

FILED

MAY 31 2016

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NOT FOR PUBLICATION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.

LORENZO ESPINOZA, AKA Seal A,

Defendant - Appellant.

No. 13-50443

D.C. No. 2:04-cr-00263-SVW-1
Central District of California,
Los Angeles

ORDER

Before: PREGERSON and CALLAHAN, Circuit Judges and BASTIAN,* District Judge.

Judge Pregerson and Judge Bastian have voted to grant the petition for panel rehearing. Judge Callahan has voted to deny the petition for panel rehearing. The petition for panel rehearing is GRANTED.

Reassignment is necessary to preserve the appearance of justice. We instruct the Clerk of Court for the Central District of California to reassign this case to a different district court judge upon remand.

* The Honorable Stanley Allen Bastian, District Judge for the U.S. District Court for the Eastern District of Washington, sitting by designation.

FILED

United States v. Espinoza, No. 13-50443

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CALLAHAN, Circuit Judge, dissenting:

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I dissent from the grant of the petition for rehearing. Here, the district court's error was only failing to give the parties notice that it would consider confidential Presentence Investigative Reports of other defendants. Accordingly, there is no need to depart from our general rule that resentencing is to be done by the original sentencing judge. *United States v. Acosta-Chavez*, 727 F.3d 903, 910 (9th Cir. 2013). Because there is no need for the district judge to put the reports out of his mind, reassignment is not necessary to preserve the appearance of justice. *See United States v. Mikaelian*, 168 F.3d 380, 387–88 (9th Cir. 1999). The reassignment is an unnecessary and undeserved slap at the district judge as well as a “waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *Id.*