**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 93-1321**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**VERSUS**

**CLEVELAND JACKSON,**

**Defendant-Appellant.**

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**Appeal from the United States District Court**
**for the Northern District of Texas**
**(3:92-CR-438-H-03)**

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(September 30, 1993)

Before KING and BARKSDALE, Circuit Judges, and PARKER, District Judge.[1]

PER CURIAM:[2]

Having pleaded guilty, Cleveland Jackson appeals his sentence, challenging only the district court's denial of his request for a downward adjustment for his role in the offense, pursuant to § 3B1.2 of the Sentencing Guidelines. We **AFFIRM.**

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[1] Chief Judge of the Eastern District of Texas, sitting by designation.

[2] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Cleveland Jackson and three others worked for Wayne Moore to transport and sell stolen motor vehicles in interstate commerce. On five occasions in May and June 1992, two stolen vehicles (usually trucks worth about $14,000 each) were driven from Texas to Oklahoma, and sold to undercover agents for $700 each.[3] Jackson participated in all but the first of the five trips.[4] The eight vehicles transported on the trips in which he participated were valued at $100,734.45.

In October 1992, the participants were indicted on 27 counts related to the criminal activity; Jackson was named in 17. He pleaded guilty to one of the four counts charging him, Moore, and another, aided and abetted by one another, with transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. §§ 2312 and 2.

In the Presentence Investigation Report (PSR), Jackson's offense level was set at 12, with a criminal history category of II, for a sentencing range of 12 to 18 months.[5]

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[3] Moore stole the vehicles, met with the undercover agents and negotiated the sales; he then paid the others $100-$150 per trip for driving the vehicles to Oklahoma.

[4] After his fourth trip, Jackson refused to participate further, because he had taken a full-time job.

[5] Jackson's criminal history category of II was pursuant to U.S.S.G. Ch. 5, pt. A (2 points were awarded for Jackson's conviction for DWI in 1990, under U.S.S.G. § 4A1.1(b)).

Jackson's offense level of 12 was calculated as follows:

(1) **4 points** for the base offense, pursuant to U.S.S.G. § 2B1.2(a) - Receiving, Transporting, Transferring, Transmitting,

Jackson made several objections to the PSR. His objection to his offense level not being reduced under U.S.S.G. § 3B1.2(b) for his "minor role" was overruled. But, the district court did sustain the objection to the recommended two-point addition for "more than minimal planning". Accordingly, Jackson's offense level was reduced to 10 points; this reduced the sentencing range to eight to 14 months. He was sentenced, *inter alia*, to 14 months imprisonment.

II.

We will uphold a Guidelines sentence unless it is imposed in violation of law, or is the result of an incorrect application of the Guidelines, or is a departure from the applicable guideline range and is unreasonable. 18 U.S.C. § 3742(e); ***United States v. Adams***, 996 F.2d 75, 78 (5th Cir. 1993), citing ***United States v. Buenrostro***, 868 F.2d 135, 139 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). The district court's legal interpretations of the Guidelines are reviewed *de novo*; factual findings, only for clear error. ***Adams***, 996 F.2d at 78, citing ***United States v. Suarez***, 911

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or Possessing Stolen Property;

(2) **+ 8 points** for the loss amount, pursuant to U.S.S.G. § 2B1.2(b)(1) (based on the value ($100,734.45) of the eight vehicles transported to Oklahoma during the four trips in which Jackson participated);

(3) **+ 2 points** for more than minimal planning, pursuant to U.S.S.G. § 2B1.2(b)(4)(B);

(4) **- 2 points** for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1.

As stated *infra*, the district judge reduced the offense level by 2 points pursuant to Jackson's objection to the planning adjustment.

F.2d 1016, 1018 (5th Cir. 1990), and ***United States v. Mourning***, 914 F.2d 699, 704 (5th Cir. 1990).

A.

A district court's determination of whether a defendant is either a minimal or a minor participant "enjoy[s] the protection of the clearly erroneous standard." ***United States v. Gallegos***, 868 F.2d 711, 713 (5th Cir. 1989), quoting ***Buenrostro***, 868 F.2d at 137; *see also* ***United States v. Palomo***, 998 F.2d 253, 257 (5th Cir. 1993); ***United States v. Thomas***, 932 F.2d 1085, 1091 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 887 (1992). However, in asserting that, under § 3B1.2, the district court should have adjusted his offense level downward for a minor role, Jackson first contends that the court's refusal to consider a downward role adjustment was an error of law. We review this contention *de novo*. *See* ***United States v. Otero***, 868 F.2d 1412, 1414 (5th Cir. 1989). Along this line, Jackson maintains that the court mistakenly believed it could not legally make a role adjustment unless Jackson had been convicted of conspiracy or sentenced based on other related conduct.

Jackson bases this interpretation of the court's reasoning on the fact that it adopted the following language from the Addendum to the PSR responding to Jackson's objection to not receiving the adjustment:

> The defendant's guidelines were calculated only upon the loss involved in the vehicles directly related to his involvement. If guidelines had been calculated upon the total loss of the conspiracy, [Jackson] would be entitled to a reduction based upon his minimal role. However, he is not entitled

> to a role reduction in addition to guideline calculations based only upon his direct involvement.

We read this language to mean simply that the applicable loss was held to a minimum; other applicable, and much greater, loss was not considered. On the other hand, as the government concedes, this language is perhaps susceptible to the interpretation that Jackson espouses. That is, one could read it to say that a defendant is not entitled to a role adjustment, *as a matter of law*, unless he has been convicted of conspiracy.

We need not reach this issue, however, because we conclude that the district court understood, and adopted, the passage as we understand it. The court never suggested that it was without the authority to make such an adjustment. To the contrary, after overruling the objection, it gave Jackson's counsel another opportunity fully to argue his role request, both as a matter of law and based on the facts of the case.[6]

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[6] At the sentencing hearing, the court stated:

> As to your third Objection to Paragraph 20 [the "minor role" objection], I overrule that really essentially for the reasons stated in the Probation Officer's Report and as to the upward departure and your argument against that[,] I will not be departing upward.
>
> And as to downward departure I will not be departing downward.

As noted, Jackson's counsel then presented more fully the minor role objection, and the court responded: "I am departing downward all I am going to do. ... I think it is a matter of giving him the benefit of every kind of charity to take off the two points that were assessed in Paragraph 18 [for `more than minimal planning'] ...."

In addition, the court selected a sentence of 14 months, the longest term of imprisonment allowed by the sentencing range. As we have done in similar cases, we find that this choice supports the conclusion that the district judge did not deny the role adjustment out of a mistaken belief that he could not legally make the adjustment, but rather because he determined that Jackson did not warrant one. *See* ***Adams***, 996 F.2d at 78-79.

B.

Jackson's second contention is that, even if the district court did not err as a matter of law, the finding was erroneous because it was clear error and because the court failed adequately to state its reasons. We disagree.

As stated, we review a district court's factual findings under the Guidelines for clear error. It is true that the district court, in denying a requested reduction for minor participation, must state on the record the basis for its conclusion. *See, e.g.*, ***United States v. Melton***, 930 F.2d 1096, 1099 (5th Cir. 1991); and *see* ***Gallegos***, 868 F.2d at 713 (holding that, although judges are encouraged to make more detailed statements, "a simple statement that the defendant was not a `minor participant' will suffice as a factual finding").

The district court adequately stated its basis for denying the downward adjustment; and that finding was not clearly erroneous. At sentencing, it considered Jackson's objections and denied the request. It stated that it was doing so "really essentially for the reasons stated in the Probation Officer's Report", *i.e.*, the

PSR and Addendum; and it adopted those findings in the judgment. *See* ***Palomo***, 998 F.2d at 257 (similar procedure by district judge held to be adequate to satisfy requirement that court state its reasons for denial on record).

As the PSR and its Addendum indicate, Jackson was sentenced based only on the trips in which he participated; he was held accountable only for $100,734.45, the value of the eight trucks driven during the four trips in which he participated, not for the value of the trucks transported on all five trips ($126,570.43), nor for the value of all the trucks Moore had stolen ($266,968.15).[7]

Furthermore, Jackson was not, as the commentary to the Guidelines specifies, "[a] participant who [was] less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, comment. (n.3). Neither the PSR nor the record indicates that Jackson was less culpable than the other

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[7] Jackson contends that he should have been held accountable only for the value of the vehicles he actually drove, not for all eight vehicles transported during trips in which he participated. The PSR, however, properly held Jackson accountable for all eight. Under the Guidelines, Jackson was accountable for the conduct of his aiders and abetters, as long as that conduct was in furtherance of the criminal activity and was reasonably foreseeable by Jackson. *See* U.S.S.G. 1B1.3, cmt. The district court certainly could have concluded, based on the evidence, that all the stolen vehicles were part of a joint criminal activity, and that Jackson could have foreseen that such activity would include at least one other truck besides the one he drove on each trip. *See, e.g.,* ***United States v. Patterson***, 962 F.2d 409, 414 (5th Cir. 1992) (holding co-conspirator accountable for value of all vehicles stolen in conspiracy); ***United States v. Giraldo-Lara***, 919 F.2d 19, 21 (5th Cir. 1990) (holding distributors in drug conspiracy accountable for entire amount of drugs involved, so long as total amount was foreseeable to distributors).

drivers; he was involved in four of five trips, and was paid the same amount as the other drivers.[8]

III.

For the foregoing reasons, the sentence is

**AFFIRMED.**

[8] Jackson was probably less culpable than Moore, who organized the scheme and stole the trucks. Even so, the mere fact that one defendant is less culpable than a co-defendant does not automatically mean that the first is a "minor participant". ***United States v. Mueller***, 902 F.2d 336, 345-46 (5th Cir. 1990). In fact, "[i]t is improper for a court to award a minor participant adjustment simply because a defendant does less than the other participants. Rather, the defendant must do enough less so that he at best was peripheral to the advancement of the illicit activity." ***Thomas***, 932 F.2d at 1092.