09-3376

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEONARD DOUGLAS LADURON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(CHIEF JUDGE KATHRYN H. VRATIL)

BRIEF FOR THE UNITED STATES

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF JURISDICTION

The United States agrees with appellant's jurisdictional statement.

ISSUE PRESENTED

Whether the district court committed clear error in finding that defendant was an organizer or leader of a criminal activity that involved five participants or was otherwise extensive and thereby merited a 4-point enhancement to his Sentencing Guidelines range under U.S.S.G. § 3B1.1(a).

STATEMENT OF THE CASE

On April 24, 2008, a grand jury returned a three-count indictment (Indictment) against Leonard Douglas LaDuron: one count of conspiracy to commit wire fraud, mail fraud, and to make false statements (18 U.S.C. § 371), and two counts of making false statements (18 U.S.C. § 1001).[1] Indictment (2 Record On Appeal (ROA) 29). On June 29, 2009, LaDuron pleaded guilty—without a plea

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[1]The Indictment also charged LaDuron's mother, Mary Jo LaDuron, in Count 1 (conspiracy) but not Counts 2 or 3 (false statements). See also p. 14 n.6, below.

agreement—to Counts 1 and 3 of the Indictment; at the government's request, the district court dismissed Count 2.

On December 23, 2009, the district court per Chief Judge Kathryn H. Vratil sentenced LaDuron to 57 months' imprisonment plus three years of supervised release, and ordered him to pay restitution of $238,609 and a special assessment of $200. LaDuron now appeals the 4-point role-in-offense enhancement he received in calculating his Sentencing Guidelines offense level. LaDuron began serving his prison sentence on February 9, 2010.

STATEMENT OF FACTS

This case concerns a four-year conspiracy to defraud the federal government's E-Rate Program, which subsidizes telecommunications and Internet infrastructure for low-income schools. The Indictment charged that LaDuron and others enlisted at least ten schools spanning six states in his efforts to defraud the E-Rate Program of over $1.1 million. Indictment ¶ 16(B); Presentence Investigation Report ¶ 73 (Dec. 10, 2009) (PSR) (3 ROA 5).

I. THE E-RATE PROGRAM

Congress created the E-Rate Program in 1996 to subsidize Internet and telecommunications infrastructure for poor schools. E-Rate is part of the Federal Communications Commission's (FCC) Universal Service program and is administered by the Schools and Libraries Division of the non-profit Universal Services Administrative Company (USAC). Funding comes from a Universal Service Fund charge on every consumer's phone bill. Every year, USAC receives fund requests far exceeding E-Rate's $2.25 billion cap. PSR ¶ 9; 47 C.F.R. § 54.507(g)(1). See generally *United States v. Green*, 592 F.3d 1057, 1060-61 (9th Cir. 2010) (describing E-Rate process).

Although the amount of the copay varies, even the poorest schools must pay 10% of the cost of equipment and services funded by E-Rate. This copay is a "core requirement" of E-Rate and helps ensure that schools (a) "have a financial incentive to negotiate for the most favorable prices, so that the government's spending under the E-Rate Program is not wasteful," and (b) "purchase only infrastructure enhancements that they truly need." PSR ¶ 10. Also, "each applicant school must seek competitive bids for the desired infrastructure

enhancement." *Id.* If an applicant school uses an E-Rate consultant, that consultant "cannot be connected to a service provider bidding on that school's contract." *Id.*

After developing a technology plan, a school submits FCC Form 470 to identify the general products and services for which it seeks E-Rate funding. USAC posts the Form 470 on its website, thereby starting the competitive procurement process intended to result in the best vendor at the lowest cost. PSR ¶ 11. Once the school selects and contracts with the winning bidders, it submits FCC Form 471, the E-Rate application. *Id.* ¶ 12.

Form 471 "details the actual services and dollar amount to be funded." PSR ¶ 12. It generally describes the equipment to be bought from each vendor (e.g., telecommunications wiring) and includes an attachment that gives the specifics. The form also identifies the total cost of eligible equipment and services, the funding requested (the remainder being the school's copay), and the cost of any ineligible equipment or services.

After reviewing Form 471, USAC issues a funding commitment letter to the school and vendors, letting them know that the application

has been funded and at what level and for which equipment. See, e.g., PSR ¶ 47. The school files FCC Form 486 when it begins to receive the contracted equipment or services. Upon completion, the vendor sends one invoice to USAC (FCC Form 474) for the portion funded by E-Rate, and another invoice to the school for the balance. *Id.* ¶ 13.

II. THE FRAUDULENT SCHEME

LaDuron organized and led a four-year conspiracy that enlisted at least ten schools across six states to defraud the E-Rate Program in excess of $1.1 million. The conspirators misled USAC into believing that schools chose the conspirators' companies through a competitive and arms-length process and that the schools were paying their E-Rate copays out of their own funds when, in fact, through a series of deceptive transactions, the schools paid nothing.

A. The Scheme As Applied To The Majority Of Schools

In Fall 1999, LaDuron agreed with Benjamin Rowner and Jay Soled to solicit and service schools seeking E-Rate funding. PSR ¶ 18.[2]

[2]At the sentencing hearing, the district court adopted the PSR's findings. Sentencing Tr. 58. (The relevant Sentencing Transcript excerpts are attached to this brief. The full transcript is available at 2

LaDuron owned three companies related to E-Rate: Myco Technologies, Inc., which provided telecommunications services; Serious ISP, which provided Internet access; and Elephantine Corp., "a purported independent E-Rate consulting company." *Id.* ¶¶ 15, 18 n.2. Rowner and Soled owned and controlled DeltaNet, which installed internal connections. *Id.* ¶ 18 & n.2. Together, these companies "provided a complete package" to applicant schools. *Id.* The agreement reached among LaDuron, Rowner, and Soled was one of "mutual assistance" and covered all schools any of the three solicited. *Id.* ¶ 20. Acting as the school's "consultant," Elephantine invariably selected Myco, Serious, and DeltaNet as the school's E-Rate providers. *Id.*

Establishing Elephantine as an "independent" consulting company was key to the conspiracy's success. Although E-Rate rules permitted consultants to assist schools with their E-Rate applications and with selecting vendors in the competitive bidding process, the rules prohibited consultants from themselves becoming service providers. LaDuron was well aware of that prohibition. Indeed, in the prior year,

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ROA 71.)

he had seen eighteen schools that had chosen LaDuron's former employer, NTS, as their service provider denied USAC funding because he had prepared those schools' E-Rate applications and had helped them choose NTS as the winning vendor. PSR ¶ 14. Thus, "Elephantine was a company that existed only for the purpose of preparing, signing and submitting E-Rate applications to USAC for schools using the services of Myco, Serious, or DeltaNet." *Id.* ¶ 15.

In addition, LaDuron staffed Elephantine with his mother and wife and instructed them to use their maiden names, in a successful effort to hide their relationship with him. PSR ¶¶ 15-17. LaDuron, his mother, or wife contacted the schools that had been denied funding, and those schools "signed contracts with Elephantine allowing it to run their E-Rate application process." *Id.* ¶ 16. The schools did not know that Elephantine was staffed by LaDuron's mother and wife. See, e.g., *id.* ¶ 58. Through the cover of "independence," "Elephantine selected Myco, Serious, or DeltaNet as service providers in every circumstance." *Id.* ¶ 17 (footnote omitted). LaDuron "created Elephantine and staffed it with his wife and mother to cover up the fact that he was doing

exactly what constituted a partial basis of USAC's rejection of [his former employer's] contracts in 1999." *Id.*

In soliciting schools to apply for E-Rate funds, LaDuron, Rowner, and Soled promised school officials that they would not have to pay a copay. PSR ¶ 21. Instead, LaDuron and the others said that the service providers would obtain "donations" to cover the school's copay amount. *Id.* To hide the fact that the schools would not fulfill their copay obligations, LaDuron, Rowner, and Soled "used false information and inflated budgets in the schools' submissions to USAC." *Id.*

For example, on the River Run project, the school contracted with Serious and DeltaNet only after LaDuron and Rowner "assured [the school director] that the school wouldn't have to pay its 20% co-pay." PSR ¶ 62. When preparing and submitting River Run's applications to USAC, LaDuron "greatly inflated" the school's budget—overstating its income by more than tenfold in 2000 and by more than threefold in 2001—and then told the school official who questioned the numbers "not to interfere." *Id.* ¶ 64. LaDuron used counterfeit fax cover sheets from the school—without the school's knowledge—to send information to USAC, and sent USAC a payment request form (Form 486) with a

forged signature. *Id.* ¶¶ 65-67. Similar conduct occurred at other schools. See *id.* ¶¶ 55-56 (LaDuron told Cornerstone Achievement Academy to "ignore their bills," and he forged a school official's signature on Form 471); ¶ 57 (LaDuron prepared Calvary Chapel Academy's forms, falsified technology plan and "greatly inflated" budget, and told school it would not have to pay its copay).

The basic agreement between LaDuron and DeltaNet's owners lasted four years, until November 2003. PSR ¶¶ 18, 20. During this ongoing, continuous conspiracy, LaDuron's companies (Serious and Myco) requested E-Rate funding for dozens of schools totaling $22.8 million—nearly six times greater than the $3.9 million those companies sought for the ten schools listed in the Indictment. *Id.* ¶¶ 71, 73.

B. The Scheme As Applied To Out-Of-Window Schools

In early 2002, USAC determined that it had money left over from the 1999-2000 school year and offered those funds to schools whose applications for internal connections it had previously denied. This was referred to as "out-of-window" funding, PSR ¶ 22, because it was not for the current year. USAC notified LaDuron, Rowner, and Soled that

eight of the original eighteen NTS schools were approved for out-of-window funding.

LaDuron, Rowner, and Soled agreed that LaDuron would solicit the eight schools and be their primary contact because (1) he had a previous relationship with them from his days at NTS, and (2) they were all Islamic schools and LaDuron was Muslim, whereas Rowner and Soled were Jewish. PSR ¶¶ 14, 23 & n.4. DeltaNet, as the only one of the conspirators' companies that installed internal connections, provided the actual service to all out-of-window schools. *Id.* ¶ 22. As with the other schools, LaDuron or DeltaNet prepared the schools' technology plans, budgets, and USAC forms "using falsified and inflated information." *Id.* ¶ 23

As before, LaDuron also promised the out-of-window schools that they would not have to pay their E-Rate copays. PSR ¶ 23. Due to concern over increased USAC audits of copays, however, LaDuron, Rowner, and Soled devised a phony paper trail to deceive USAC into believing that the schools were paying their copays. Under this artifice, DeltaNet would divert some of its USAC proceeds to LaDuron,

who would "donate" the money to the school, which would then use the "donated" money to pay DeltaNet its copay. *Id.* ¶¶ 24-27.

The scheme worked. Seven of the eight potential out-of-window schools signed up with LaDuron and used DeltaNet for their internal connection services. PSR ¶ 28. LaDuron prepared the schools' USAC forms, inflated budgets, forged signatures, counterfeited schools' letterhead and faxes, and directed schools to refer any USAC questions to him. *Id.* ¶¶ 36, 38-39, 41, 44, 46. He told the schools they would not have to pay their copays, and "donated" money to the schools using money DeltaNet siphoned to him. *Id.* ¶¶ 37, 40, 42, 45, 47. In total, DeltaNet transferred $554,624 to LaDuron, of which he then "donated" $211,100 to the out-of-window schools, *id.* ¶¶ 31, 72, which then "paid" DeltaNet their copays. *Id.* ¶¶ 24, 45.

III. SENTENCING

LaDuron pleaded guilty, without a plea agreement, to Count 1 (conspiracy to commit fraud) and Count 3 (false statements) of the Indictment. The district court held a sentencing hearing on

December 16, 2009. Using § 2B1.1 (Fraud) of the 2009 Guidelines Manual, the court computed the total offense level of 23 as follows:

SENTENCING GUIDELINE (2009)[3]		Level
Fraud Base Offense Level	§ 2B1.1(a)(2)	6
Loss, between $1.0-$2.5 million	§ 2B1.1(b)(1)(I)	+16
Role in Offense, Organizer/Leader	§ 3B1.1(a)	+4
Acceptance of Responsibility	§ 3E1.1(a)	−2
Additional Reduction	§ 3E1.1(b)	−1
TOTAL OFFENSE LEVEL		23

Sentencing Tr. 24-25; PSR ¶¶ 87-105. The court's offense level of 23 yielded a Guidelines sentencing range of 46-57 months' imprisonment.[4]

A. LaDuron's Objections

LaDuron did not challenge the loss calculation. Sentencing Tr. 5. He did, however, object to the 4-point enhancement for role in offense under § 3B1.1(a), arguing that he should receive at most a 2-point

[3]All citations to the Sentencing Guidelines in this brief are to the 2009 version.

[4]Count 3 was unrelated to E-Rate. It concerned LaDuron's false statements on forms seeking rent subsidies from the U.S. Department of Housing and Urban Development (HUD). The conviction on Count 3 increased LaDuron's restitution amount but did not affect his term of imprisonment. PSR ¶¶ 74-79, 84, 99-100, 144; Sentencing Tr. 57. LaDuron has not appealed his sentence related to Count 3.

enhancement. *Id.* at 15. Although LaDuron declined to present any additional evidence at sentencing, *id.* at 6, he argued that the facts contained in the PSR did not show that he was the organizer/leader of a conspiracy or that the scheme "involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a).

LaDuron argued that Rowner and Soled, not he, were the organizers and leaders of the conspiracy because they were at "the top of the heap" and were "lording over the other individuals." Sentencing Tr. 12; see also *id.* at 14 (organizer is "the person who made it all happen"). According to LaDuron, Rowner and Soled were "in charge" and "certainly did not subordinate themselves to Doug LaDuron." *Id.* at 12. LaDuron argued that he was merely "the go-through guy, the middle, the conduit for the flow of money." *Id.* at 13. Noting that Rowner and Soled each received 3-point enhancements (§ 3B1.1(b)) in their sentencing,[5] LaDuron argued that it was "simply not congruous to

[5]Rowner and Soled each pleaded guilty pursuant to plea agreements. They were sentenced by a different court than LaDuron, however, because their cases were transferred—at their request—to the U.S. District Court for the Northern District of Illinois for sentencing.

say that those two individuals who were at the top of the heap can now suddenly be jumped over by [him]." *Id.* at 14.

With respect to the number of participants in the scheme, LaDuron conceded that he, Rowner, Soled, and LaDuron's mother (Mary Jo) were "participants" under § 3B1.1(a).[6] He argued, however, that neither his wife, Ada, nor his employee Erik Chaney could be the necessary fifth participant because neither was "criminally responsible." Sentencing Tr. 16-18. The government acknowledged that Ada LaDuron did not knowingly participate in the criminal activity, but it argued that she used her maiden name "to mislead not only the schools but also USAC into believing that there was no family relationship between her and himself." *Id.* at 18-19. Further, the government argued that Chaney knowingly misrepresented to USAC that he was an employee of the River Run school, which was sufficient to count him as a "participant" under § 3B1.1(a). *Id.* at 18.

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[6]On July 2, 2009, Mary Jo LaDuron pleaded guilty to one count of a Superseding Information charging her with making a false statement, in violation of 18 U.S.C. § 1001, for her role in this E-Rate fraud. On October 3, 2009, the district court sentenced Mary Jo LaDuron to two years probation and a fine of $3,743. PSR ¶ 5.

With respect to the "otherwise extensive" prong of § 3B1.1(a), LaDuron conceded that he had "primarily focused" on the number of participants rather than whether the criminal activity was "otherwise extensive." Sentencing Tr. 16. He also argued that the analysis of extensiveness is "very difficult . . . because so many courts do not typically make an analysis of it." *Id.* at 15. LaDuron offered a "sophisticated means" standard of extensiveness and suggested that his conduct failed to satisfy that standard. *Id.* at 15-16.

B. District Court's Findings

The district court stated that "this is a *really easy call* to find that the defendant was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive." Sentencing Tr. 23 (emphasis added).

To the court, "the three principals, [Rowner and Soled] plus this defendant, have equal culpability and equal responsibility in terms of the manager or supervisor enhancement. Granted, they didn't play identical roles, but clearly each of them organized and led the part of the conspiracy for which he had responsibility." Sentencing Tr. 24.

The court rejected LaDuron's argument that by receiving a 4-point enhancement, he would be "leapfrogging" Rowner and Soled's roles in the offense. The court observed that Rowner and Soled pleaded guilty pursuant to plea agreements that specified their enhancements under § 3B1.1(b), while LaDuron pleaded guilty without such an agreement; "consequently, he did not have the benefit of concessions with regard to role in the offense and he also didn't have the obligations and burdens of a Plea Agreement. So I don't see that the calculations here are necessarily inconsistent with those in the other two cases." *Id.* at 29-30.

The district court also found that the criminal activity involved five participants and that it was "otherwise extensive." As to the five participants, the court included Erik Chaney in addition to LaDuron, Rowner, Soled, and LaDuron's mother (Mary Jo). It found that LaDuron "directed Mr. Chaney to send a form 486 by e-mail to USAC on October 23rd, 2002. And that it was fraudulent. . . . But anyway, he's definitely a participant in the criminal enterprise knowingly." Sentencing Tr. 23-24 (citing PSR ¶¶ 67-68).

The district court also found that the PSR "more than adequately details a criminal activity which was otherwise extensive within the scope of " § 3B1.1(a). Sentencing Tr. 24. Finally, the court thought it "instructive" that both Rowner and Soled had stipulated in their plea agreements that their criminal activity "involved five or more participants and was extensive in nature." *Id.*

Turning to the non-Guidelines factors, the district court determined that there was nothing "in this record which suggests that a nonguideline sentence is appropriate." Sentencing Tr. 53. The court viewed LaDuron's case as one of ordinary fraud, and rejected his suggestion that he should receive a lesser sentence because he was helping to bring technology to poor schools and did not get rich from his scheme. The court observed that it was "not particularly moved by . . . the alleged humanitarian motives" because, but for LaDuron's fraud, USAC would still have subsidized technology for other needy children. After noting that LaDuron had used the schools, his mother, and his wife, the district court concluded:

> I think . . . a sentence at the high end of the guideline range is necessary to reflect the seriousness of this offense to promote respect for the law, to provide just punishment, to deter others

> from engaging in this kind of conduct, and to protect the public from further crimes.

Id. at 54-55.

The district court sentenced LaDuron to 57 months' imprisonment —the top of the level 23 Guidelines range—plus three years of supervised release. The court also ordered LaDuron to pay restitution of $238,609.[7] Judgment (attached as Ex. 1 to LaDuron's brief).

SUMMARY OF ARGUMENT

The district court did not clearly err in finding that LaDuron was an organizer or leader of a criminal activity that involved five participants and was otherwise extensive within the meaning of U.S.S.G. § 3B1.1(a).

1. Although the government need demonstrate only that LaDuron was a leader *or* an organizer, he was, in fact, both. LaDuron was an "organizer" of the conspiracy. Not only did LaDuron actively plan and participate in the fraud for four years, but most importantly,

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[7]Of the restitution ordered, $217,771 was to be paid to USAC for the conduct of Count 1, and the remaining $20,838 to be paid to the Lawrence-Douglas County Housing Authority for the conduct of Count 3. See also p. 12 n.4, above.

he formed and controlled a company, Elephantine, "for the purpose of defrauding the E-Rate Program." Indictment ¶ 9. Elephantine deceived schools and USAC into believing that the schools were getting independent E-Rate consulting advice when, in fact, the company existed to steer contracts to the conspirators' service companies.

Moreover, once the fraudulent scheme was established, LaDuron was an active participant by soliciting schools, telling them they would not have to pay their copays, falsifying schools' tech plans and budgets, forging signatures, and knowingly submitting false forms to USAC. For the out-of-window schools, LaDuron planned with Rowner and Soled the crucial artifice of deceiving USAC with phony "donations," and he brought that plan to fruition by securing those schools' cooperation and by making the "donations."

LaDuron also recruited, led, and controlled two "participants" who were criminally responsible: Mary Jo LaDuron (his mother and Elephantine employee) and Erik Chaney (Serious employee). Contrary to LaDuron's brief, Br. 16, it is irrelevant whether LaDuron supervised Rowner or Soled, two other coconspirators. *United States v. Hamilton*, 587 F.3d 1199, 1222 (10th Cir. 2009).

2. It would be sufficient if the criminal activity involved five participants *or* were otherwise extensive. It was, in fact, both. The criminal activity involved five participants. LaDuron challenges only Erik Chaney's classification as a "participant," but Chaney is criminally culpable because he falsely represented himself to USAC as a tech administrator and contact person for one of the schools. That deception paved the way for USAC to pay LaDuron's company for work.

This Court need not reach the question regarding the number of participants, however, because LaDuron has failed to challenge the district court's finding that the criminal activity was "otherwise extensive" within the meaning of § 3B1.1(a). Sentencing Tr. 24. In any event, LaDuron's fraudulent scheme was extensive in every respect: it was national in scope, involving millions of dollars; it involved forged and inflated documents and phony paper trails to disguise illicit "donations"; and it involved four primary participants, two lesser participants, and numerous unwitting outsiders. LaDuron even created a company, Elephantine, to accomplish the fraud.

ARGUMENT

THE DISTRICT COURT DID NOT CLEARLY ERR IN DETERMINING THAT LADURON MERITED A FOUR-LEVEL ENHANCEMENT UNDER 3B1.1(a)

The sole issue on appeal is whether the district court clearly erred in enhancing LaDuron's Sentencing Guidelines range by four points for his role in the offense under U.S.S.G. § 3B1.1(a). To impose the 4-level increase, the district court was required to find that the government had shown two facts by a preponderance of the evidence: (1) that LaDuron was an organizer or leader, and (2) that the criminal activity involved five or more "participants" or was "otherwise extensive." *United States v. Cruz Camacho*, 137 F.3d 1220, 1224 (10th Cir. 1998); *United States v. Roberts*, 14 F.3d 502, 523 (10th Cir. 1993).

LaDuron "does not dispute the underlying factual findings to which he pleaded guilty." Br. 11. Rather, he claims that those subsidiary findings do not add up to the Court's ultimate finding that he was an organizer or leader. This Court reviews Guideline enhancements only for clear error and "'will not reverse [the] lower court's finding of fact simply because [it] would have decided the case differently.' Rather, [this Court] 'ask[s] whether, on the entire

evidence, [it is] left with the definite and firm conviction that a mistake has been committed.'" *United States v. Wilfong*, 475 F.3d 1214, 1218 (10th Cir. 2007) (quoting *United States v. Gonzalez Edeza*, 359 F.3d 1246, 1248 (10th Cir. 2004)).

Aside from challenging the § 3B1.1(a) enhancement, LaDuron does not contend that his sentence was otherwise unreasonable.[8] Thus, if this Court determines that the district court did not commit clear error in calculating the Guidelines range, LaDuron has offered no other basis to vacate and remand for resentencing.

A. The District Court Did Not Err In Finding That LaDuron Was An Organizer Or Leader

LaDuron argued in the district court that he should receive no enhancement for his role in the offense, or at most a 2-point enhancement under § 3B1.1(c). Sentencing Tr. 15. On appeal,

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[8]See *United States v. Tom*, 494 F.3d 1277, 1280 (10th Cir. 2007) (in the wake of *United States v. Booker*, 543 U.S. 220 (2005), this Court "reviews the sentencing decisions of district courts under a reasonableness standard"); *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006) (per curiam) ("[a] sentence cannot . . . be considered reasonable . . . if it was based on an improper determination of the applicable Guidelines range").

however, LaDuron concedes that he was at least a "manager or supervisor" and therefore deserving of a 3-point enhancement, depending on the size and scope of the criminal activity. Br. 16 ("LaDuron should be more properly characterized as a manager or supervisor under § 3B1.1(b) or § 3B1.1(c)").[9] Still, LaDuron's concession does not go far enough, and the district court did not clearly err in finding that he was an organizer or leader under § 3B1.1(a).

This Court has observed that "the wording of § 3B1.1(a) is disjunctive. In other words, an enhancement is appropriate if defendant was either a leader *or* an organizer." *United States v. Tagore*, 158 F.3d 1124, 1131 (10th Cir. 1998). LaDuron was both a leader and an organizer. Although § 3B1.1(a) "requires five or more

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[9]Both § 3B1.1(a) and § 3B1.1(b) require a finding that the "criminal activity . . . involved five or more participants or was otherwise extensive." Section 3B1.1(c) does not. Thus, LaDuron's concession that he was at least a "manager or supervisor," Br. 16, means that he concedes he deserves a 3-point enhancement under § 3B1.1(b) if the criminal activity involved five participants or was otherwise extensive. The scope of the criminal activity is addressed at pp. 30-37, below. A 3-point enhancement under § 3B1.1(b) would have reduced LaDuron's Guidelines sentencing range to 41-51 months rather than his actual range of 46-57 months. See U.S.S.G., ch. 5, pt. A, Sentencing Table (comparing Offense Level 22 to Offense Level 23).

participants, the leadership role need only be over 'one or more other participants.' 'This is not a particularly onerous showing: The Guideline requires only a conclusion that [the defendant] supervised at least one such participant.'" *United States v. Hamilton*, 587 F.3d 1199, 1222 (10th Cir. 2009) (quoting U.S.S.G. § 3B1.1 cmt. n.2, and *United States v. Gallant*, 537 F.3d 1202, 1241 (10th Cir. 2008) (other citation omitted)). Thus, the United States did not need to demonstrate that LaDuron led Rowner or Soled, cf. Br. 16—merely that he led one other participant.

LaDuron in fact recruited, led, and controlled *two* participants: Mary Jo LaDuron (his mother and Elephantine employee) and Erik Chaney (Serious employee). PSR ¶¶ 15-17, 68; Indictment ¶ 10 (Mary Jo "assisted her son"). At LaDuron's direction, Mary Jo LaDuron helped her son solicit schools, often acted as the schools' contact, "certified to USAC the school's 'choice' of Myco, Serious, or DeltaNet as the schools' service providers," and signed and submitted various forms to USAC. PSR ¶¶ 16, 17, 36, 38, 44, 47. Chaney, in turn, falsely represented to USAC his employer and position, also at LaDuron's direction. *Id.* ¶ 68; see also pp. 36-37, below.

Moreover, LaDuron's role went well beyond leading two participants—he was deeply involved in every aspect of the criminal activity. In distinguishing an organizer/leader role from manger/supervisor, the "Guidelines application note explains that relevant factors include 'the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, . . . the degree of participation in planning or organizing the offense, . . . and the degree of control and authority exercised over others.'" *Hamilton*, 587 F.3d at 1222 (ellipses in *Hamilton*) (quoting U.S.S.G. § 3B1.1 cmt. n.4).

Given these factors, it was an "easy call" for the district court to find that LaDuron merited the enhancement. Sentencing Tr. 23. LaDuron participated in the organizing and planning of the fraud throughout its four-year run. He entered into an agreement with Rowner and Soled under which they exchanged client information and provided "mutual assistance" to each other. PSR ¶ 20. Their three service companies—Serious, Myco, and DeltaNet—complemented each other and provided a "complete package" to applicant schools. *Id.* ¶ 18 n.2.

Most importantly, LaDuron formed Elephantine "for the purpose of defrauding the E-Rate Program." Indictment ¶ 9. Elephantine "existed only for the purpose of preparing, signing and submitting E-Rate applications to USAC for schools using the services of Myco, Serious, or DeltaNet." PSR ¶ 15. LaDuron staffed Elephantine with his mother and wife and instructed them to use their maiden names to hide their relationship with him, thereby falsely "giving the impression to USAC that an independent consultant was working on behalf of a school." *Id.* ¶¶ 15-17. LaDuron "created Elephantine and staffed it with his wife and mother to cover up the fact that he was doing exactly what constituted a partial basis of USAC's rejection of [his former employer's] contracts in 1999." *Id.* ¶ 17. LaDuron owned and controlled Elephantine, and without Elephantine the fraudulent scheme would not have worked.

LaDuron's role did not stop there. He organized, planned, and was an active participant in the fraudulent scheme. In order for the scheme to succeed, the conspirators needed schools to apply for E-Rate funds and to use Serious, Myco, or DeltaNet as their service providers. LaDuron solicited schools—in part by telling them that they would not

have to bear any of the cost—and was the primary contact for many of the in-window schools and for all of the out-of-window schools. See PSR ¶¶ 14, 16, 23 & n.4, 55, 62. He controlled the schools' bidding process. *Id.* ¶¶ 17, 20. He wrote the tech plans, falsified budgets, forged signatures, and submitted false forms to USAC. *Id.* ¶¶ 23, 56-57, 64, 66-67; Indictment ¶¶ 14, 16(C). For the out-of-window schools, LaDuron planned with Rowner and Soled the crucial artifice of deceiving USAC with phony "donations," and LaDuron brought that plan to fruition by actually making the "donations." PSR ¶¶ 24, 37, 40, 45, 47, 72; Indictment ¶ 16(D).

LaDuron argues that Rowner and Soled exercised greater control than he did or, at least, that he did not exercise greater control than they did yet they received only 3-point enhancements. Br. 13-16. In arguing that Rowner and Soled exercised greater control, however, LaDuron focuses on only one aspect of the conspiracy—the out-of-window schools—and ignores that the overall, ongoing scheme lasted four years and involved many schools beyond the out-of-window schools. LaDuron, Rowner, and Soled developed the scheme together, and each solicited schools, but it was LaDuron who founded, controlled,

and ran Elephantine, and Elephantine was the linchpin for the general fraudulent scheme. Elephantine ran the schools' application process. PSR ¶ 16. The creation of Elephantine "hid the relationship" between the schools' "consultant" and LaDuron. *Id.* ¶ 17. As LaDuron well knew from past experience, without Elephantine USAC would have denied every school's application, *id.* ¶¶ 10, 14, 17, and Elephantine was LaDuron's baby.

Even on the out-of-window schools, LaDuron's role was hardly subservient. He designed the "donation" artifice with Rowner and Soled, and he secured those schools' cooperation. PSR ¶¶ 23-24, 28. Indeed, he was due to receive 40% of the conspirators' profits on those schools—more than Rowner or Soled, who would split the remaining 60%—even though Rowner and Soled's company, DeltaNet, would be the one actually providing the service to the schools. *Id.* ¶ 28. That Rowner and Soled ultimately tried to shortchange LaDuron out of his 40% share, Br. 14, proves merely that "there is no honor among thieves." *SEC v. Lyttle*, 538 F.3d 601, 604-05 (7th Cir. 2008); *United States v. Mankarious*, 151 F.3d 694, 697 (7th Cir. 1998).

LaDuron points to the district court's statement that LaDuron, Rowner, and Soled have "equal culpability and equal responsibility," Sentencing Tr. 24, and suggests that he should therefore receive the same 3-point enhancement as Rowner and Soled. Br. 12. It is well settled, however, that multiple conspirators can qualify as an organizer or leader. U.S.S.G. § 3B1.1 cmt. n.4; *United States v. Parker*, 553 F.3d 1309, 1322 (10th Cir. 2009); *United States v. Knox*, 124 F.3d 1360, 1366 (10th Cir. 1997). Thus, the question is not whether LaDuron deserves a 4-point enhancement *more than* Rowner or Soled do, but whether the district court clearly erred in finding that LaDuron merited that enhancement in his own right. See *United States v. Kneeland*, 148 F.3d 6, 16 (1st Cir. 1998) (court should not avoid "properly applied [Guidelines] enhancements" simply to meet "'perceived need to equalize sentencing outcomes for similarly situated codefendants'") (citation omitted); *United States v. Blackwell*, 127 F.3d 947, 951-52 (10th Cir. 1997) (disparity in sentences among coconspirators is not grounds for reducing sentence). No error occurred. Moreover, to the extent that a comparison to Rowner or Soled's enhancements is appropriate, the district court was correct to note that the other two pleaded guilty

pursuant to negotiated plea agreements, while LaDuron pleaded guilty without one and took his chances. Sentencing Tr. 29-30.

B. The Conspiracy Involved Five Participants And Was Otherwise Extensive

"The district court's finding that [defendant's] criminal activity involved five or more participants or, in the alternative, that the operation was otherwise extensive is a finding of fact which is reviewed under the 'clearly erroneous' standard." *United States v. Yarnell*, 129 F.3d 1127, 1138 (10th Cir. 1997). LaDuron challenges only the district court's finding that five participants were involved. Br. 16-19. This Court, however, need not reach that issue because LaDuron has waived any argument that the conspiracy was "extensive" within the meaning of § 3B1.1(a). In any event, the district court did not clearly err in finding both that the conspiracy was "extensive" and that it involved five "participants."

1. The Conspiracy Was "Extensive"

The district court found both that five participants were involved *and* that the conspiracy was "otherwise extensive" within the meaning

of § 3B1.1(a). Sentencing Tr. 23-24. On appeal, however, LaDuron challenges only the finding that the conspiracy involved five participants, Br. 16-19, ignoring the finding that the criminal activity was extensive. Having failed to raise the issue in his opening brief, LaDuron has now waived any challenge to the finding that the conspiracy was "otherwise extensive" and thereby satisfies the second prong of § 3B1.1(a). See *United States v. Martinez*, 518 F.3d 763, 767 n.2 (10th Cir. 2008); *United States v. Beckstead*, 500 F.3d 1154, 1164-65 (10th Cir. 2007).

Even had LaDuron not waived the issue, the record supports the district court's finding that the conspiracy was extensive. Recognizing that the Guidelines do not define "otherwise extensive," this Court looks to the totality of circumstances to determine whether criminal activity is sufficiently "extensive":

> [T]he sentencing court is free to consider the use of unwitting outsiders in determining if a criminal enterprise is "extensive" within the contemplation of section 3B1.1. . . . The extensiveness of a criminal activity is not necessarily a function of the precise number of persons, criminally culpable or otherwise, engaged in the activity. Rather, an inquiring court must examine the totality of the circumstances, including not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme.

Yarnell, 129 F.3d at 1139 (quoting *United States v. Dietz*, 950 F.2d 50, 53 (1st Cir. 1991)).

LaDuron's fraudulent scheme was extensive in every respect. The conspiracy lasted four years and took advantage of schools across the country. Indictment ¶ 16. LaDuron's companies, Myco and Serious, requested E-Rate funding totaling nearly $22.8 million. PSR ¶ 71. The Indictment charged conduct with respect to ten schools in six states, stretching from Oregon to New Jersey. Indictment ¶¶ 11, 16(B); PSR ¶¶ 18, 20. The scheme involved four primary participants (LaDuron, Rowner, Soled, and LaDuron's mother), two lesser participants (Erik Chaney and LaDuron's wife), and numerous unwitting outsiders (officials from each school). Sentencing Tr. 16, 18-19, 23-24; PSR ¶ 37, 39, 42, 45, 68.[10]

To pull off the scheme, LaDuron created a company, Elephantine, "that existed only for the purpose of preparing, signing and submitting

[10]"In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." U.S.S.G. § 3B1.1 cmt. n.3.

E-Rate applications to USAC for schools using the services of Myco, Serious, or DeltaNet." PSR ¶ 15; see also Indictment ¶ 9 (Elephantine formed "for the purpose of defrauding the E-Rate Program"). LaDuron used Elephantine to mislead USAC by "cover[ing] up the fact that he was doing exactly what constituted a partial basis of USAC's" previous rejection of the schools' E-Rate applications. PSR ¶ 17.

In addition, LaDuron and his coconspirators designed an artifice of phony "donations" to make it appear that schools were paying their copays out of their own funds, when in reality USAC was funding the copays; falsified school budgets and technology plans; and forged signatures on many documents. PSR ¶¶ 21, 23-25, 39, 56-57. This was an extensive and complex conspiracy, resulting in an intended loss in excess of $1.1 million. PSR ¶ 73; Sentencing Tr. 5 (LaDuron did not contest loss calculation).

The conspiracy here fits comfortably within the range of cases that have upheld 4-level enhancements under § 3B1.1(a). In *Yarnell*, this Court affirmed a 4-level enhancement when the fraudulent scheme to lease tow trucks

> spread from Denver to Phoenix, St. Louis and Atlanta. It lasted four months, created at least 40 victims, and generated losses in excess of $140,000. [Defendant's] enterprise involved considerable planning and complex execution, and included at least one other culpable participant as well as a number of other participants who may not have been culpable.

Yarnell, 129 F.3d at 1139. See also *United States v. Massey*, 48 F.3d 1560, 1564, 1572 (10th Cir. 1995) (upholding 4-level enhancement when conspiracy lasted two years, had "national scope, . . . attract[ing] clients from many parts of the country," and involved many non-conspirators); *United States v. Diekemper*, 604 F.3d 345, 349, 354 (7th Cir. 2010) (four-year bankruptcy fraud involving "three knowing participants, six outsiders," and a loss exceeding $2.5 million leads court to observe, "[s]urely this constitutes an extensive scheme"); *United States v. Yelaun*, 541 F.3d 415, 421-22 (1st Cir. 2008) (criminal enterprise "involved the services of numerous employees and a fairly complex scheme, involving falsifying medical reports and prescriptions and follow up billings based on that false documentation"); *United States v. Harvey*, 532 F.3d 326, 338 (4th Cir. 2008) (defendants "used a number of persons, both knowing and unknowing, in their scheme, including family members and various employees of their businesses").

2. The Criminal Activity Involved Five Participants

It is sufficient that the district court found that the conspiracy was "extensive" within the meaning of § 3B1.1(a). See *Yarnell*, 129 F.3d at 1138 (district court must find that "criminal activity involved five or more participants *or, in the alternative,* that the operation was otherwise extensive" (emphasis added)). Affirmance is additionally proper, however, because the district court did not clearly err in finding that LaDuron's scheme involved five "participants."

To count as a "participant," a person must be "criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1 cmt. n.1; *United States v. Beltran*, 571 F.3d 1013, 1020-21 (10th Cir. 2009). The district court found that the conspiracy's participants included LaDuron, Rowner, Soled, Mary Jo LaDuron, and Chaney. Sentencing Tr. 23-24. LaDuron challenges only the finding that Chaney was a "participant." Br. 17 ("It is Mr. Chaney's role in this case that is most ambiguous and the reason that the district

court should not have found that the total number of participants totaled five").[11]

Chaney was an employee of Serious, one of LaDuron's companies. PSR ¶ 68. In October 2002, at LaDuron's request, Chaney signed a Form 486 certifying to USAC that Serious had performed work at the River Run school in Salem, Oregon and authorizing USAC to pay Serious for that work. *Id.* ¶¶ 67-68. Chaney signed the Form 486, however, not in his true capacity as a Serious employee, but by falsely representing that he was the tech administrator and contact person for River Run. *Id.* Thus, Chaney may not have known "what the Form 486 represented or why [LaDuron] asked him to sign it," *id.* ¶ 68, but he certainly knew his job title and employer and therefore that he was making a false statement on a government form authorizing payment to LaDuron, which is one of the objects of the conspiracy alleged in Count 1. LaDuron chose not to present additional evidence at

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[11]LaDuron asserts that only LaDuron, Rowner, and Soled were "ultimately found to be criminally liable," Br. 17 n.2, but ignores that Mary Jo LaDuron pleaded guilty as well. See Sentencing Tr. 16 ("the Court can take judicial notice that Miss Mary LaDuron is criminally responsible"); PSR ¶ 5; p. 14 n.6, above.

sentencing challenging Chaney's culpability, Sentencing Tr. 6, opting instead to argue that the facts as contained in the PSR were insufficient. See *id.* at 17 (arguing that the PSR "says what it says. And what I'm saying is that it doesn't say enough"). On these facts, therefore, the district court did not clearly err in finding that the government had shown by a preponderance of the evidence that Chaney was a criminally responsible participant.

CONCLUSION

The sentence imposed by the district court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,888 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in Century 14-point font.

Dated: July 15, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on JULY 15, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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