FILED
United States Court of Appeals
Tenth Circuit

March 10, 2025

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

D.A.*,

Defendant - Appellant.

No. 25-600

Before **HOLMES**, Chief Judge, **BACHARACH**, and **EID**, Circuit Judges.

HOLMES, Chief Judge.

This case concerns the availability of the mitigating-role adjustment set forth in United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") § 3B1.2.[1] Defendant-Appellant D.A. pleaded guilty to conspiracy to possess with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846.

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* At the request of Defendant-Appellant, Mr. A., we have attempted to protect his identity, in light of the well-understood safety concerns that are associated with his status as a government cooperator, even though we deem the public interest to militate in favor of publication of this decision. *See, e.g.*, *United States v. A.B.*, 529 F.3d 1275, 1275 n.* (10th Cir. 2008). In that regard, we use only initials in referring to Mr. A. and those involved in the conspiratorial activities that form the backdrop for our review of the sentencing order before us.

[1] All citations to the Guidelines are to the 2021 Guidelines Manual.

At sentencing, the district court attributed to Mr. A. seven pounds of methamphetamine, the amount he trafficked from Los Angeles, California, to Topeka, Kansas, on a single commercial flight. Mr. A., with the government's support, sought a two-level reduction in his Guidelines base offense level pursuant to the minor-role provision of U.S.S.G. § 3B1.2.

Acknowledging that Mr. A.'s crime implicated him in a broad conspiracy to traffic methamphetamine from Mexico through California on to Kansas and elsewhere, the district court nonetheless found that the relevant conduct for Mr. A.'s conviction was centered in Topeka, Kansas. Finding that Mr. A. was not substantially less culpable than the average participant in the "conspiracy to distribute within Topeka," the district court denied the parties' joint request for a mitigating-role adjustment. Aplt.'s App., Vol. II, at 244 (Tr. of Sent'g Hr'g, held Aug. 31, 2022); *see* U.S.S.G. § 3B1.2, cmt. n.3(A). Mr. A. now appeals, contending that the district court's focus on Topeka and the concomitant denial of the mitigating-role adjustment was error.

We disagree. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court's sentencing judgment.

I

A

Mr. A. had a meth problem. As a matter of fact, he had two meth problems: both his underlying addiction *and* supplying meth to feed it. So, Mr. A. went looking for a source. He found Mr. M., a member of a large drug trafficking organization.

Mr. M. and his co-conspirators trafficked methamphetamine and heroin for resale throughout the United States, including via U.S. mail and luggage carried on domestic flights and passenger-rail trips. Mr. A., then-unemployed, soon found work as a Topeka-based meth distributor for Mr. M.

Mr. M. employed two methods to provide Mr. A. with methamphetamine for downstream distribution. First, on at least one occasion, Mr. M. shipped methamphetamine to Mr. A. via mail. Second, Mr. M. arranged for Mr. A. to accompany him on a round-trip journey from Topeka, Kansas, to Los Angeles, California, sending Mr. A. home with several pounds of methamphetamine concealed in a suitcase. But these were not the only drug transactions between Messrs. M. and A.: for example, after Mr. M. was threatened by another methamphetamine distributor, Mr. A. traded a handgun to Mr. M. for a half-ounce of methamphetamine, which Mr. A. subsequently characterized as methamphetamine for his own "personal use." Aplt.'s App., Vol. II, at 240. Mr. A. eventually became one of Mr. M.'s key methamphetamine distributors.

Nonetheless, Mr. A.'s participation in the methamphetamine conspiracy was brief. In August of 2018, mere months after joining the conspiracy, police arrested Mr. A. in a Topeka home rented by Mr. M. Near Mr. A., officers found a backpack containing twelve bags of methamphetamine. Mr. A. took responsibility for the twelve bags of methamphetamine in his plea agreement.

While on bond for state charges stemming from his August 2018 arrest, but before his indictment on federal drug charges, Mr. A. sold a machinegun to an

undercover federal agent. This offense was not connected to Mr. A.'s participation in the methamphetamine conspiracy but is relevant here because the parties resolved both the firearm and methamphetamine cases with a single plea agreement.

B

The district court adopted the foregoing facts (Section I.A *supra*) from the Presentence Investigation Report [hereinafter PSR]. But the district court also relied on additional facts that "were not disputed below," Aplee.'s Resp. Br. at 3, in denying the mitigating-role adjustment.[2] Because these undisputed facts—which go to the "structure of the organization, its members, and the members' various roles," Aplee.'s Resp. Br. at 3—were part of the basis for the district court's denial of the mitigating-role adjustment and Mr. A.'s resulting appeal, we detail them here.

Specifically, the parties agreed and the district court accepted that Mr. M. was a "mid-level supplier" in a Southern California-based drug trafficking ring. Aplt.'s App., Vol. II, at 113–14 (Objs. to the PSR, filed Aug. 24, 2022). Upstream suppliers in Mexico trafficked methamphetamine, heroin, and fentanyl to the Los Angeles area, at which point midstream suppliers, like Mr. M., distributed the narcotics to downstream dealers across the United States. Mr. M. was tasked with distributing methamphetamine to lower-level dealers in Topeka, Kansas, which he accomplished

[2] Indeed, at Mr. A.'s sentencing hearing, counsel for Mr. A. clarified, and the government confirmed, that there remained "no factual dispute with the government [and Mr. A.] about the description of the roles . . . or the factual information" presented in Mr. A.'s Objection to the PSR. Aplt.'s App., Vol. II, at 353.

by either mailing the drugs from California to Topeka or paying the Topeka dealers to transport the drugs from California to Topeka themselves. Mr. M. also made frequent trips to Topeka himself.

Although Mr. A.'s primary point of engagement with the drug trafficking operation was Mr. M., the two did not operate alone. As relevant to this appeal, there were two nodes of co-conspirators: Californians and Topekans. The California co-conspirators included J.P., for whom Mr. M. delivered methamphetamine before striking out on his own; S.L., one of Mr. M.'s Los Angeles-based suppliers, who brought methamphetamine into the United States from Mexico; and P.S., who shipped methamphetamine to individuals in Topeka, including Mr. A., at Mr. M.'s behest.

The Topeka co-conspirators included M.V., who moved pounds of methamphetamine through his Topeka storefront; S.K., Mr. M.'s girlfriend, who rented Topeka hotel rooms from which Mr. M. distributed methamphetamine; A.S., a Topeka-based large-scale heroin distributor that both Mr. M. and J.P. supplied with heroin; D.R., the Topeka distributor who introduced Mr. A. to Mr. M.; B.C. and C.F., Topeka distributors supplied by J.P. via A.S.; and R.P., another Kansas distributor who received his narcotics from Mr. M. and A.S.

C

1

Mr. A. was indicted separately for the firearm and methamphetamine offenses. First, a District of Kansas grand jury indicted him on three related charges of

(1) possessing a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2); (2) transferring a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2); and (3) possessing an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Eleven months later, another District of Kansas grand jury indicted Mr. A. for conspiracy to possess with intent to distribute and dispense 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846 and possession with intent to distribute and dispense 405.9 grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1).

Several months after the second indictment, Mr. A. entered into a plea agreement resolving both the firearm and methamphetamine charges. Mr. A. pleaded guilty to knowingly possessing a machinegun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2), and to conspiracy to possess with the intent to distribute and dispense 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846. The factual basis in Mr. A.'s plea agreement for the methamphetamine count reproduced the indictment's language, specifying that Mr. A. conspired to distribute methamphetamine "in the District of Kansas and elsewhere." Aplt.'s App., Vol. I, at 24 (Plea Agreement, filed Oct. 6, 2021) (quoting *id.* at 8 (Indictment, filed June 23, 2021)).

In return for Mr. A.'s guilty plea, the government agreed to dismiss the remaining counts against Mr. A. and "to recommend that [Mr. A.'s] Guidelines base offense level be reduced by two levels for his role in the [methamphetamine] offense, pursuant to U.S.S.G. § 3B1.2(b)." *Id.* at 26. Further, the government agreed "to not

file any additional charges against [Mr. A.] arising out of the facts forming the basis for the two present Indictments, in Kansas and California." *Id.* Although Mr. A. generally waived his rights to appeal or collaterally attack his convictions or sentence, the plea agreement permitted him to appeal from the district court's denial of a requested minor-role adjustment.

2

The U.S. Probation Office ("Probation") prepared a PSR that calculated a combined offense level in accordance with U.S.S.G. § 3D1.1. The base offense level for the methamphetamine offense was thirty-four, which Probation increased by two offense levels to thirty-six in accordance with U.S.S.G. § 2D1.1(b)(1) because Mr. A. possessed a firearm—i.e., the handgun that he traded to Mr. M.—in connection with the offense.

Probation's computed base offense level was predicated, in part, on the amount of methamphetamine it deemed Mr. A. to be personally responsible for—e.g., to have received or distributed: seventeen pounds in total. Aplt.'s App., Vol. II, ¶ 21, at 11 (PSR, dated Aug. 8, 2020). Of the seventeen pounds Probation attributed to Mr. A., the return flight from Mr. A.'s only trip to California accounted for seven pounds, with the other ten pounds comprised of "methamphetamine [Mr. A.] received from [Mr.] [M.] during the course of the conspiracy." *Id.*

Because the base offense level for the gun charge was substantially lower than that for the methamphetamine charge, Probation concluded that the gun charge did not increase the combined Guidelines range under U.S.S.G. § 3D1.1. From Mr. A.'s

base offense level of thirty-six, Probation subtracted three offense levels for acceptance of responsibility, resulting in a total offense level of thirty-three. Based on the total offense level of thirty-three, and accounting for Mr. A.'s Criminal History Category of IV, Probation recommended a Guidelines range of 188 to 235 months' imprisonment. Probation did not, however, adopt the government's recommendation of a minor-role adjustment.

Mr. A. filed a sentencing memorandum and written objections to the PSR, contending, *inter alia*, that Probation should recommend a minor-role adjustment under U.S.S.G. § 3B1.2. In support, Mr. A. argued that he "had a comparatively minor role in the overall conspiracy," which he characterized as "a multi-state, multi-drug distribution operation." Aplt.'s App., Vol. II, at 107. Comparing his own actions to those of the California and Topeka co-conspirators and also applying the five non-exhaustive factors that bear on a mitigating-role adjustment under U.S.S.G. § 3B1.2, Mr. A. argued that all five factors cut in favor of a minor-role adjustment. The government joined Mr. A.'s objection.

Probation responded by reiterating its opposition to a mitigating-role adjustment. Probation concluded that a majority of the five non-exhaustive factors of U.S.S.G. § 3B1.2 counseled against a finding that Mr. A.'s culpability relative to his co-conspirators warranted a minor-role adjustment. Specifically, Probation found that, even though Mr. A. did not *plan* the criminal activity and exercised only limited decision-making authority, he was a "trusted member" of the conspiracy who handled

large quantities of methamphetamine and benefitted accordingly. PSR, *supra*, ¶¶ 146–47, at 32–33.

Mr. A. also objected to Probation's description of his "relevant conduct," specifically the PSR's seventeen-pound attribution weight, suggesting that "the total 17-pound assessment might be off by 4.6 pounds, either by overestimation or double counting or both." Aplt.'s App., Vol. II, at 128. Mr. A. further maintained that he was unaware that Mr. M. had put "six or seven pounds of meth in his suitcase" before he flew from Los Angeles to Topeka. *Id*. at 119. Probation disagreed with Mr. A. and reaffirmed its account of Mr. A.'s relevant conduct. Ultimately, Mr. A. agreed to stipulate for sentencing purposes that "the relevant conduct is over 1.5 but less than 5 kilograms" of methamphetamine.[3] *Id.* at 131.

3

At sentencing, Mr. A. reiterated his argument for a minor-role adjustment under U.S.S.G. § 3B1.2. Specifically, Mr. A. contended that his role in the methamphetamine conspiracy was minor in light of the "multistate" and "multidrug" nature of the trafficking operation. Aplt.'s App., Vol. II, at 234. Rather than "myopically" focusing on Topeka, said Mr. A., the district court should weigh his culpability relative to that of co-conspirators from California, where he contended the conspiracy "originated" and "was run from." *Id.* From this California-centric perspective, reasoned Mr. A.'s counsel, the court could see that his role in the

[3] Notably, seven pounds—the amount Mr. A. trafficked in his luggage from Los Angeles to Topeka—is equivalent to just over three kilograms.

conspiracy was minor: "it is a broader conspiracy than just looking at what [Mr. A.] was doing in Topeka. He was basically the runner for Mr. [M.] in Topeka. He delivered drugs where Mr. [M.] said to. He brought money back where Mr. [M.] said to." *Id.* at 236–37.

Mr. A. pointed to the government's promise in the plea agreement not to charge him with any conduct that formed the basis for the indictment stemming from California conduct and suggested this signaled that Mr. A. would otherwise have "had liability as to part of that [California activity] and that it [i.e., the California conspiracy] actually is the same conspiracy." *Id.* at 235. Mr. A. therefore maintained it would be inappropriate to exclude the California co-conspirators from the mitigating-role analysis.

The district court rejected Mr. A.'s California-centric view of the conspiracy and, relatedly, the propriety of the minor-role adjustment. *Id.* at 326–30. Acknowledging that "there may be folks, in presuming all this stuff came from Mexico and California, who are more responsible in a global aspect," the district court nonetheless viewed the relevant conspiracy for role-adjustment purposes as being one to "transact and distribute methamphetamines within the Topeka community," pursuant to which "Mr. [A.] was utilizing Mr. [M.] to engage in the transactions for his own personal benefit, both to maintain his own personal use but also to enrich himself." *Id.* at 326–27. The district court made clear that its mitigating-role analysis considered Mr. A.'s culpability relative to "the Topekans and

those engaged in the transportation and distribution within the Topeka area," *id.* at 328, particularly M.V., S.K., D.R., A.S., B.C., C.F., R.P., and Mr. M., *id.* at 362.

Thus, the district court found that the factors enumerated under U.S.S.G. § 3B1.2 "all seem to cut towards Mr. A. having a greater role in the conspiracy when you focus it more directly to the Topeka community instead of zooming out to the manufacturer and distribution that originated in California." *Id.* at 327. At a more granular level, the district court found that Mr. A.

> understood the scope and organization, [and] was being trained by [Mr.] [M.] to facilitate the process. He was traveling with [Mr.] [M.] to California and bringing a large amount of methamphetamine into the local area, which suggests more than a minor participant. While he had limited national decision-making knowledge and awareness, he was learning the ropes, at least according to what I understand in the presentence report, and was trusted with large quantities of methamphetamines, local control over the distribution, and stood [to] benefit as the result of that distribution. While he may not have been in charge or even familiar with all the national tentacles of the organization, he was at least familiar with the critical part of the local aspect.

Id. at 415.

In denying the requested mitigating-role adjustment, the district court highlighted the scope of the methamphetamine conspiracy that the plea agreement described, noting that Mr. A. "pled to . . . the conspiracy to distribute within Topeka," *id.* at 330, and that the plea agreement described "a conspiracy to distribute and transact methamphetamine in the Topeka area," *id.* at 329.

Finally, the district court clarified that its denial of the mitigating-role adjustment rested on factual, not legal, grounds. The court explicitly rejected defense

counsel's characterization of its ruling as concerning "a legal question about who the court is going to consider as a participant in this conspiracy for comparison purposes." *Id.* at 353. Instead, the court explained, "I think I actually do view it as a factual basis . . . . That's why I think the Topeka aspect is an important focus." *Id.* at 353.

4

The district court's ultimate sentence relied largely on Probation's analysis in the PSR. The court used the methamphetamine conspiracy charge as the controlling offense, establishing a base offense level of thirty-two based on a drug quantity of between 1.5 and 5 kilograms of methamphetamine. The court explicitly calculated the base offense level with reference to the amount of methamphetamine Mr. A. trafficked in his suitcase on the flight from Los Angeles to Topeka—that is, seven pounds. Mr. A. did not object to this seven-pound attribution amount.[4] Then, the district court added two offense levels for possession of the handgun that Mr. A. traded to Mr. M., and subtracted three levels for acceptance of responsibility, producing a total offense level of thirty-one. Combined with Mr. A.'s Criminal History Category of VI, that offense level generated a Guidelines imprisonment range of 151 to 188 months. The district court varied downward, sentenced Mr. A. to 60

[4] After the court used the seven-pound attribution amount to calculate Mr. A.'s offense level, it inquired: "Does anyone disagree with the offense level 31, the manner in which it was calculated, and the criminal history category of 4?" Aplt.'s App. at 342. Mr. A.'s counsel answered in the negative, excepting counsel's objection to the court's denial of the mitigating-role adjustment. *See id.* at 343. He also does not challenge this attribution amount on appeal.

months' imprisonment, and entered final judgment. *Id*., Vol. I, at 43–44 (J., dated Sept. 22, 2022). Mr. A. timely appealed.

II

Mr. A. appeals from the district court's denial of the parties' joint request for a mitigating-role adjustment under U.S.S.G. § 3B1.2. More specifically, Mr. A. assigns error to the district court's conclusion "that the California-based co[-]conspirators in this California-to-Kansas drug trafficking case should be excluded from the minor-role comparison." Aplt.'s Opening Br. at 2. Mr. A. attacks the district court's denial on both legal and factual grounds. *See id.* at 12; Oral Arg. Tr. 28:30–30:55 (citing Aplt.'s Opening Br. at 37–41).

To decide this appeal, we must answer three closely related questions: (1) Did the district court's delineation of relevant conduct stem from application of an incorrect legal test? (2) Did the district court's factual delimitation of the scope of jointly undertaken criminal activity rely on a clearly erroneous understanding of the facts of the underlying conspiracy? And (3) was the district court's mitigating-role analysis (i.e., consideration of the factors enumerated at U.S.S.G. § 3B1.2 cmt. n.3(C)) clearly erroneous given the court's exclusion of the California co-conspirators?

In Section II.A, we describe the applicable standard of review. Then, in Section II.B, we explicate the law of the mitigating-role adjustment. Finally, Part II.C applies the legal framework to the facts of this case.

A

"[W]e review sentences for reasonableness under a deferential abuse-of-discretion standard." *United States v. Nkome*, 987 F.3d 1262, 1268 (10th Cir. 2021) (alteration in original) (quoting *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1214 (10th Cir. 2008)). "Reasonableness includes both procedural and substantive components." *Id.* (quoting *United States v. Masek*, 588 F.3d 1283, 1290 (10th Cir. 2009)). "The procedural component concerns how the district court calculated and explained the sentence." *Id.* (quoting *United States v. Adams*, 751 F.3d 1175, 1181 (10th Cir. 2014)).

Mr. A. argues that the district court committed legal and factual error in denying his requested mitigating-role adjustment—that is, in computing his ultimate Guidelines base offense level. Accordingly, we understand him to be challenging the procedural reasonableness of his sentence. *See* Aplt.'s Opening Br. at 28; *see also Nkome*, 987 F.3d at 1268 ("Ms. Nkome's challenges implicate the procedural reasonableness of her sentence because, at bottom, she alleges that the district court committed legal and factual error in calculating her Guidelines sentence—more specifically, that the court's denial of her mitigating-role adjustment rested on legal error and inadequate factual evidence.").

Where—as here—a procedural reasonableness challenge implicates subsidiary questions of law and fact, however, the abuse of discretion standard "is not monolithic." *Nkome*, 987 F.3d at 1268 (quoting *United States v. Arias-Mercedes*, 901 F.3d 1, 5 (1st Cir. 2018)). Instead, we apply distinct standards of review to the

legal and factual questions nested within the overarching procedural reasonableness inquiry. And in this regard, we "review de novo the district court's legal conclusions regarding the [G]uidelines and review its factual findings for clear error." *Id.* (quoting *United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012)).

"The court's denial of a mitigating-role adjustment is a factual determination and, accordingly, we review it for clear error. But, we recognize that '[a] district court commits legal error when it applies the "wrong test" in making a factual finding at sentencing.'" *Id.* at 1268–69 (alteration in original) (citations omitted) (quoting *United States v. Delgado-Lopez*, 974 F.3d 1188, 1194 (10th Cir. 2020)); *see United States v. Martinez*, 512 F.3d 1268, 1275 (10th Cir. 2008) ("Because denial of a minor participant status represents a finding of fact, we review the district court's decision for clear error."); *see also* U.S.S.G. § 3B1.2, cmt. n.3(C) (noting that whether to apply a mitigating-role adjustment is "a determination that is heavily dependent upon the facts of the particular case").

B

1

The law governing Mr. A.'s appeal—the law of mitigating-role adjustments—is grounded in the Guidelines and associated commentary. *See* U.S.S.G. § 3B1.2. "The defendant bears the burden of proving by a preponderance of the evidence whether an adjustment under § 3B1.2 is warranted." *Nkome*, 987 F.3d at 1269 (quoting *United States v. Salas*, 756 F.3d 1196, 1207 (10th Cir. 2014)). And that law directs district courts to (1) collect a series of inputs, (2) apply those inputs to the

Guidelines role adjustment analysis, and (3) based on the result of that analysis, grant or deny the mitigating-role adjustment.

More specifically, the Guidelines mitigating-role adjustment analysis requires the district court to assess the defendant's culpability in light of:

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

U.S.S.G. § 3B1.2 at cmt. n.3(C).

The "crux" of a mitigating-role adjustment is the "defendant's relative culpability." *United States v. Yurek*, 925 F.3d 423, 446 (10th Cir. 2019). However, a salient threshold question is *culpability relative to whom*? The Guidelines provide a straightforward answer: "[t]he determination of the defendant's role in the offense is to be made on the basis of all conduct within the scope of [U.S.S.G.] § 1B1.3 (Relevant Conduct)." *Nkome*, 987 F.3d at 1269 (alterations in original) (quoting U.S.S.G., Ch. 3, Pt.B., intro. cmt.). Thus, the Guidelines direct district courts, in considering a mitigating-role adjustment, to assess the defendant's culpability

relative to other actors within the scope of relevant conduct of the defendant's offense. In the Guidelines' parlance, those other actors are typically referred to as "participants." The Guidelines define a "participant" as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. 3B1.1, cmt. n.1. "As a general matter, it cannot be gainsaid that, in assessing a defendant's fitness for a § 3B1.2 [mitigating-role] adjustment, the sentencing court 'must focus on whether the defendant "is substantially less culpable than the average participant in the criminal activity."'" *Nkome*, 987 F.3d at 1273 (quoting *Yurek*, 925 F.3d at 445).

A salient question thus becomes *what constitutes relevant conduct*? Notably, the Guidelines explain what relevant conduct is *not*—that is, a facsimile of the "elements and acts cited in the count of conviction." *Nkome*, 987 F.3d at 1269 (quoting U.S.S.G., Ch. 3, Pt.B., intro. cmt.). And they also define what relevant conduct *is*: "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). Importantly, in the case of conspiracies, as here, the Guidelines introduce the concept of "jointly undertaken criminal activity," which plays a central role in the configuration of relevant conduct. The Guidelines define "jointly undertaken criminal activity" as "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others." U.S.S.G. § 1B1.3(a)(1)(B).

"[T]he scope of the 'jointly undertaken criminal activity' is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." U.S.S.G. § 1B1.3, cmt. n.3(B); *accord United States v. Ellis*, 23 F.4th 1228, 1242 (10th Cir. 2022). Indeed, "[e]ach member of a conspiracy may have had a different scope of jointly undertaken criminal activity and therefore different relevant conduct." *United States v. Figueroa-Labrada*, 720 F.3d 1258, 1265 (10th Cir. 2013).

In conspiracy cases like this one, then, *relevant conduct* includes "all acts and omissions of *others* that were[] (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of *that* criminal activity, *and* (iii) reasonably foreseeable in connection with *that* criminal activity." U.S.S.G. § 1B1.3(a)(1)(B) (emphases added). The Guidelines commentary puts a fine point on the matter:

> The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., 'within the scope,' 'in furtherance,' and 'reasonably foreseeable') is relevant conduct under the provision. However, when the conduct of others does not meet any one of the three criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

U.S.S.G. § 1B1.3, cmt. n.3(A).

Notably, given the manner in which the Guidelines structure these three criteria, the "scope of jointly undertaken criminal activity" establishes the guidepost or reference point for the other two criteria. *See id.*, cmt. n.3(B) ("In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must *first* determine the scope of the criminal activity the

particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement)." (emphasis added)). And the court's delimitation of that scope of jointly undertaken criminal activity establishes the conceivable universe of criminal conduct—as well as, necessarily, the conceivable universe of participants in that conduct. The other two criteria—"in furtherance" and "reasonably foreseeable"—ordinarily will further refine and potentially further circumscribe that universe in order to ultimately configure a defendant's relevant conduct.[5]

Stated otherwise, as comment 3(A) of § 1B1.3 makes clear, not all criminal conduct that falls within "the scope of jointly undertaken criminal activity" constitutes relevant conduct, but a district court's delimitation of "the scope of jointly undertaken criminal activity" plays a central role in configuring the applicable relevant conduct. And it is on the terrain of relevant conduct that a district court analyzes and decides whether a defendant qualifies for a mitigating-role adjustment—that is, the court determines a defendant's relative culpability as to other participants and, in particular, whether a defendant is "substantially less culpable than the average participant in the criminal activity." U.S.S.G. § 3B1.2, cmt.3.

[5] When we have previously referred to these other two criteria as "independent" features of relevant conduct, *Ellis*, 23 F.4th at 1242; *accord United States v. Green*, 175 F.3d 822, 837 (10th Cir. 1999), we did not intend to imply that that they do not depend on the previously delimited scope of jointly undertaken criminal activity as a guidepost or reference point that they ordinarily further refine or potentially circumscribe but, rather, that they, too, are essential and unique components that must be assessed in the ultimate configuration of relevant conduct.

In sum, where conspiracy offenses are at issue, as here, relevant conduct is configured by a series of sub-factors—most importantly, "jointly undertaken criminal activity." *See* U.S.S.G. § 1B1.3(a)(1). When considering a mitigating-role adjustment in a conspiracy case, a district court must consider a defendant's culpability relative to the average participant in the scope of the jointly undertaken criminal activity that configures a defendant's relevant conduct. *See United States v. Diaz*, 884 F.3d 911, 916–17 (9th Cir. 2018); *United States v. Rojas-Millan*, 234 F.3d 464, 472 (9th Cir. 2000).

We thus read the Guidelines as implicitly establishing a decision-making order for marking the proper analytical terrain (i.e., relevant conduct) for resolving the mitigating-role adjustment question. The court must

> *first* delimit through fact-finding the "scope of the jointly undertaken criminal activity";
>
> *then* delineate the boundaries of "relevant conduct" by, in substantial part, making factual determinations regarding "subsidiary" questions—specifically, what conduct is "in furtherance of that criminal activity" and (as to the defendant) "reasonably foreseeable in connection with that criminal activity"; and
>
> *only then* consider the defendant's relative culpability—that is, whether the defendant is substantially less culpable than the average participant in the delineated relevant conduct.

See U.S.S.G. § 1B1.3(a)(1); *Ellis*, 23 F.4th at 1240–41. In other words, on the terrain of properly configured relevant conduct, the district court applies the five-factor role adjustment analysis of § 3B1.2 at comment n.3(C) in considering whether to grant or deny the mitigating-role adjustment. And it is important to highlight that "a

sentencing court's assessment of a defendant's role in the offense may involve in certain instances consideration of the conduct of uncharged co[-]conspirators, as well as the conduct of charged, co[-]defendant conspirators." *Nkome*, 987 F.3d at 1270.

The district court's delimitation of the scope of jointly undertaken criminal activity necessarily includes establishing the boundaries of the set of conceivable participants in that activity. And these determinations are all factual in nature. The same is true for the court's findings on the other factors that are "subsidiary" to and configure a defendant's relevant conduct—i.e., the "in furtherance" and "reasonably foreseeable" criteria. As such, these factual decisions are subject to review only "for clear error." *Ellis*, 23 F.4th at 1240; *see Nkome*, 987 F.3d at 1276; *see also Ellis*, 23 F.4th at 1240 (noting that "de novo review does *not* apply to the subsidiary finding concerning the scope of jointly undertaken criminal activity"). Under the deferential clear error standard, "[i]f the 'court's account of the evidence is plausible in light of the record viewed in its entirety,' we may not reverse it even if we might have weighed the evidence differently." *United States v. Piper*, 839 F.3d 1261, 1271 (10th Cir. 2016) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

On the other hand, we have repeatedly assumed without deciding that the district court's overarching delineation of relevant conduct—though configured by key factual findings—is a legal determination that we review de novo. *See United States v. Garcia*, 946 F.3d 1191, 1202 (10th Cir. 2020) ("We need not delve into this matter further, however. Instead, we are content to 'give [Mr. Garcia] the benefit of the doubt and assume for the purposes of this appeal that a district court's ultimate

determination of relevant conduct is a legal conclusion we review de novo.'" (quoting *United States v. Craig*, 808 F.3d 1249, 1255 (10th Cir. 2015))); *see also Ellis*, 23 F.4th at 1240 (noting that "even assuming that [the relevant conduct determination is subject to de novo review], it does not ineluctably follow that the evidentiary sufficiency of the court's findings as to subsidiary issues that make up the ultimate relevant conduct determination—such as the scope of jointly undertaken criminal activity . . . are also reviewed de novo." (citation omitted)). We make that same assumption of de novo review here as to relevant conduct.

2

Before proceeding to consider Mr. A.'s specific challenges, we highlight two potential errors that district courts must avoid in conducting the mitigating-role adjustment analysis.

The *first error* is applying the incorrect legal test in delineating the applicable relevant conduct. The court commits this error in perhaps a paradigmatic way—and one that is pertinent here—when it "divorce[s] the offense of conviction from the surrounding facts." *Nkome*, 987 F.3d at 1275 (quoting *United States v. Hill*, 563 F.3d 572, 578–79 (7th Cir. 2009)). The Guidelines make clear that relevant conduct is not necessarily identical to the "elements and acts cited in the count of conviction." *Nkome*, 987 F.3d at 1269 (quoting U.S.S.G., Ch. 3, Pt.B., intro. cmt.). Indeed, in the conspiracy context, as here, this is naturally so because, as we have learned, the scope of jointly undertaken criminal activity of a defendant—which plays a central role in configuring relevant conduct—need not be conterminous with the criminal

conspiracy comprising the defendant's offense of conviction. *See*, *e.g.*, *Ellis*, 23 F.4th at 1242.

Consequently, when it appears that a district court's decision-making in delineating relevant conduct is influenced by the belief that a defendant's relevant conduct should be categorically conterminous with the elements and acts cited in the defendant's offense of conviction, the court commits legal error. In *Nkome*, we discussed the Seventh Circuit's stance on such an error, which it articulated in *United States v. Hill*:

> There, though the district court had made "a factual determination normally entitled to deferential review," in denying the defendant a mitigating-role adjustment, the Seventh Circuit nevertheless remanded the matter for reconsideration, stating that it "cannot be confident that [the court's] analysis was guided by the appropriate factors." More specifically, the Seventh Circuit lacked confidence in the court's factual analysis because the defendant there had successfully demonstrated that the court's analytical approach was *infected with legal error*. Specifically, the defendant had shown that "the [district] court's approach . . . reflect[ed] an inclination to divorce the offense of conviction from the surrounding facts," and the Seventh Circuit had concluded that this tendency had led the court to erroneously disregard relevant conduct, as the Guidelines define it (i.e., U.S.S.G. § 1B1.3), in concluding that the defendant was legally ineligible for a mitigating-role adjustment.

Nkome, 987 F.3d at 1275–76 (first and third alterations and omission in original) (emphasis added) (citations omitted) (quoting *Hill*, 563 F.3d at 578–79). In the interest of analytical clarity and concision, we will refer here to this form of legal error—equating relevant conduct, as a categorical matter, with the elements and acts cited in a defendant's offense of conviction—as "*Hill* error."

We offer two observations about *Hill* error. First, because *Hill* error pertains to the district court's delineation of relevant conduct and such conduct provides the essential analytical terrain upon which the district court conducts its mitigating-role adjustment analysis, *Hill* error fatally infects such a role analysis, and the ultimate decision of the district court regarding the adjustment cannot stand. Second, it should be kept in mind that there is a distinction between (1) a district court delineating a defendant's relevant conduct under the view that such conduct should be categorically conterminous—that is, conterminous in every case—with the elements and acts cited in the defendant's offense of conviction, and (2) a district court determining that under the circumstances of a particular case the relevant conduct is (more or less) conterminous with the facts and acts cited in the defendant's offense of conviction. The former is *Hill* error; the latter is not. Indeed, the Guidelines commentary anticipates that proper application of U.S.S.G. § 1B1.3(a)(1) will sometimes generate relevant conduct that is identical in scope to the offense of conviction. *Cf.* U.S.S.G. § 1B1.3(a)(1)(B), cmt. n.1 ("The principles and limits of sentencing accountability under [the relevant conduct] guideline are *not always* the same as the principles and limits of criminal liability." (emphasis added)).

The *second error* that a district court must avoid in conducting its mitigating-role analysis is making clearly erroneous factual findings regarding the factors that configure relevant conduct in a conspiracy case like this one—most importantly, regarding the scope of jointly undertaken criminal activity. Recall that these findings are subject to scrutiny under the deferential clear-error standard, *see, e.g.*, *Garcia*,

946 F.3d at 1202–03, and thus should be upheld unless they are implausible "in light of the record viewed in its entirety," *Piper*, 839 F.3d at 1271 (quoting *Anderson*, 470 U.S. at 574). However, clear error as to these factors—especially, the scope of jointly undertaken criminal activity—ordinarily will distort the configuration of relevant conduct, that is, improperly alter the terrain upon which the court is obliged to conduct its mitigating-role adjustment analysis, and thus result in that analysis being fatally flawed.

C

To set the table for our analysis of Mr. A.'s specific challenges, we briefly recap the district court's reasoning in denying his requested mitigating-role adjustment. Acknowledging that Mr. A.'s criminal activity implicated him in a broader conspiracy to traffic methamphetamine from Mexico through California on to Topeka, Kansas, Aplt.'s App., Vol. II, at 240–42, the district court nonetheless concluded that the relevant conduct underlying Mr. A.'s conviction—and thus the universe of participants against whom Mr. A.'s relative culpability should be measured—centered in Topeka, *see id.* at 240–44. Finding that Mr. A. was not substantially less culpable than the average participant in the "conspiracy to distribute within Topeka," *id.* at 244, the district court denied Mr. A. and the government's joint request for a mitigating-role adjustment. *See id.* at 240–44; *see also* U.S.S.G. § 3B1.2, cmt. n.3(A).

On appeal, Mr. A. argues that the district court's focus on Topeka, and concomitant denial of the mitigating-role adjustment, was error. *See* Aplt.'s Opening

Br. at 7. First, Mr. A. argues, in substance, that the district court committed legal (*Hill*) error by "focus[ing] on the charged conspiracy rather than all relevant conduct." Aplt.'s Opening Br. at 25. Second, Mr. A. discerns error in the district court's findings of fact concerning the "scope of the conspiracy charged in this case." *Id.* In this regard, Mr. A. argues that "the district court was simply wrong about the scope of the conspiracy that was charged in this case." *Id.* We read Mr. A.'s second argument as, in substance, challenging the district court's delimitation of Mr. A.'s scope of jointly undertaken criminal activity. Curiously, however, Mr. A.'s briefing is devoid of any explicit reference to "jointly undertaken criminal activity." Ultimately, however, we do not deem this failure of linguistic framing to be an obstacle to our review. And, finally, Mr. A. concludes that the district court's erroneous delineation of relevant conduct and/or improper delimitation of jointly undertaken criminal activity infected its relative culpability analysis—especially, its consideration of the five factors contemplated by U.S.S.G. § 3B1.2—and resulted in an erroneous denial of his request for a mitigating-role adjustment.

For the reasons that follow, we reject all of Mr. A.'s contentions of error. We conclude that the district court did not commit legal or factual error in its mitigating-role adjustment analysis and that the court's ultimate denial of Mr. A.'s request for a mitigating-role adjustment was not clearly erroneous.

1

Mr. A. first contends that "the district court applied an incorrect legal standard by excluding some participants" from the scope of Mr. A.'s relevant conduct. Aplt.'s

Opening Br. at 25. We review this assertion of legal error de novo. *Nkome*, 987 F.3d at 1269 (quoting *United States v. Lopez-Avila*, 665 F.3d 1216, 1219 (10th Cir. 2011)). If the district court did indeed apply the wrong legal test, we must vacate Mr. A.'s sentence and remand this case to the district court for reconsideration under the appropriate test. *Delgado-Lopez*, 974 F.3d at 1193 (quoting *United States v. Bowen*, 437 F.3d 1009, 1019 (10th Cir. 2006)).

Mr. A.'s contention of legal error depends on his showing us that the court improperly restricted the universe of conduct and participants for its comparative analysis by incorrectly delineating the scope of relevant conduct. We conclude that even assuming the district court here delineated Mr. A.'s relevant conduct as approximately coterminous with the conduct specified in the plea agreement, Mr. A.'s argument for *Hill* error comes up short. That is because to establish *Hill* error, Mr. A. must demonstrate that the overlap between the plea agreement and relevant conduct was not merely a function of the district court's assessment of the factual circumstances of this particular case. But, rather, that this overlap is likely attributable to the district court's mistaken belief under the law that relevant conduct is categorically conterminous with the elements and acts cited in Mr. A.'s offense of conviction, as set out in the plea agreement. This Mr. A. fails to do.

Mr. A.'s argument for *Hill* error focuses on the district court's explicit reliance on the contents of Mr. A.'s plea agreement when delineating the scope of relevant conduct. *See* Aplt.'s Opening Br. at 18–19 (quoting Aplt.'s App., Vol. II, at 320–21, 327–30); *id.* at 19 (highlighting the following statement of the court, "[m]y

understanding from reviewing the plea agreement is that the conspiracy to which he was pleading guilty to and to which I think the minor role is the applicable aspect is the Topeka prong" (alteration in original) (quoting Aplt.'s App., Vol. II, at 328)). It is true that the district court did repeatedly refer to Mr. A.'s plea agreement when delineating the relevant conduct that would constitute the terrain on which it would conduct its mitigating-role analysis. *See* Aplt.'s App., Vol. II, at 328–29.

However, even assuming that the district court did delineate Mr. A.'s scope of relevant conduct in a manner that was approximately coterminous with the facts alleged in Mr. A.'s plea agreement, Mr. A. has not shown that the district court believed that it was legally obliged to do so—that is to say, Mr. A. has not adequately demonstrated that the court did so because it believed that, as a matter of law, relevant conduct was conterminous with the facts alleged in a plea agreement. Instead, focusing on the unique factual circumstances of Mr. A.'s case, the district court clarified that "the conspiracy that Mr. [A.] participated in [was] *consistent* with [. . .] the plea agreement." *Id.* at 326 (emphasis added). As we have noted *supra*, there is a material distinction between artificially restricting—as a categorical matter—the scope of relevant conduct to that specified in a plea agreement because a court believes that is what the law requires (which is *Hill* error) and finding under the unique circumstances of a particular case that the scope of relevant conduct is approximately coterminous with a plea agreement's facts (which is not *Hill* error). Here, the district court's findings are better characterized as the latter. Indeed, when defense counsel invited the district court to confirm that it was excluding from

relevant conduct all individuals not implicated by Mr. A.'s offense of conviction, the district court demurred. *Id.* at 327–29 ("I guess what I'm trying to tell you is I've considered all of [the participants] and I'm comfortable with my ruling.").

Perhaps sensing the weakness of his argument for *Hill* error, Mr. A. attempts to move the goalposts, arguing that "[a]n error regarding which participants should be considered in the minor-role comparison is a misapplication of the correct legal standard under § 3B1.2." Aplt.'s Opening Br. at 32. But Mr. A. is mistaken. We rejected a virtually identical argument to Mr. A.'s in *Nkome*, concluding that this participation-identification exercise was a factual matter.[6] *See* 987 F.3d at 1262 ("Ms. Nkome primarily complains about how the district court exercised its judgment in identifying criminal participants with whom to compare Ms. Nkome's culpability and about the results of such (as she sees it) flawed comparisons. But such

[6] Mr. A. nevertheless persists. In making an assertion of legal error, he argues that "[i]f a conspiracy spans multiple states or districts, then co[-]conspirators in each state or district *must* be considered as participants in the minor-role analysis, regardless of who is charged and not charged." Aplt.'s Opening Br. at 30 (emphasis added) (first citing *United States v. Aptt*, 354 F.3d 1269, 1274, 1279 (10th Cir. 2004); then citing *United States v. Anderson*, 189 F.3d 1201, 1205, 1212 (10th Cir. 1999); and then citing *United States v. Cruz Camacho*, 137 F.3d 1220, 1225 (10th Cir. 1998)). Yet the *Aptt*, *Anderson*, and *Cruz Camacho* courts did not articulate the legal per se rule for which Mr. A. cites them, but instead considered the district courts' application of the role-adjustment provisions under the unique circumstances of those cases, treating the participant identifications as findings of fact subject to clear error review. *See Aptt*, 354 F.3d at 1279 ("We therefore find no error, let alone clear error, in the district court's conclusion that Mr. Gallegos was a participant in the fraud scheme within the meaning of the Guidelines."); *Anderson*, 189 F.3d at 1212 ("In sum, the evidence of Mr. Anderson's involvement in the conspiracy is not sufficient, under our cases, to support application of the enhancement for his role in the offense."); *Cruz Camacho*, 137 F.3d at 1224 ("The record overflows with evidence demonstrating Defendant's leadership role . . . .").

arguments implicate the sufficiency of the court's factual—not legal—analysis." (citations omitted)); *see also Ellis*, 23 F.4th at 1240–41 (noting that "it does not ineluctably follow that the evidentiary sufficiency of the court's findings as to subsidiary issues that make up the ultimate relevant conduct determination—such as the scope of jointly undertaken criminal activity, *see* U.S.S.G. § 1B1.3(a)(1)(B)(i)—are also reviewed de novo," and indeed, "de novo review does *not* apply to the subsidiary finding concerning the scope of jointly undertaken criminal activity," which would necessarily set the boundaries for the universe of conceivable participants in relevant conduct). Accordingly, Mr. A.'s argument here regarding the identification of participants is mistaken.[7]

[7] Mr. A. also misreads the non-binding authority he cites in support of his proposition that "[a]n error regarding which participants should be considered in the minor-role comparison is a misapplication of the correct legal standard under § 3B1.2." Aplt.'s Opening Br. at 32 (first citing *United States v. Dominguez-Caicedo*, 40 F.4th 938, 963 (9th Cir. 2022); and then citing *Rojas-Millan*, 234 F.3d at 474). In both *Rojas-Millan* and *Dominguez-Caicedo*, the district court applied the wrong legal test in delineating the scope of relative conduct. Neither case supports the proposition that subsidiary findings of fact underlying the court's delineation of relevant conduct are subject to de novo review. In *Rojas-Millan*, the district court committed a form of *Hill* error by limiting "the pool of 'co-participants'" to Mr. Rojas-Millan's co-defendants. 234 F.3d at 473–74 ("The district court made no findings comparing Rojas-Millan's role relative to other participants in the criminal scheme."). Likewise, the district court in *Dominguez-Caicedo* committed *Hill*-like error by arbitrarily excluding from its comparative analysis certain participants who were unambiguously within the scope of relevant conduct. *See* 40 F.4th at 963–64. In both *Rojas-Millan* and *Dominguez-Caicedo*, defendant-appellants clearly identified "the source of [. . .] *legal* error in the [district] court's analysis," entitling them to reversal. *Nkome*, 987 F.3d at 1276 (emphasis added). Here, by contrast, Mr. A. fails to show that the district court's comparative analysis was infected by legal error. Instead, Mr. A. merely complains that the factual range of participants that the district court considered—based on the district court's factual delimitation of the scope of jointly undertaken criminal activity—was too narrow.

We thus reject Mr. A.'s first argument, predicated on purported legal error.

2

For his second argument for reversal, Mr. A. asserts that the court "was simply wrong about the scope of the conspiracy that was actually charged in this case." Aplt.'s Opening Br. at 32. In substance, Mr. A. appears to take aim at the district court's factfinding in delimiting the scope of jointly undertaken criminal activity that configures the relevant conduct. Curiously, however, the phrase "jointly undertaken criminal activity" is conspicuously absent from Mr. A.'s appellate briefing. This conspicuous absence raises an arguable preservation issue. However, Mr. A. vigorously attacks the findings of fact bearing on the district court's delimitation of jointly undertaken criminal activity. *See, e.g.*, Aplt.'s Opening Br. at 37; *id.* at 39 ("A review of the various participants' roles shows that there is simply no way to divorce the California-based coordinators, suppliers, packagers, distributors, and transporters . . . from the Topeka-based recipients and distributors."); *id.* at 41 ("[T]he record contradicts the district court's view of this conspiracy as one that was limited to distribution in the Topeka area.").

Moreover, although Mr. A. does not use the term "jointly undertaken criminal activity," his objections to the district court's related factfinding are not "inadequate[]," "perfunctory," or "nominal[]." *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (first quoting *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019); and then quoting *United States v. Kunzman*, 54 F.3d 1522, 1534 (10th Cir. 1995)). We acknowledge that our preservation doctrines focus on the

articulation of discrete theories for reversal. *See, e.g.*, *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1314 n.4 (10th Cir. 1998) ("We have consistently rejected the argument that raising a related theory below is sufficient to preserve an issue for appeal. Changing to a new theory on appeal that 'falls under the same general category as an argument presented at trial' or discussing a theory only in a vague and ambiguous way below is not adequate to preserve issues for appeal." (citations omitted) (quoting *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721–22 (10th Cir. 1993)); *see also Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011) ("Where, as here, a plaintiff pursues a new legal theory for the first time on appeal, that new theory suffers the distinct disadvantage of starting at least a few paces back from the block."). However, that does not mean that we require the incantation of magic words. Accordingly, we would be reluctant to deem waived any factual challenge by Mr. A. to the district court's delimitation of the scope of jointly undertaken criminal activity because of his failure to expressly invoke by name this Guidelines concept.

What's more, the government fails to adequately raise a possible preservation issue. Thus, even if we deemed Mr. A. to have waived through his inadequate briefing his factual challenge to the district court's delimitation of the scope of jointly undertaken criminal activity, we would conclude that the government waived the waiver. *See Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013); *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996). Indeed, the government explicitly acknowledges that "Mr. [A.] primarily contests the district court's factual

findings"—in other words, the findings undergirding the district court's delimitation of jointly undertaken criminal activity. *See* Aplee.'s Resp. Br. at 37 (bold typeface omitted); *see id.* at 39. Accordingly, under these circumstances, it would be odd indeed for us to deem this argument waived.[8] Instead, we turn to the merits of Mr. A.'s second argument.

On the merits, we conclude that the district court did not clearly err by delimiting the scope of jointly undertaken criminal activity to exclude the actions of the California co-conspirators. The court could plausibly find that those actions were not within the scope of Mr. A.'s agreement to participate in jointly undertaken criminal activity. And the amount of methamphetamine that the district court attributed to Mr. A. with his agreement—the seven pounds he trafficked from Los Angeles to Topeka—further supports the plausibility of the court's exclusion of the California co-conspirators from its delimitation of jointly undertaken criminal activity. *See Ellis*, 23 F.4th at 1237. In sum, we conclude that the district court's decision to exclude the California co-conspirators from Mr. A.'s jointly undertaken criminal activity was not clearly erroneous.

[8] To be sure, the government raises the broader preservation contention that Mr. A. "waived *any* claim that the district court's factual findings were clearly erroneous." Aplee.'s Resp. Br. at 45 (emphasis added). But the government does so directly after noting that "a section of Mr. [A.]'s opening brief is dedicated to disputing the district court's factual findings." *Id.* This broader contention of waiver is not persuasive.

Here, the district court plausibly found that the California co-conspirators' conduct was beyond the scope of Mr. A.'s agreement to jointly undertake criminal activity. In this regard, the district court observed:

> I understand that there may be folks, in presuming all this stuff came from Mexico and California, who are more responsible in a global aspect. I think that [in] the conspiracy to transact and distribute methamphetamines within the Topeka community *Mr. [A.] was utilizing Mr. [M.] to engage in the transactions for his own personal benefit*, both to maintain his personal use but also to enrich himself and distribute to benefit Mr. [M.].

Aplt.'s App., Vol. II, at 326–27 (emphasis added).

Thus, the district court plausibly found that the scope of Mr. A.'s agreement to jointly undertake criminal activity was limited to local distribution—in partnership with Mr. M.—in part to feed Mr. A.'s personal meth habit. Mr. A. admits that he developed a methamphetamine addiction, and that he initially met Mr. M. when searching for a source of methamphetamine for personal use. *Id.* at 107; PSR, *supra*, ¶ 84, at 22. And we know that Mr. A. continued using methamphetamine while working for Mr. M., because he traded Mr. M. a handgun for "a day['s] worth of meth." Aplt.'s App., Vol. II, at 119; *see id.* at 159.

Because Mr. A. joined the methamphetamine conspiracy to feed his personal addiction, because that addiction continued throughout Mr. A.'s participation in the conspiracy, and because Mr. A. was only involved in the conspiracy for three months before his arrest (leaving him little time to redefine the scope of his participation), the court could plausibly infer that the scope of Mr. A.'s agreement to jointly undertake criminal activity was limited to Topeka.

Moreover, the district court further commented that:

> While [Mr. A.] had limited national decision-making knowledge and awareness, he was learning the ropes, . . . and was trusted with large quantities of methamphetamines, local control over the distribution, and stood [to] benefit as the result of that distribution. *While he may not have been in charge or even familiar with all the national tentacles of the organization,* he was at least familiar with the critical part of the local aspect.

Id. at 415 (emphasis added). In other words, the court found—and we think plausibly so from our own record study—that Mr. A.'s conspiratorial activities, knowledge, and sphere of influence were centered in Topeka. It does not necessarily follow that by helping Mr. M. import the drugs from California, Mr. A. necessarily agreed to participate in a methamphetamine trafficking operation with the California drug dealers. Moreover, the fact that Mr. A. may have possessed some knowledge of the conspiracy's multi-state—and in particular California—reach does not, in our view, render implausible the court's finding that the scope of his criminal agreement did not reach beyond Topeka. Indeed, Mr. A.'s "familiar[ity] with the critical part of the local aspect," *id.*, provided strong support for the court's finding that Topeka was the focus of his agreement.

With the notable exception of Mr. M., Mr. A. fails to draw any connection between himself and the California-based co-conspirators. Indeed, the DEA conspiracy chart the parties jointly submitted to the district court does not link Mr. A. to any of the California co-conspirators except through Mr. M.. *Id.* at 136 (Joint Mot. for Admission of Ex. No. 412, filed Sept. 6, 2022). Additionally, Mr. A. made only a single trip to Los Angeles during his brief participation in the conspiracy, and he fails

to direct us to record evidence proving that he met the California co-conspirators during his brief (two full days) trip to Southern California. *See id.* at 64; Aplt.'s Opening Br. at 13, 38. Consequently, we cannot say that the district court's finding that the California co-conspirators' actions were beyond the scope of Mr. A.'s agreement to jointly undertake criminal activity was clearly erroneous.

The district court's exclusion of the California co-conspirators from the scope of jointly undertaken criminal activity is further supported by the district court's unchallenged attribution to Mr. A. of only seven pounds of methamphetamine. The scope of a defendant's jointly undertaken criminal activity bears a "key" relationship to the drug amount attributed to that defendant. *Ellis*, 23 F.4th at 1237; *see* U.S.S.G. § 1B1.3(a)(1)(B) cmt. n.3(D); *United States v. Harris*, 148 F. App'x 690, 693–94 (10th Cir. 2005)[9]; s*ee also United States v. Rodriguez De Varon*, 175 F.3d 930, 943 (11th Cir. 1999) ("[T]he amount of drugs imported is a material consideration in assessing a defendant's role in her relevant conduct. . . . Indeed, because the amount of drugs in a courier's possession—whether very large or very small—may be the best indication of the magnitude of the courier's participation in the criminal enterprise, we do not foreclose the possibility that amount of drugs may be dispositive—in and of itself—in the extreme case. . . . [T]he Guidelines explicitly recognize that amount of drugs may be determinative in the context of minimal participants.").

[9] We rely on this unpublished case only for its persuasive value. *See United States v. Engles*, 779 F.3d 1161, 1162 n.1 (10th Cir. 2015).

In the case of jointly undertaken criminal activity involving controlled substances, the defendant is responsible for both "quantities of contraband with which he was directly involved" as well as "all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3(a)(1)(B) cmt. n.3(D). So, it is notable that, without objection from Mr. A., the district court only attributed to Mr. A. seven pounds of methamphetamine—the amount he trafficked from Los Angeles to Topeka with Mr. M..[10] *See* Aplt.'s Opening Br. at 38; Aplt.'s App., Vol. II, at 342. The district court's seven-pound attribution amount reinforces the plausibility of the court's finding that the transactions of the California co-conspirators were *not* within the scope of Mr. A.'s jointly undertaken criminal activity. *See* U.S.S.G. § 1B1.3(a)(1)(B) cmt. n.3(D). In other words, the unchallenged seven-pound attribution amount is plausibly related to Topeka-only activity.

[10] The district court's seven-pound attribution amount excluded, for example, the twelve bags of methamphetamine Mr. A. possessed at the time of his arrest (even though Mr. A. acknowledged responsibility for them in his plea agreement), Aplt.'s App., Vol. I, at 24 (Plea Agreement, filed Oct. 6, 2021); *Id.*, Vol. II, at 194, 216; Aplt.'s Opening Br. at 11, and the ten pounds of methamphetamine Mr. A. received from his co-conspirator Mr. M. over the duration of the conspiracy. *See* Aplt.'s App., Vol. II, ¶ 21, at 11 (PSR, filed Aug. 8, 2022). Indeed, Mr. A.'s appellate counsel recognized at oral argument that Mr. A. was in fact personally responsible for "more drugs than the seven pounds in this case." Oral Arg. Tr. 11:00–11:30.

If the Californians' transactions had been within the scope of Mr. A.'s jointly undertaken criminal activity, then one reasonably would have expected the district court's attribution amount to include at least a substantial portion of the amount of methamphetamine encompassed by the California transactions. The fact that the district court attributed to Mr. A. *only* the amount of methamphetamine he personally trafficked from Los Angeles to Topeka—for local distribution—thus *reinforces* the plausibility of its decision to exclude the California co-conspirators from the scope of Mr. A.'s jointly undertaken criminal activity. And, ultimately, because it was not clear error for the district court to exclude the California co-conspirators from the scope of Mr. A.'s jointly undertaken criminal activity, it was not clear error for the court to likewise omit the California co-conspirators as participants when it conducted the relative culpability analysis that the Guidelines contemplate.

At bottom, Mr. A. is "trying to eat [his] cake and have it, too." *Harris*, 148 F. App'x at 693. Mr. A. attempts to reap the benefit of a narrow scope of jointly undertaken criminal activity—which configures his relevant conduct—for the purposes of setting his base offense level (i.e., being held responsible for only the seven pounds of methamphetamine he trafficked from California) without suffering the detriment at the role reduction stage flowing from a narrow scope of jointly undertaken criminal activity. The Guidelines head off this tactic by identifying the same relevant conduct—with the same subsidiary finding of jointly undertaken criminal activity—as the guidepost or reference point for *both* the setting of the base offense level *and* the finding regarding the mitigating-role adjustment. *See Nkome*,

987 F.3d at 1269 ("Once a defendant's relevant conduct for sentencing purposes is determined, the same relevant conduct is used . . . for any role in the offense adjustments." (quoting *Harris*, 148 F. App'x at 693–94)); U.S.S.G. § 1B1.3(a)(1)(B) cmt. n.3(D).

As the Ninth Circuit put it in *Rodriguez De Varon*:

> [The mitigating-role adjustment] only makes sense analytically if the defendant can establish that her role was minor as compared to the relevant conduct *attributed to her*. Otherwise, a defendant could argue that her relevant conduct was narrow for the purpose of calculating base offense level, but was broad for determining her role in the offense. A defendant cannot have it both ways.

175 F.3d at 941. Mr. A. cannot have it both ways either.

In sum, we discern no clear error in the district court's delimitation of the scope of jointly undertaken criminal activity—which necessarily included marking the boundaries of conceivable participants for purposes of the court's mitigating-role analysis. We therefore reject Mr. A.'s second argument predicated on a claim of factual error.

3

Considering the foregoing, Mr. A.'s ultimate attack on the district court's denial of his requested mitigating-role adjustment has no legs. Mr. A.'s argument on appeal, as before the district court, is that "in making the minor-role comparison, the court should not look 'myopically at Topeka' but should understand 'that this was a multistate conspiracy that included California and that's where it originated and was run from.'" Aplt.'s Opening Br. at 15 (quoting Aplt.'s App., Vol. II, at 320). Mr. A.

argued then, as now, that "the district court should consider all the participants in the multistate conspiracy in assessing the relative culpability of the participants, and in particular should consider the California-based participants because the conspiracy originated in and was controlled from California." *Id.* at 17 (citing Aplt.'s App., Vol. II, at 320–22). In this regard, Mr. A. notes in his opening brief that his written objections to the PSR applied the five U.S.S.G. § 3B1.2 factors to "the facts"—notably, those relating to the California co-conspirators. *See id.* at 14.

However, because Mr. A. has failed to establish legal or factual error in the district court's delineation of relevant conduct—i.e., the terrain upon which the mitigating-role adjustment analysis is performed—Mr. A.'s "facts" regarding the California co-conspirators are inapposite for purposes of our assessment of whether the district court committed error in its application of the five factors of § 3B1.2 and its ultimate denial of the mitigating-role adjustment. Indeed, once the district court delineated the scope of Mr. A.'s relevant conduct as limited to the Topeka distribution network, it would have been legal error for the court to *include* the California-based co-conspirators—who were *not* part of the delineated relevant conduct—in its relative culpability analysis.

Accordingly, Mr. A.'s overarching argument that the district court erred in denying his requested mitigating-role adjustment because it excluded the California-based co-conspirators from its relative culpability analysis is wholly without merit.

III

For the foregoing reasons, we **AFFIRM** the district court's sentencing judgment.