NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ROBERTO TOSTADO-CADENAS, Defendant - Appellant.	No. 25-3108 D.C. No. 2:22-cr-00151-WBS-2 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted May 21, 2026
San Francisco, California

Before: WARDLAW, BEA, and SANCHEZ, Circuit Judges.

Roberto Tostado-Cadenas pleaded guilty to conspiracy to possess and distribute methamphetamine for working with co-defendant Jose Curiel to sell illegal drugs to a confidential source. 21 U.S.C. §§ 846, 841(a)(1). The district court denied Tostado-Cadenas's request for a minor role adjustment under United

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

States Sentencing Guidelines (U.S.S.G.) § 3B1.2.[1] Tostado-Cadenas now argues that the district court failed to consider and apply the relevant factors for determining his eligibility for a minor role adjustment under the Sentencing Guidelines. We agree and vacate his sentence.

1. We review the district court's selection of a sentencing guideline de novo, findings of fact for clear error, and application of Sentencing Guidelines to the facts of the case for abuse of discretion. *United States v. Gasca-Ruiz,* 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). Contrary to the government's position, plain error review does not apply because Tostado-Cadenas raised and preserved his objection to the denial of the minor participant adjustment in his objections to the Presentence Report ("PSR") and at sentencing. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument [on appeal] in support of that claim; parties are not limited to the precise arguments they made below."). Here, the transcript, objections to the PSR, and submitted filings, make clear that the district court was well aware of the applicability of the § 3B1.2 sentencing factors. *See United States v. Diaz*, 884 F.3d 911, 916 (9th Cir. 2018).

[1] Following an evidentiary hearing, the district court determined that Tostado-Cadenas did not furnish a firearm to a co-participant and applied a two-level safety-valve reduction to his sentence. *See* U.S.S.G. § 5C1.2. Because a firearm was present in connection with the offense, the court also applied a two-level enhancement under U.S.S.G. § 2D1.1(b)(1).

2. Under U.S.S.G. § 3B1.2(b), the district court may impose a two-level downward adjustment "[i]f the defendant was a minor participant in any criminal activity." In assessing the minor role reduction, our caselaw requires a judge to "first identify all participants in the defendant's crime." *United States v. Chichande*, 113 F.4th 913, 916 (9th Cir. 2024). The sentencing court then "must calculate a rough average level of culpability for all the participants," considering the five factors articulated in U.S.S.G. § 3B1.2 cmt. n.3(C).[2] *Id.* at 916. Finally, the court must compare the defendant's culpability to that rough average to assess whether a defendant was "substantially less culpable than the average participant." *Id.* at 920 (citing *United States v. Dominguez-Caicedo*, 40 F.4th 938, 960 (9th Cir. 2022)); U.S.S.G. § 3B1.2 cmt. n.3(C). Based on the record in this case, we are not persuaded that the district court gave any consideration to the five factors listed in U.S.S.G. § 3B1.2 cmt. n.3(C) or assessed Tostado-Cadenas's relative culpability to the average participant. The district court made no reference to any of the relevant

[2] These five "non-exhaustive" factors include: (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; and (v) the degree to which the defendant stood to benefit from the criminal activity. *See* U.S.S.G. § 3B1.2 cmt. 3(C).

factors at sentencing and did not even attempt to identify all the relevant participants to the drug transaction.

Indeed, the district judge's comments during sentencing suggested that he viewed a minor role adjustment under U.S.S.G. § 3B1.2 to be inapplicable in criminal drug transactions. The court stated that "[p]eople outside the drug business seem to think it's something like the Army or it's something like the Rotary Club where you have officers and noncommissioned officers and leaders, and they have some sort of a formal structure." In the district court's view, "[g]angs, drug dealers, they're not like that. It doesn't work that way. Everybody does a little bit of everything." To the extent these comments suggest an unwillingness to apply a minor role adjustment to all drug-trafficking defendants, the district court erred.

While it is a defendant's burden to prove their entitlement to a downward adjustment, *see United States v. Cantrell*, 433 F.3d 1269, 1282 (9th Cir. 2006), it is "the sentencing court" that must apply the governing legal framework. *Chichande*, 113 F.4th at 916. The absence of any meaningful assessment by the district court of the relevant factors under U.S.S.G. § 3B1.2 constitutes a procedural error that requires resentencing. *See Dominguez-Caicedo*, 40 F.4th at 963 ("[W]e have vacated sentences and remanded for resentencing when district courts have misunderstood the law governing the minor role reduction."); *see also Diaz*, 884

F.3d at 918 ("[W]e must remand for re-sentencing because the decision to deny the adjustment rested on incorrect interpretations of the § 3B1.2 Guideline.").

3. At oral argument, Tostado-Cadenas requested remand to a different judge for resentencing. Although we generally remand for resentencing to the original district judge, we have found remand to a new judge for resentencing to be appropriate "to preserve the appearance of justice." *See United States v. Quach*, 302 F.3d 1096, 1103 (9th Cir. 2002). Given the district court's comments about minor role adjustments in the context of criminal drug transactions, we conclude that the ends of justice warrant remand to a different judge. *Id.*

We therefore vacate and remand for resentencing for the district court to conduct the minor role analysis under the proper framework and before a different judge.

VACATED AND REMANDED.