

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8903
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY ALLEN LININGHAM,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CR-83-1)

(July 18, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Convicted by a jury, Gregory Allen Liningham appeals his life sentence for possession with the intent to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1). Two of the three issues raised implicate our discretionary plain error review. We **AFFIRM**.

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Prior to trial, the Government filed a sentence enhancement information, pursuant to 21 U.S.C. § 851(a),² claiming that Liningham was subject to a mandatory life sentence, pursuant to 21 U.S.C. § 841(b)(1)(A),³ because he had been convicted of felony drug offenses in 1985 and 1989. Liningham stipulated that he had been convicted of the offenses listed in the enhancement information, but challenged the validity of both convictions, contending that he did not knowingly and voluntarily plead guilty. The district court held the challenge to the first conviction barred by 21 U.S.C. § 851(e), because it was over five years old;⁴ rejected Liningham's claim that his guilty plea to the second offense had been involuntary; and imposed the statutorily-mandated life sentence.

² Section 851(a) requires the Government to file an information prior to trial, notifying the defendant of the previous convictions to be relied upon for sentence enhancement. 21 U.S.C. § 851(a).

³ Section 841(b)(1)(A) provides, in relevant part, that a person who commits an offense involving 50 or more grams of a substance which contains cocaine base "after two or more prior convictions for a felony drug offense have become final ... shall be sentenced to a mandatory term of life imprisonment without release" 21 U.S.C. § 841(b)(1)(A).

⁴ Section 851(e) provides:

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

21 U.S.C. § 851(e).

II.

Liningham contends that the district court erred by not recommending executive clemency, and by finding his 1989 plea knowing and voluntary, and violated his right to due process by relying on § 851(e) to bar his challenge to the first plea. We review the first and third issues only for plain error.

A.

Liningham asserts that the district court believed erroneously that it lacked authority to recommend consideration for executive clemency.⁵ But, he did not request that the district court recommend it. Because this issue is being raised for the first time on appeal, we exercise discretionary review only for plain error. It goes without saying that there was none. *See United States v. Rodriguez*, 15 F.3d 408, 414-17 (5th Cir. 1994) (for issues raised for the first time on appeal, appellate court has discretion to correct a plain error if it affects substantial rights and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings").

⁵ This assertion springs from the following comment by the district judge at sentencing:

[I]f it were not for that provision of the law that requires a life sentence, I would not sentence you to life in this case. If I were able to sentence you within the Guideline range, I would sentence you to the lower end of the Guideline range, because while your offense is viewed serious by society, there are much more serious offenders that receive much less sentence than a life sentence, and I think it is not an expression of true justice for you to be sentenced to life in this case, but I have no choice.

B.

Liningham maintains that the district court erred by finding that his 1989 guilty plea was knowing and voluntary. A defendant challenging the constitutionality of a prior conviction used to enhance his sentence must demonstrate, by a preponderance of the evidence, that the conviction is invalid. 21 U.S.C. § 851(c)(2); **United States v. Mergerson**, 4 F.3d 337, 343-45 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1310 (1994).

At the sentencing hearing, Liningham testified that he had entered a guilty plea because of pressure from his court-appointed attorney. On cross-examination, however, when asked about the nature of the alleged pressure, he responded only that he had lacked confidence in the attorney (essentially, because counsel was appointed). Liningham did not describe coercion or indicate that he had not understood the consequences of his plea. Moreover, he admitted that he had represented to the court that he was freely and voluntarily waiving his right to a jury trial, and understood that he was giving up the rights to a jury trial and to cross-examine and call witnesses. The district court did not clearly err in determining that the plea was voluntary. See **Mergerson**, 4 F.3d at 345, 347 (reviewing for clear error the district court's determination of the amount of drugs supporting the imposition of a statutorily-mandated life sentence).

C.

As with the first issue, Liningham's challenge to the constitutionality of § 851(e) is being raised for the first time on appeal; accordingly, we again review only for plain error. Our court has not addressed the constitutionality of § 851(e), but has cited it as limiting a defendant's ability to challenge prior convictions. See **United States v. Frago**, 978 F.2d 896, 902 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1664 (1993). The Eleventh Circuit has upheld its constitutionality against a due process and equal protection challenge. **United States v. Williams**, 954 F.2d 668, 673 (11th Cir. 1992) ("Section 851(e) is wholly reasonable, both to effectuate the legitimate purposes of enhanced sentencing for recidivists, and to eliminate a host of practical problems with respect to ancient records absent such a provision") (quoting **Cirillo v. United States**, 666 F. Supp. 613, 616 (S.D.N.Y. 1987)). But, recently, the Ninth Circuit held that it violates due process. **United States v. Davis**, 15 F.3d 902, 915-17 (9th Cir. 1994) (no compelling government interest for § 851(e)'s time bar to the exercise of criminal defendants' constitutional right to challenge prior convictions which will be used against them at sentencing).

Even assuming "error", the foregoing demonstrates that it is far from "plain" -- "clear" or "obvious". **Rodriguez**, 15 F.3d at 415. In short, we need not proceed further.

III.

For the foregoing reasons, the judgment is

AFFIRMED.