NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 21 2022

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AARON DAVID FARRELL, Defendant-Appellant.	No. 21-50222 D.C. Nos. 3:20-cr-03628-LAB-1 3:20-cr-03628-LAB MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted November 18, 2022[**]
Pasadena, California

Before: NGUYEN and SUNG, Circuit Judges, and FITZWATER,[***] District Judge.

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

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

[***] The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Defendant Aaron David Farrell ("Farrell") was caught attempting to smuggle 46.807 kilograms of 100% pure methamphetamine into the United States at the San Ysidro Port of Entry in San Diego via a pickup truck in which he was the driver, sole occupant, and registered owner. He pleaded guilty to the offense of Importation of Methamphetamine in violation of 21 U.S.C. §§ 952 and 960. At sentencing,[1] he objected to the district court's refusal to grant him a role adjustment as a minor participant under U.S.S.G. § 3B1.2(b),[2] and he now appeals his sentence on the same basis. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we vacate and remand for re-sentencing.

We review the district court's identification of the correct legal standard *de novo*, its factual findings for clear error, and its application of the legal standard to the facts for abuse of discretion. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). "We have . . . held that district courts must consider *all* of [the] factors [of Application Note 3(C)(i)-(v)] when determining whether to grant a mitigating-role adjustment." *United States v. Rodriguez*, 44 F.4th 1229, 1233 (9th Cir. 2022) (emphasis in original) (citing *United States v. Quintero-Leyva*, 823 F.3d 519,

[1] The presentence investigation report ("PSR") used the 2018 Guidelines Manual to determine Farrell's offense level.

[2] Farrell also objected to the PSR's calculation of his criminal history category. The district court sustained this objection.

523 (9th Cir. 2016)). Here, although the district court purported to address all five factors, it did not properly consider the first, second, and fifth factors.

The first factor is "the degree to which the defendant understood the scope and structure of the criminal activity." U.S.S.G. § 3B1.2 cmt. 3(C)(i). This factor "requires district courts to assess the defendant's knowledge of the scope and structure of the 'criminal *enterprise*,' not just his knowledge of his own conduct that led to his conviction." *Rodriguez*, 44 F.4th at 1235 (emphasis in original) (quoting *United States v. Diaz*, 884 F.3d 911, 917 (9th Cir. 2018)). "Amendment 794 makes clear that when a defendant knows little about the scope and structure of the criminal enterprise in which he was involved, that fact weighs in favor of granting a minor-role adjustment." *Diaz*, 884 F.3d at 917. The district court failed, however, to consider Farrell's knowledge of the overall scope and structure of the criminal enterprise. Instead, the district court improperly cabined its discussion to Farrell's knowledge of his own conduct.

The second factor is "the degree to which the defendant participated in planning or organizing the criminal activity." U.S.S.G. § 3B1.2 cmt. 3(C)(ii). In weighing this factor, the district court must assess the degree to which the defendant participated in *devising* the plan. *Rodriguez*, 44 F.4th at 1236. Because the district court found that Farrell did not devise the plan, it should have weighed this factor in Farrell's favor.

The fifth factor is "the degree to which the defendant stood to benefit from the criminal activity." U.S.S.G. § 3B1.2 cmt. 3(C)(v). The district court was required to consider whether Farrell was to be paid a fixed amount to perform a discrete task, whether he had a proprietary interest in the drugs, and whether the amount that he was to be paid was relatively modest when compared to the value of the drugs. *See Rodriguez*, 44 F.4th at 1237. But the district court in effect stated that it did not understand the metric in this circuit for comparing the amount of money the defendant was to be paid with the total value of the drugs, or that it found that this metric did not "make a lot of sense." The district court also found that the defendant's lack of a proprietary interest was "sort of like a strawman argument," to which it would give little weight, even though this Court has recognized that this very fact does have significance. *See Diaz*, 884 F.3d at 917-18.

Although the district court found that the third factor weighed in Farrell's favor, it abused its discretion in applying the first, second, and fifth factors of Application Note 3(C). "Because we cannot determine whether the district court would have granted a minor-role adjustment had these factors been properly applied, we vacate [Farrell's] sentence and remand for re-sentencing." *Diaz*, 884 F.3d at 918.

The district court considered an additional factor: the time Farrell had to deliberate his actions. Even assuming without deciding that this factor was

permissible, the district court's consideration was based on a comparison of Farrell to the "hypothetical average participant in similar criminal activity," rather than, as Application Note 3(C) requires, to other participants in the scheme at issue. *Diaz*, 884 F.3d at 916.

VACATED AND REMANDED.