

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5601  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE BENJAMIN GUTIERREZ,  
a/k/a Joe Benjamine Gutierrez,  
a/k/a Joe Ben Gutierrez,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA 92 CR 10 1)

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(December 18, 1992)

Before POLITZ, Chief Judge, JONES, and EMILIO M. GARZA, Circuit  
Judges.

PER CURIAM:\*

Appellant Gutierrez pled guilty to count one of an  
indictment charging him with possession of a firearm by a convicted  
felon. The Government filed a sentencing enhancement information  
notifying Gutierrez of its intent to move to enhance his sentence  
under the armed career criminal statute, 18 U.S.C. § 924(e)(1).

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\* Local Rule 47.5 provides: "The publication of opinions that have no  
precedential value and merely decide particular cases on the basis of well-  
settled principles of law imposes needless expense on the public and burdens on  
the legal profession." Pursuant to that Rule, the Court has determined that this  
opinion should not be published.

The following prior convictions based on guilty pleas were used for enhancement: the burglary of a private residence at night with intent to commit theft on July 15, 1970; the burglary of a habitation on January 27, 1975; and the burglary of a habitation on August 9, 1985. Based on the guidelines calculations, the district court sentenced Gutierrez to a term of imprisonment of 200 months, a four-year term of supervised release, and a special assessment of \$50. He raises two issues on appeal,<sup>1</sup> but we find neither one meritorious.

Gutierrez first contends that the same prior felony conviction cannot serve both as an element of the offense of conviction and as a predicate felony for enhancement under the armed career offender statute. He argues that the clear language of the statute requires at least four violent felony convictions or serious drug offenses to violate § 922(g) and to enhance under § 924(e)(1).

This court has addressed the dual use of a prior felony convictions for the substantive offense and for the sentence enhancement in the context of a double jeopardy violation. The court reasoned that reliance "on a prior felony for sentence enhancement of a later conviction [was] not punishment for the prior offense" and concluded that such use was "neither a double prosecution nor a double punishment." U.S. v. Wallace, 889 F.2d 580, 584 (5th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990).

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<sup>1</sup> Gutierrez executed a waiver of appeal that included the enhancement of his sentence. As the government has disclaimed its intention to enforce the waiver, we shall proceed to the merits of appellant's contentions.

Although Gutierrez frames his issue as one of statutory construction rather than in a constitutional posture, the reasoning of Wallace is applicable because this court implicitly and necessarily interpreted the statute as requiring as few as three felonies. There is no merit to this claim.

Gutierrez also argues that prior convictions older than fifteen years should not be used for sentence enhancement under § 924(e)(1) and U.S.S.G. § 4B1.4. Two of Gutierrez' prior convictions occurred in 1970 and 1975. PSR, ¶¶ 22, 23. In support of this proposition, he points to the disparity in the guidelines between computations of criminal history, which includes a temporal restriction, and the armed career criminal provision. Contrary to Gutierrez's position, this court has concluded that there was no indication in the legislative history or in the statute that Congress intended to include a temporal restriction in section 924(e)(1). See U.S. v. Blankenship, 923 F.2d 1110, 118 (5th Cir.), cert. denied, 111 S.Ct. 2262 (1991). This argument also fails.

The sentence imposed by the district court is AFFIRMED.