants can be considered extensive if it involved the "unknowing services" of others.[99]

94 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1(a), (b). Part (c) was omitted, as it pertains to criminal activity that is not otherwise extensive.

95 *See generally* 21 AM. JUR. 2D, *Criminal Law* § 771 (2018).

96 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1 cmt. n. 1.

97 *Id.* at cmt. n. 2.

98 *Id.* at cmt. n. 3; *see also* Van Arsdale, *supra* note 23.

99 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1 cmt. n. 3.

Despite the language of the provision and its commentary, ambiguity regarding the proper method to determine "extensiveness" remains, which is illustrated in the current split that divides the circuits. Is the "otherwise extensive criminal activity" limited to activity that amounts to the equivalent of five participants? Or is it a totality of the circumstances analysis that considers all relevant factors regarding the scope of the criminal activity? Or does it encompass something else? This Note seeks to answer these lingering questions.

B. Purpose of the Adjustment

Courts look to the policy of the Sentencing Commission when interpreting an ambiguous provision of the Sentencing Guidelines.[100] Under the SRA, Congress sought to achieve uniformity and proportionality by requiring judges to calculate the applicable guidelines range based on factors determined by the Sentencing Commission to be pertinent and to then impose a sentence from within that narrow range.[101] Although the Guidelines are no longer mandatory after *Booker*, the policy persists, as judges must use the Guidelines as a starting point.

The primary concern behind the Sentencing Commission's inclusion of the aggravating role adjustment is the "defendant's relative responsibility [in] the commission of the offense."[102] The Commission intended for the adjustment to apply when both the scope of the organization and the degree of the defendant's responsibility increased.[103] In other words, the provision sought to ensure that defendants' sentences are proportional to their level of responsibility. For example, in a money laundering case, a defendant who was an organizer of a three-participant conspiracy should not receive the same "offense level" as the leader of the prostitution organization that involved four participants and the unwitting services of twenty others. As illustrated, the Commission wanted to impose essentially the same sentence on similar defendants who committed similar crimes, while at the same time also distinguish non-similar defendants in order to eliminate unwarranted disparities and to achieve greater uniformity among sentences.[104] This aggravating role adjustment addressed that distinction, and thus, is appropriate when the defendant has authority or control over an organization that either involves five or more participants or is otherwise extensive.[105]

C. Context Within the Sentencing Guidelines

The Guidelines are structured into an easy-to-follow process such that a judge proceeds chronologically from Chapter Two through Chapter Five to arrive at the applicable sentence range unless the circumstances make Chapter Six, Seven, or

100 *See generally* 21 AM. JUR. 2D, *Criminal Law* § 756 (2018).

101 *See generally id.* § 748.

102 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1 cmt. background; s*ee also* 21 AM. JUR. 2D, *Criminal Law* § 771 (2018).

103 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1 cmt. background.

104 *See generally* Blum, *supra* note 11.

105 *Id.*; *see also* 21 AM. JUR. 2D, *Criminal Law* § 771 (2018).

Eight relevant. The aggravating role guideline is located in Chapter Three. Therefore, prior to considering the aggravating role enhancement, a judge has already performed the Chapter Two analysis. Specifically, the judge would have determined the applicable Chapter Two offense and located its "base offense level." The judge would have also considered all relevant conduct pertaining to the "specific offense characteristics"—all aggravating or mitigating circumstances that are *specific* to the particular offense at issue—and applied any necessary departures from the "base offense level." Chapter Three, on the other hand, contains *general* aggravating or mitigating circumstances—factors that apply generally and are not specific to the offense at hand—that were not taken into account in other guidelines, including Chapter Two's specific offense characteristics.[106] The relevant conduct to be considered under a Chapter Three adjustment is strictly limited to the language of the adjustment provisions and is not to double count the same aspects of the same conduct that was factored into the sentencing calculation in a previous step or chapter.[107]

IV. LEGAL STANDARDS FOR "OTHERWISE EXTENSIVE" CRIMINAL ACTIVITY SCOPE DETERMINATION

Due to the ambiguous meaning of "extensiveness," there is a current circuit split. It is uncontested that to qualify for the adjustment under the scope determination, the defendant must have led, organized, supervised, or managed at least one other participant—someone "who is criminally responsible for the commission of the offense, but need not have been convicted."[108] In addition, the circuits agree that the enhancement is appropriate under the "extensiveness" prong when the criminal activity involves the equivalent of five participants. However, the circuits disagree about whether the test to determine equivalence "must focus upon a headcount of the individuals involved, or may also rely upon other indices of extensiveness such as the magnitude of the harm, the complexity of the planning, or the number of victims."[109] This Section will discuss these two leading approaches that the circuits have taken.

106 GUIDELINES MANUAL, *supra* note 15, at § 1B1.3 cmt. n. 2 ("In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established."). For a general overview of the structure of the application of the Guidelines, see GUIDELINES MANUAL, *supra* note 15, at § 1B.

107 *See, e.g.*, United States v. Diekemper, 604 F.3d 345, 354 (7th Cir. 2010) ("Double-counting under the U.S. Sentencing Guidelines Manual occurs . . . if precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways.")

108 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1 cmt. n. 2; *see also* United States v. Skys, 637 F.3d 146, 156 (2d Cir. 2011).

109 United States v. Helbling, 209 F.3d 226, 244 (3d Cir. 2000), *cert. denied*, 531 U.S. 1100 (2001). *Compare* United States v. Carrozzella, 105 F.3d 796, 802–03 (2d Cir. 1997) (focusing analysis on the number of individuals involved), *with* United States v. Dietz, 950 F.2d 50, 53–54 (1st Cir. 1991) (permitting consideration of a broad range of factors).

A. Numerosity Approach

The Second, Third, Sixth, and D.C. Circuits have adopted a numerosity approach to determine "extensiveness," which requires a showing that the criminal activity involved the functional equivalent of five or more participants.[110] The courts in these circuits conduct a three-fact inquiry by considering: (1) "the number of knowing participants," (2) "the number of unknowing participants whose activities were organized, led, [managed, or supervised] by the defendant with specific criminal intent," and (3) "the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme."[111] Under the first factor, the court is more likely to find the criminal activity to be extensive as the number of knowing participants increases.[112] Under the second factor, the court separates out nonparticipants who facilitate the defendant's criminal activities but who are not the functional equivalents of participants.[113] This factor requires that the defendant has specific criminal intent in involving them in the offense and considers the nature of the nonparticipants' role in the offense.[114] Thus, the analysis of "otherwise extensive" under the numerosity approach focuses at first upon the number of participants and unknowing nonparticipants involved in the criminal activity, followed by a subsequent determination regarding whether their roles and involvement amounts to the functional equivalent of five participants.[115]

These circuits implement this numerosity approach for a variety of reasons. First, the circuits believe that focusing the inquiry upon the number and roles of the individuals involved, both knowing participants and unknowing nonparticipants, corresponds with the language of the provision.[116] The text of the provision and its accompanying commentary are concerned with the number of people involved in the criminal activity and the size of the organization.[117] It does not make reference to the other factors that are considered under the totality of the circumstances approach.[118] Moreover, the numerosity approach best complies with the structure of the Sentencing Guidelines because the adjustment is meant to account for factors that have not already been considered in prior guidelines.[119] Therefore, the numerosity approach reduces the "potential for double counting certain aspects of [the] criminal activity that are already considered elsewhere in the [G]uidelines" and that have

110 *Carrozzella*, 105 F.3d at 803; *Helbling*, 209 F.3d at 247–48; United States v. Anthony, 280 F.3d 694, 701 (6th Cir. 2002).

111 *Carrozzella*, 105 F.3d at 803–04; *see, e.g.*, United States v. Kent, 821 F.3d 362, 369 (2d Cir. 2016); United States v. Bathily, 392 F. App'x 371, 377–78 (6th Cir. 2010); United States v. Antico, 275 F.3d 245, 269 (3d Cir. 2001), *cert. denied*, 537 U.S. 821 (2002); *Anthony*, 280 F.3d at 700; United States v. Wilson, 240 F.3d 39, 50 (D.C. Cir. 2001); *Helbling*, 209 F.3d at 247–48.

112 *Carrozzella*, 105 F.3d at 804; United States v. Archer, 671 F.3d 149, 165 (2d Cir. 2011).

113 *Carrozzella*, 105 F.3d at 804.

114 *Id.*; *Helbling*, 209 F.3d at 247–48.

115 United States v. Helbling, 209 F.3d 226, 244 (3d Cir. 2000).

116 *Id.* at 245.

117 United States v. Anthony, 280 F.3d 694, 699 (6th Cir. 2002); United States v. Wilson, 240 F.3d 39, 48 (D.C. Cir. 2001).

118 *Anthony*, 280 F.3d at 700.

119 *See Helbling*, 209 F.3d at 245.

already resulted in a sentencing enhancement.[120] Third, the purpose of the sentencing adjustment was to have sentences reflect the criminal culpability or role of the defendant.[121] These circuits propose that if the Sentencing Commission intended for the provision to call for a broader interpretation of "extensiveness" it could explicitly say so, whereas the notes clearly indicate the policy advanced through this provision is to have sentences account for the relative responsibility of the defendant compared to other defendants.[122] This test enables a court to "identify an individual whose contribution [is] so essential to the criminal objective that he should be counted as a 'participant.'"[123]

1. Application of Test

In their application of the numerosity approach, these circuits have found the criminal activity to be "otherwise extensive" in cases where there was at least one participant but involved the necessary services of unknowing outsiders. For example, the Second Circuit in *Archer*[124] affirmed the application of the aggravating role adjustment for being a leader of otherwise extensive criminal activity.[125] The court determined that the visa fraud and the conspiracy to commit visa fraud were extensive because: (1) there were at least three participants, (2) there were a fair number of unknowing nonparticipants—the defendant's clients—who signed the applications and the defendant led these clients with the specific criminal intent of filing false visa applications, and (3) the services of the unknowing nonparticipants were peculiar and necessary to the defendant's criminal scheme—the defendant needed them to provide their own information and to secure the supporting affidavits that the office prepared in order to commit the visa fraud.[126] Likewise, the Third Circuit in *Helbling*[127] found that the district court properly applied the aggravating role enhancement because the defendant was a leader of an embezzlement fund scheme that was otherwise extensive.[128] The scheme involved three criminally responsible participants and five unknowing nonparticipants. The defendant directed the nonparticipants' actions and their actions were peculiar and necessary since they helped hide his criminal activity, transformed the accounts into the type needed to embezzle funds, and aided his

120 *Id.* at 246; *see also* United States v. Carrozzella, 105 F.3d 796, 802–03 (2d Cir. 1997).

121 *Helbling*, 209 F.3d at 245.

122 *Helbling*, 209 F.3d at 246; *see also Anthony*, 280 F.3d at 700.

123 United States v. Anthony, 280 F.3d 694, 700–01 (6th Cir. 2002).

124 United States v. Archer, 671 F.3d 149 (2d Cir. 2011).

125 *Id.* at 165.

126 *Id.* at 166; *see also* United States v. Rubenstein, 403 F.3d 93, 99 (2d Cir. 2005) (finding the extensiveness requirement met when there were at least two knowing participants and as many as seven unknowing nonparticipants who were necessary to the criminal activity).

127 United States v. Helbling, 209 F.3d 226 (3d Cir. 2000).

128 *Id.* at 250.

embezzlements.[129] Similarly, in *Embry*,[130] the Sixth Circuit held that the defendant's false tax return scheme was extensive because it involved one participant and nearly 150 unknowing participants—taxpayers—who were necessary in signing the false tax returns.[131]

However, these circuits have also remanded cases or found the enhancement to be improperly applied when the district court made inadequate factual findings to support the three-prong test or when the district court considered factors that were already contemplated in calculating the offense level. For instance, in *Skys*,[132] the Second Circuit determined that the district court's factual findings that the defendant led a life of fraud and was constantly seeking new victims were insufficient to support the extensiveness prong of the aggravating role enhancement, and could possibly indicate an impermissible overlap with the number-of-victims enhancement already applied.[133] Similarly, the D.C. Circuit in *Wilson*[134] found that the aggravating role enhancement for being a leader or organizer for otherwise extensive activity was improperly applied, as there was no evidence that the defendant organized or led the unknowing nonparticipants—numerous bank personnel—since they were following their routine practice even though their services were peculiar and necessary to the scheme and the defendant used them with specific criminal intent.[135]

B. Totality of the Circumstances Approach

The First, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits implemented a totality of the circumstances approach to determine what constitutes "otherwise extensive" criminal activity. This broader inquiry does not limit the extensiveness inquiry to solely a function of the number of criminally culpable participants or unknowing nonparticipants engaged in the activity. Instead, these circuits examine the "totality of the circumstances," which includes the number of participants and nonparticipants involved as well as the "width, breadth, scope,

129 *Id.* at 249. For additional examples of this idea, see United States v. Britton, 567 F. App'x 158, 161 (3d Cir. 2014) (determining that the prostitution ring the defendant led was extensive because there was one participant and the unknowing services of his many prostitutes who were necessary and particular to the criminal activity); United States v. Bennett, 161 F.3d 171, 193–94 (3d Cir. 1998), *cert. denied*, 528 U.S. 819 (1999) (determining that the large and complex Ponzi scheme the defendant ran was extensive because it involved two participants and at least thirteen nonparticipants who assisted the defendant by withholding information from investors and legitimizing his activities by preparing reports based on false information).

130 United States v. Embry, 61 F. App'x 166 (6th Cir. 2003).

131 *Id.* at 168. For an additional example, see United States v. Zazueta-Garcia, 239 F. App'x 941, 946 (6th Cir. 2007) (finding the criminal activity to be otherwise extensive because it involved at least seven individuals with at least one being a knowing participant).

132 United States v. Skys, 637 F.3d 146 (2d Cir. 2011).

133 *Id.* at 158; *see also* United States v. Kent, 821 F.3d 362, 370–71 (2d Cir. 2016) (remanding the case because the district court failed to state any factual findings regarding the number of unknowing participants organized or led by the defendant and whether their services were peculiar and necessary to the scheme, and instead, considered impermissible factors outside the scope of the "numerosity" test and factors that have already been taken into account in calculating the defendant's offense level).

134 United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001).

135 *Id.* at 50.

complexity, and duration" of the criminal activity.[136] Thus, the extensiveness prong is satisfied if the number of criminally responsible participants, the number of unknowing outsiders, and the circumstances surrounding the criminal activity amount to the functional equivalent of five participants.[137]

These circuits adopted this approach for multiple reasons. First, the circuits believe that this approach best comports with the language of the aggravating role adjustment because there is nothing in the text of the provision or its commentary that limits the inquiry to a strict headcount.[138] Second, to limit the inquiry to merely a headcount of the individuals involved would effectively nullify the "otherwise extensive" clause of the provision, which provides another alternative than just the number of people involved.[139] Lastly, the approach best incorporates the relevant conduct provision in Chapter One of the Sentencing Guidelines that states that "all relevant conduct surrounding the crime of conviction" can be considered.[140]

1. Application of Test

These circuits have found "extensiveness" when the criminal activity involved many participants or nonparticipants, spanned over a long duration, involved a significant amount of victims and/or clients, involved multiple states or spanned across a wide geographic reach, involved a large quantity of money and/or drugs, or was a complex scheme. For example, in *Pierre*,[141] the First Circuit found that the cocaine conspiracy the defendant led was otherwise extensive based on the number of people involved, the number of places in which drugs were sold, the fact drugs were sold at both the wholesale level and retail level, the significant amount of drugs that were sold, and the length—the activity occurred over at least three years.[142]

136 United States v. Dietz, 950 F.2d 50, 53 (1st Cir. 1991); *see also* United States v. Arbour, 559 F.3d 50, 54 (1st Cir. 2009); United States v. Beverly, 284 F. App'x 36, 41–42 (4th Cir. 2008). Specifically, the Ninth Circuit looks to factors such as the "number of knowing participants and unwitting outsiders; the number of victims; and the amount of money fraudulently or illegally obtained." United States v. Booth, 309 F.3d 566, 577 (9th Cir. 2002) (citing United States v. Rose, 20 F.3d 367, 374 (9th Cir. 1994)).

137 *See* United States v. Tai, 41 F.3d 1170, 1174–75 (7th Cir. 1994).

138 *Arbour*, 559 F.3d at 54; *see also* United States v. Laboy, 351 F.3d 578, 586 (1st Cir. 2003).

139 The pertinent clause of the aggravating role guideline provision reads: "that involved five ***or*** more participants or was otherwise extensive . . . ." GUIDELINES MANUAL, *supra* note 15, at § 3B1.1(a)–(b) (emphasis added); *see Laboy*, 351 F.3d at 585 n.10; *Dietz*, 950 F.2d at 53; United States v. Tejada-Beltran, 50 F.3d 105, 113 (1st Cir. 1995); *Arbour*, 559 F.3d at 53.

140 United States v. Holland, 22 F.3d 1040, 1045 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); s*ee also Arbour*, 559 F.3d at 54; *Laboy*, 351 F.3d at 585.

141 United States v. Pierre, 484 F.3d 75 (1st Cir.), *cert. denied*, 552 U.S. 915 (2007).

142 *Pierre*, 484 F.3d at 89; *see also* United States v. Al Kabouni, 641 F. App'x 6, 8 (1st Cir. 2016) (determining the criminal activity to be extensive when it involved numerous unwitting store employees and beneficiaries, and the illicit transfer of $1.9 million in SNAP credits over roughly three years); United States v. Arbour, 559 F.3d 50, 54 (1st Cir. 2009) (determining the criminal activity was extensive because it involved a host of knowing and unknowing participants for a significant duration of time, and involved overarching drug and firearm dealings); United States v. Colón-Muñoz, 318 F.3d 348, 364 (1st Cir. 2003) (holding that the extensiveness prong was met since the fraud was complex, and involved many unwitting participants, more than minimal planning, a series of documents prepared internally through a bank and externally through a notary, and a number of checks personally issued by the defendant); United States v. Anderson, 139 F.3d 291, 297 (1st Cir.), *cert. denied*, 525 U.S. 866 (1998) (determining that the prostitution ring was extensive because a significant number of women were under the defendant's control, the services of several other individuals

Likewise, in *Fluker*,[143] the Seventh Circuit found the fraudulent criminal activity to be extensive because there were three participants, over $18 million was obtained, the geographic scope involved at least six states, it affected over 3,000 people, and was deemed complex in its use of straw buyers to facilitate housing program transactions.[144] Furthermore, the Eleventh Circuit found the extensiveness criteria

were used in pursuit of his activities, and his plan involved prostitution in three states); United States v. D'Andrea, 107 F.3d 949, 957 (1st Cir. 1997) (determining the bank fraud was extensive because it involved fraud against two financial institutions, the submission of many documents that contained false financial information and forged signatures to obtain loans for $8.1 million, the manipulation of figures to misrepresent that he was investing his money into the sale, conspiracy with another participant to falsify the actual sale price of the property, and the use of unwitting services of many others to secure the loans); United States v. Rostoff, 53 F.3d 398, 414 (1st Cir. 1995) (determining the fraud conspiracy was otherwise extensive since it lasted for over three years, involved at least 140 fraudulent loans, consumed millions of dollars, affected many lives, and involved a legion of people beyond the five named defendants); *Tejada-Beltran*, 50 F.3d at 113 (finding that a scheme to smuggle illegal immigrants met the extensiveness requirement because of its duration, the number of clients involved, and its geographic reach); United States v. Graciani, 61 F.3d 70, 76 n.7 (1st Cir. 1995) (finding the extensiveness requirement met by a ledger that established a wide-ranging pattern of drug trafficking activities, and a trash bag containing thousands of empty vials used to package crack cocaine); *Dietz*, 950 F.2d at 54 (finding the criminal activity of committing fraud against the Social Security Administration was extensive because it occurred for over twelve years, used many false identities, and involved seven states, eight government agencies, and more than five persons to complete the scheme).

For a Fourth Circuit application, see United States v. Beverly, 284 F. App'x 36, 42 (4th Cir. 2008) (finding the defendant's scheme to defraud the Medicaid system to be extensive since it involved numerous employees and clients, derived excessive revenue in the amount of $2.6 million, occurred over multiple locations, and was a large operation).

143 United States v. Fluker, 698 F.3d 988 (7th Cir. 2012).

144 *Id.* at 1002–03; *see also* United States v. Hussein, 664 F.3d 155, 162 (7th Cir. 2011) (finding extensiveness because the defendant made a substantial portion of his income from the food stamp scheme, amounting to almost $2 million through fraudulent redemptions, the operation continued for an extended period of time, the defendant traded cash for benefits with hundreds of customers, he used many food stamp venders to make a profit, and he ran the scam from multiple locations); United States v. Pabey, 664 F.3d 1084, 1097 (7th Cir. 2011) (extensiveness found when the criminal activity involved two participants and at least five lower-level workers); United States v. Diekemper, 604 F.3d 345, 354 (7th Cir. 2010) (finding the bankruptcy and mail fraud conspiracy to be extensive when the scheme involved three knowing participants and six outsiders, spanned over four years, involved more than $2.5 million, was highly orchestrated, and utilized the assistance of several other people); United States v. Chen, 497 F.3d 718, 722 (7th Cir. 2007) (criminal activity was otherwise extensive because it involved roughly $380,000, about 150 victims, a significant number of participants and nonparticipants, a record keeping system of the daily activity, and used means of extortion to receive debt collection); United States v. Shearer, 479 F.3d 478, 483 (7th Cir. 2007) (extensiveness found because the criminal activity involved two participants and more than four outsiders); United States v. Mansoori, 304 F.3d 635, 668 (7th Cir. 2002), *cert. denied*, 538 U.S. 967 (2003) (criminal activity was extensive, as it involved at least five individuals, had a broad temporal and geographic reach, and involved numerous narcotics transactions that took place on a daily basis); United States v. Frost, 281 F.3d 654, 658 (7th Cir. 2002) (criminal activity was otherwise extensive since a substantial portion of the defendant's income was obtained by fraud and the amount of the loss was about $2.8 million); United States v. Miller, 962 F.2d 739, 745 (7th Cir. 1992) (extensiveness found when the criminal activity involved two participants and four outsiders); United States v. McKenzie, 922 F.2d 1323, 1329 (7th Cir.), *cert. denied*, 502 U.S. 854 (1991) (extensiveness found when it involved at least seven individuals, several couriers, cross-country trips, and numerous drugs for money transactions).

For some examples of the Fifth Circuit's precedent, see United States v. Akinosho, 285 F. App'x 128, 130 (5th Cir. 2008) (finding the criminal activity was otherwise extensive and there was at least one participant); United States v. Fullwood, 342 F.3d 409, 415 (5th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004) (criminal activity was otherwise extensive because it involved three participants and the unwitting services of at least eleven other agencies); United States v. Sidhu, 130 F.3d 644, 655 (5th Cir. 1997) (court found the criminal activity was otherwise extensive when the defendant submitted false claims for medical services, the defendant recruited numerous office employees to provide billing and collection support for his fraudulent practices, the

met when the fraud lasted for over ten years, resulted in the loss of over $20 million, and involved one participant with the unknowing services of many others to perpetrate the fraud.[145]

However, these circuits have found the "extensiveness" prong to not be satisfied when the operation was small, occurred over a short duration, and involved a lesser quantity of drugs and/or money. For instance, the Fourth Circuit in *Lines*[146] found

scheme generated more than $2 million in fraudulent billings over a nineteen month period, and when the fraud could not have succeeded without unwitting participation of his vulnerable patients and unknowing assistance of employees); United States v. Mergerson, 4 F.3d 337, 348 (5th Cir. 1993), *cert. denied*, 510 U.S. 1198 (1994) (the defendant's drug trafficking operation was extensive because it involved four participants and the defendant controlled the unwitting services of several girls who distributed heroin for him, involved an extremely large quantity of heroin, and was high-purity heroin); United States v. Stouffer, 986 F.2d 916, 927 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993) (finding that activity involving over 2,000 investors and $11 million in fraudulently obtained funds was "otherwise extensive"); United States v. Allibhai, 939 F.2d 244, 252–53 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992) (extensiveness found for money laundering scheme that involved $1 million, four participants, and the unknowing service of many outsiders).

145 United States v. Zada, 706 F. App'x 500, 509 (11th Cir. 2017); *see also* United States v. Sosa, 777 F.3d 1279, 1301–02 (11th Cir. 2015) (holding that a Medicaid fraud scheme was otherwise extensive where the defendant recruited at least a dozen patients, falsified medical records, submitted more than $1 million in false claims in just three months, and received almost $119,000); United States v. Rodriguez, 981 F.2d 1199, 1200 (11th Cir.), *cert. denied*, 508 U.S. 955 (1993) (concluding that criminal activity was otherwise extensive based on its extensive geographic scope and amount of cocaine involved).

For an example of the Tenth Circuit's application, see United States v. Yarnell, 129 F.3d 1127, 1139 (10th Cir. 1997) (extensiveness found when the fraudulent enterprise covered a wide geographic region, involved at least forty victims, generated losses in excess of $140,000, included one participant and the unwitting services of others, and involved considerable planning and complex execution).

For some examples of the Ninth Circuit's precedent, see United States v. Farris, 585 F. App'x 934, 936 (9th Cir. 2014) (finding extensiveness because the defendant perpetrated an elaborate fraud involving millions of dollars, many employees, and victims across several states); United States v. Wynn, 300 F. App'x 544, 546 (9th Cir. 2008), *cert. denied*, 555 U.S. 1216 (2009) (finding criminal activity to be otherwise extensive since it involved a significant loss of money and a substantial number of fraudulent tax returns); United States v. Cooley, 68 F. App'x 804, 806 (9th Cir.), *cert. denied*, 540 U.S. 992 (2003) (finding extensiveness when the fraudulent enterprise involved the services of many individuals and twenty victims, the amount of money obtained exceeded $1 million, involved numerous transactions and corporations, and the activity spanned more than five years); United States v. Booth, 309 F.3d 566, 577 (9th Cir. 2002) (extensiveness found for a fraudulent scheme involving more than ten unknowing employees and spanning across a wide geographical reach); United States v. Govan, 152 F.3d 1088, 1096 (9th Cir. 1998) (finding that a conspiracy was otherwise extensive because it involved interstate travel, a large number of victims, and nearly $100,000 in robbery proceeds); United States v. Rose, 20 F.3d 367, 374 (9th Cir. 1994) (criminal activity was extensive because the fraudulent scheme involved about $3 million, sixty knowing or unwitting participants, and many victims).

For Eighth Circuit precedent, see United States v. Lizarraga, 682 F. App'x 529, 533 (8th Cir.), *cert. denied*, 138 S. Ct. 277 (2017) (finding the criminal activity otherwise extensive due to the nature and complexity of the operation and its geographical reach, as the defendant and those under his control traveled between California and Iowa to retrieve or deliver large quantities of drugs and the proceeds of the drug sales were to be wired in U.S. and Mexican bank accounts opened in other peoples' names); United States v. Branch, 591 F.3d 602, 612 (8th Cir. 2009), *cert. denied*, 559 U.S. 1115 (2010) (extensiveness criteria met when the scheme involved hundreds of victims, several business locations, and the unwitting services of more than 20 people); United States v. Rosas, 486 F.3d 374, 377 (8th Cir. 2007) (finding extensiveness when there was a separate apartment to operate a drug storehouse and involved materials to prevent the detection of the illegal narcotics, five cross-country trips to pick up drugs, and a significant amount of high purity methamphetamine); United States v. Senty-Haugen, 449 F.3d 862, 864 (8th Cir. 2006) (finding the tax scheme to be extensive where twenty-nine fraudulent income tax returns were filed resulting in approximately $71,000 of loss); United States v. Brockman, 183 F.3d 891, 900 (8th Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000) (finding the fraudulent criminal activity to be extensive because there were four participants, it involved $5.8 million, it was a thirteen year scheme, and it involved a number of unwitting outsiders).

146 United States v. Lines, No. 99-4440, 2000 U.S. App. LEXIS 18330 (4th Cir. 2000).

that the criminal activity was not extensive, as it involved four persons, a single drug transport incident, a relatively short duration of drug dealing, and involved a quarter-kilogram of crack.[147] Similarly, the court in *Tai*[148] determined the criminal activity was not otherwise extensive because it involved only three participants and the unwitting services of two other individuals with no other circumstances.[149]

V. NUMEROSITY TEST AS THE LEGAL STANDARD

The numerosity test ought to be the legal standard for "otherwise extensive criminal activity" determinations under the scope clause of the Sentencing Guideline's aggravating role adjustment. The numerosity approach must be the standard for a variety of reasons. First, this standard best complies with the language of the provision and the Sentencing Commission's intent in establishing the adjustment. Second, it best aligns with the purposes of the Sentencing Reform Act and the Sentencing Guidelines. Third, this approach best follows the structure of the Sentencing Guidelines and the procedure a judge must conduct to calculate the applicable guideline range. Lastly, it prevents factors already considered in increasing the offense level in other Guidelines from being double counted. This Section will present each argument in turn.

A. Language of the Sentencing Guideline

The language of Sentencing Guideline § 3B1.1(a) and (b) best supports the numerosity approach as opposed to the totality of the circumstances approach. The provision requires the sentencing judge to make two findings: (1) a role determination, and (2) a scope determination.[150] The role determination pertains to whether or not there are sufficient factual findings to support the conclusion that the defendant was a leader, organizer, supervisor, or manager of the criminal activity. The scope determination regards the size of the criminal activity. The clause explicitly provides two options for the criminal activity to satisfy the scope requirement—either by the number of participants or by the activity being "otherwise extensive."[151] Although the provision does not provide a clear definition of what it means by "otherwise extensive," there is enough information provided in the guideline to determine which factors district court judges are allowed to consider and which factors exceed the scope of the adjustment. The permissible factors point towards a numerosity analysis.

First, the background commentary of the aggravating role adjustment clearly states that the primary concern behind the inclusion of the adjustment provision is to ensure that the defendant's sentence is proportional to his or her level of

147 *Id.* at *15–16.

148 United States v. Tai, 41 F.3d 1170 (7th Cir. 1994).

149 *Id*. at 1175.

150 GUIDELINES MANUAL, *supra* note 15 at § 3B1.1(a)–(b); *see also* 21 AM. JUR. 2D, *Criminal Law* § 771 (2018).

151 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1(a)–(b) (2018).

responsibility in the commission of the offense.[152] Specifically, the adjustment should only be applied based upon "the size of a criminal organization (*i.e.*, the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense."[153] From this language, it can reasonably be drawn that the role determination derives from the degree of responsibility prong, whereas the scope determination derives from the size of the organization prong. Therefore, in order to best accord with a size analysis, the court ought to limit its inquiry to the number of individuals involved in the criminal scheme—participants and unknowing outsiders. If a broader totality of the circumstances inquiry were performed, then factors that do not demonstrate the size of the organization would be considered. For example, the amount of money that was fraudulently obtained—a factor that the opposing circuits consider—has no bearing on, or is not a clear indicator of, the size of the organization because a defendant in a two-person conspiracy can obtain $4 million just like a defendant in a twenty-person conspiracy can obtain that same amount. Consequently, the adjustment could be applied in situations where the size of the organization was small, which was not the provision's intent. The aggravating role adjustment is meant to enhance the defendant's sentence when the size of the organization increases, which in turn, increases the significance of the defendant's role.[154]

Furthermore, the language of the adjustment makes no reference to the factors that are considered by the circuits that follow the totality of the circumstances approach. In particular, Application Note 3 clarifies the meaning of "otherwise extensive" by explaining that an organization that involves less than five participants can be considered extensive if it involved the "unknowing services" of other persons.[155] In other words, the adjustment is applicable even if there are not five participants, if the unknowing services of other persons amount to the functional equivalent of five participants. Thus, the provision's language explicitly responds to the size of the criminal organization concerning the number of both participants and unknowing outsiders. The Application Notes do not refer to other factors, besides the number of participants and unknowing outsiders, that might potentially increase the severity of the criminal organization's activity or the potential harm it might cause. Therefore, if the Sentencing Commission intended for a broader analysis than one limited strictly to the size of the organization, it is free to add language to the provision to do so. However, as the language of the provision currently stands, the aggravating role adjustment is concerned with the size of the criminal organization and the role of the defendant. Thus, the "extensiveness" inquiry ought to be limited to the factors expressed in the adjustment guideline—the number of participants and the unknowing services of other persons.

152 *Id*. at § 3B1.1 cmt. background; *see also* 21 AM. JUR. 2D, *Criminal Law* § 771 (2018).

153 GUIDELINES MANUAL, *supra* note 15, at § 3B1.1 cmt. background.

154 *Id.*

155 *Id.* at § 3B1.1 cmt. n. 3.

B. Goals and Purpose of Sentencing and the Guidelines

The numerosity approach best aligns with the purposes of both sentencing and the Sentencing Guidelines as advanced in the SRA. First, the SRA intended for the Sentencing Guidelines to promote transparency, predictability, and fairness in sentencing and to avoid unwarranted sentence disparities. The numerosity approach would achieve these goals—it provides a strict test that is transparent and will lead to predictable determinations of whether the aggravating role adjustment would apply. This test considers the same three criteria each time. Consequently, under this approach, different judges would reach the same determination regarding whether or not the criminal activity was "otherwise extensive" for the same defendant. Furthermore, this approach promotes fairness, as the defendant's sentence would increase in proportion to the significance of his role in the criminal activity.

In contrast, the totality of the circumstances approach does not have a set test and judges have discretion to look at a wide variety of factors to establish "extensiveness." There is no clear line of when a certain factor—such as the amount of funds illegally obtained in the fraud, the geographic scope, or the number of victims—indicates that the criminal activity was "otherwise extensive" under this broader inquiry. Thus, different sentencing judges can make different factual findings regarding the "extensiveness" prong in the same case. As a result, unwarranted disparities result where the adjustment is applied in one court but is not applied in a similar case in a different court. Furthermore, it creates similarities between defendants who were not similar. For instance, the adjustment can apply to a defendant who was a leader of a criminal organization with one participant and the services of two unknowing persons—that involved $1 million in illegally obtained funds over a three year period and crossed six states—as well as a defendant who was a leader of a criminal organization with three participants and the involvement of fourteen others.[156] As shown, this approach improperly created a similarity between those defendants because the adjustment is supposed to be applied in accordance to the size of the organization that the defendant led, organized, managed, or supervised and not the amount of harm or the effect the criminal organization had on the public—different guidelines take into account those harms. Here, however, the adjustment was applied in the first situation due to the amount of harm, its duration, and the geographic reach of the organization. A leader of a small organization is considered as relatively responsible as a leader of a large organization—the opposite result of what the aggravating role adjustment was created to address. Therefore, the totality of the circumstances test should not be the court's line of inquiry to determine "extensiveness."

156 *Compare* United States v. Sosa, 777 F.3d 1279, 1301–02 (11th Cir. 2015) (holding that a Medicaid fraud scheme was otherwise extensive where the defendant recruited at least a dozen patients, falsified medical records, submitted more than $1 million in false claims in just three months, and received almost $119,000), *with* United States v. Bennett, 161 F.3d 171, 194 (3d Cir. 1998) (determining that the large and complex Ponzi scheme the defendant ran to be extensive because it involved two participants and at least thirteen nonparticipants who assisted the defendant by withholding information from investors and legitimizing his activities by preparing reports based on false information).

Moreover, the numerosity approach best ensures that the sentence imposed is "sufficient, but not greater than necessary to meet the purposes of sentencing": retribution,[157] deterrence,[158] incapacitation,[159] and rehabilitation.[160] Regarding retribution, the aggravating role adjustment was designed to "reflect the seriousness of the offense," as the severity of the defendant's role increases with the size of the criminal activity. Thus, to account for this increase in severity, defendants who held a leadership or supervisory role in a larger criminal organization should receive a greater sentence than a defendant who led or supervised a few individuals. The numerosity approach limits the applicability of the enhancement to large criminal activity while the totality of the circumstances approach allows the enhancement to be applied to small criminal organizations. In addition, the numerosity test will provide adequate deterrence, as defendants will not want to have a leadership or management role in a large criminal enterprise for fear of a three or four point increase in the offense level. Furthermore, it has the potential to prevent the establishment of large criminal enterprises that create a greater danger to the community. Thus, the numerosity approach will best achieve the goals set out in the SRA.

C. Structure of the Sentencing Guidelines and Double Counting

Finally, the numerosity approach best complies with the overall structure of the Sentencing Guidelines and prevents double counting of sentencing factors. As mentioned in Part II and Part III, the Guidelines are structured such that a judge proceeds chronologically through Chapter Two to Chapter Five to arrive at the applicable sentence range unless the circumstances make the Chapter Seven provisions relevant. Therefore, prior to considering the Chapter Three aggravating role adjustment, a judge has already performed the Chapter Two analysis, considered all relevant conduct in regard to "specific offense characteristics," and applied all aggravating or mitigating departures from the base offense level that were specific to the offense. By the time the judge gets to Chapter Three adjustments, he or she is supposed to only consider general aggravating or mitigating circumstances that have not previously been considered. Thus, an aggravating factor must apply generally and not be specific to the offense at hand.

However, the totality of the circumstances approach considers factors that were already considered in prior guidelines such as the amount of money obtained, the number of victims, the geographic reach of the criminal activity, and the amount of drugs. Therefore, it double counts conduct that had already raised or decreased the

157 The sentence imposed needs to impart retribution for the offense by "reflect[ing] the seriousness of the offense, . . . promoting respect for the law, and . . . provid[ing] just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A) (2012).

158 The sentence imposed needs "to afford adequate deterrence" to both the offender and the public. *Id.* § 3553(a)(2)(B).

159 The sentence imposed needs to incapacitate "to protect the public from further crimes." *Id.* § 3553(a)(2)(C).

160 The sentence imposed needs to rehabilitate by "provid[ing] the defendant with needed . . . correctional treatment." *Id.* § 3553(a)(2)(D).

offense level previously. For example, assume a defendant was convicted for fraud under U.S.S.G. § 2B1.1 with a base offense level of seven.[161] That base offense level can be increased based on the amount of loss, the extent of planning, and the number of victims. Suppose the loss was above $1.5 million but less than $3.5 million. The base offense level would increase by sixteen levels raising it to twenty-three.[162] In addition, the base offense level is raised by two levels for involving ten or more victims[163] and by an additional two levels for using sophisticated means[164] to a base offense level of twenty-seven. Furthermore, the USSG § 3B1.1(a) aggravating role adjustment would be applied and would raise the base offense level by an additional four levels to a base offense level of thirty-one for serving a leadership role in "otherwise extensive" criminal activity because the criminal activity involved one participant and fifteen victims, the illegal obtainment of $3 million, and the use of sophisticated means. In other words, the aggravating role adjustment resulted in a four level increase even though the factors that resulted in the determination that the criminal activity was otherwise extensive had already raised the offense level by twenty levels in the Chapter Two specific offense aggravating circumstances analysis. Assuming the defendant would have received a criminal history category of one, the guideline range with the aggravating role adjustment and Chapter Two departures would have resulted in a sentence of 108 to 135 months instead of seventy to eighty-seven months without the adjustment and only the Chapter Two departures. That is a significant difference of thirty-eight to forty-eight months, or more commonly, approximately three to four years of imprisonment. As demonstrated through this example, a defendant could possibly receive multiple sentence enhancements for the same aspects of the crime under the totality approach. Even though each provision is arguably intended to address different harms, the same conduct and harm is double counted under multiple provisions.

On the other hand, the numerosity approach prevents double counting by focusing only upon the number of persons involved and the size of the criminal organization. Thus, it accounts for conduct that has not already been considered in previous Chapter Two specific offense guidelines. Specifically, the inquiry is limited to the role the defendant played and the size of the organization—the number of participants and the number of unknowing persons whose services were necessary and peculiar to the criminal activity—which has not already been factored into the sentencing calculation. It does not recount factors that indicate the criminal activity was harmful but do not indicate that the criminal organization was large.[165]

161 GUIDELINES MANUAL, *supra* note 15, at § 2B1.1(a).

162 *Id.* at § 2B1.1(b)(1).

163 *Id.* at § 2B1.1(b)(2).

164 *Id.* at § 2B1.1(b)(10).

165 *Compare* United States v. Kent, 821 F.3d 362, 370–71 (2d Cir. 2016) (finding that the district court considered impermissible factors outside the scope of the "numerosity" test and factors that have already been taken into account in calculating the defendant's offense level), *with* United States v. Diekemper, 604 F.3d 345, 354 (7th Cir. 2010) (rejecting the defendant's argument that the district court improperly double counted factors considered in a previous sentencing enhancement in determining "extensiveness," including the amount of money obtained, the sophistication in the plan, and the number of victims).

In addition, the narrow inquiry follows the procedure of the guidelines by only considering general offense characteristics that can be applied universally across all offense types. The number of participants and the number of unknowing persons—whose services are necessary and peculiar to the criminal activity—can be applied generally, whereas factors that are considered under the totality of the circumstances approach, such as the amount of money fraudulently obtained and the amount of drugs, cannot be applied to all offense types but are only applicable to certain types of offenses. Therefore, the totality test permits a Chapter Two analysis for a Chapter Three adjustment, which is not the proper procedure that a judge ought to follow—a judge is to proceed chronologically through the chapters.

In sum, the numerosity approach best complies with the overall structure of the Guidelines by proceeding chronologically and by limiting its inquiry to general offense characteristics as opposed to broadening the inquiry to a Chapter Two specific offense characteristics analysis. As a result, it prevents double counting factors that have already resulted in a sentencing enhancement during the Chapter Two analysis.

VI. CONCLUSION

The Sentencing Reform Act of 1984 was enacted by Congress to establish set principles and guidelines in federal sentencing law. The Sentencing Guidelines were created with the purpose of establishing a transparent sentencing procedure that provided proportionate, consistent, and fair sentences that reflected the seriousness of the offense. This Note discussed the Chapter Three aggravating role adjustment, which was designed to enhance a defendant's sentence based on his or her relative responsibility. Specifically, it was meant to account for the increase in the significance of the defendant's role resulting from the size of the criminal organization. The ambiguity surrounding what constitutes "otherwise extensive criminal activity" for purposes of the aggravating role adjustment has resulted in a current circuit split. However, the numerosity test is the proper approach for a variety of reasons.

First, the numerosity approach best aligns with the language of the adjustment itself. The inquiry is limited to a headcount analysis of the number of participants and the number of unknowing persons whose services were necessary and peculiar to the criminal activity. Thus, the "extensiveness" determination is confined to criminal activity that amounts to the equivalent of five participants, which accords to the explicit language of the provision. The provision does not make reference to the other factors that are improperly considered under the totality of the circumstances approach, which impermissibly expand the inquiry beyond a functional equivalence test. Therefore, the numerosity approach restricts the inquiry to what the Sentencing Commission intended.

Secondly, this approach best comports with the purposes of sentencing set out in the SRA. The strict three factor test prevents unwarranted disparities and ensures predictability and consistency in sentences because the same analysis is performed each time; however, the totality of the circumstances approach affords judges wide discretion in the factors they can consider, which can vary from case-to-case and

judge-to-judge. Furthermore, this test promotes the purposes of sentencing, as it adequately deters defendants from serving in a leadership or supervisory role in large criminal organizations for fear of a significant increase in their term of imprisonment, which in turn can reduce the number of large criminal organizations. In addition, it reflects the seriousness of the offense, as the severity of the defendant's role increases with the size of the criminal activity.

Lastly, this test best complies with the structure of the Sentencing Guidelines and prevents double counting factors that have already resulted in an increase or decrease in the base offense level. The inquiry is limited under the numerosity approach to the general offense characteristics regarding the number of people involved in the criminal activity. These factors are universally applied across offense types and their applicability does not depend on the offense of conviction. On the other hand, the totality of the circumstances approach considers specific offense characteristics that were considered in the Chapter Two analysis regarding the particular offense of conviction. The totality test proceeds backwards when the Guidelines are structured to be forward-looking. By contemplating Chapter Two specific offense characteristics, it double counts factors resulting in a second sentencing enhancement based on the same harm. Because the numerosity approach only considers general offense characteristics and does not look back to Chapter Two characteristics, the Sentencing Guidelines procedure is properly followed and does not double count provisions.

In conclusion, the circuits ought to adopt the numerosity approach's three-prong test[166] in determining when criminal activity is "otherwise extensive" for the reasons set forth above.

166 "(1) The number of knowing participants, (2) the number of unknowing participants whose activities were organized, led, [managed, or supervised] by the defendant with specific criminal intent, [and] (3) the extent to which the services of the nonparticipants were peculiar and necessary to the criminal scheme." United States v. Carrozzella, 105 F.3d 796, 803–04 (2d Cir. 1997).