

MAY 20 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FABIO NOEL-RODRIGUEZ,

Defendant - Appellant.

No. 13-30175

D.C. No. 1:12-cr-00061-SEH

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted May 13, 2014**

Before: CLIFTON, BEA, and WATFORD, Circuit Judges.

Fabio Noel-Rodriguez appeals from the district court's judgment and challenges the 148-month sentence imposed following his guilty-plea conviction for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). We have jurisdiction under 28 U.S.C. § 1291, and we vacate and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

remand for resentencing.

Noel-Rodriguez contends that the district court incorrectly calculated the advisory Guidelines range and imposed an unreasonable sentence. The government contends that this appeal should be dismissed based on a sentencing appeal waiver. We review de novo whether Noel-Rodriguez has waived his right to appeal. *See United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009).

Because the district court made no reference to the sentencing appeal waiver at the plea hearing, we cannot enforce the waiver. *See United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004).

Because Noel-Rodriguez did not raise any objection to the Guidelines calculation before the district court, we review for plain error. *See United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187 (9th Cir. 2013). Although the district court determined that Noel-Rodriguez was a minor participant in the offense and properly applied a three-level reduction to the base offense level under U.S.S.G. § 2D1.1(a)(5), the court failed to apply the two-level role reduction under U.S.S.G. § 3B1.2(b). Incorrect calculation of a defendant's Guidelines range is a significant procedural error, and "when a sentencing judge incorrectly calculates the Guidelines range, potentially resulting in the imposition of a greater sentence, the error affects the defendant's substantial rights and 'the fairness of the judicial

proceedings.”” *Bonilla-Guizar*, 729 F.3d at 1188 (quoting *United States v. Castillo-Marin*, 684 F.3d 914, 927 (9th Cir. 2012)). Accordingly, we vacate Noel-Rodriguez’s sentence and remand for resentencing. *See id.* at 1189.

In light of this disposition, we decline to reach Noel-Rodriguez’s remaining contentions.

VACATED and REMANDED for resentencing.