

APR 29 2013

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

JOSE LUIS VALENCIA-MENDOZA,

Defendant - Appellee.

No. 11-10616

D.C. No. 2:09-cr-00408-
LKK-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior District Judge, Presiding

Submitted April 15, 2013**
San Francisco, California

Before: KOZINSKI, Chief Judge; O'SCANNLAIN and N.R. SMITH, Circuit
Judges.

1. The district judge erred by placing the burden of proof on the government to
show that Valencia-Mendoza was ineligible for safety-valve relief. *See United*

* 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)*.

States v. Mejia-Pimental, 477 F.3d 1100, 1104 (9th Cir. 2007); *see also* 18 U.S.C. §§ 3553(f)(2), (5). Consequently, his finding that Valencia-Mendoza was safety-valve eligible was clearly erroneous. *See Mejia-Pimental*, 477 F.3d at 1103.

2. This case is ordered assigned to a new district judge on remand in light of the “unusual circumstances.” *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979) (internal quotation marks omitted). The district judge stated on the record that his “sentencing justice [was] deeply offended” by the sentencing disparity that would arise from imposition of the mandatory minimum and further indicated his desire not to be tasked with resentencing on remand. These statements suggest that (1) the district judge would “have substantial difficulty in putting out of his . . . mind previously-expressed views” regarding Valencia-Mendoza’s sentence; (2) “reassignment is advisable to preserve the appearance of justice”; and (3) “preserving the appearance of fairness” outweighs the minimal duplication of effort that will be necessary for a new judge to resentence Valencia-Mendoza. *Id.*

REVERSED and REMANDED.