

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 23 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 17-50179

Plaintiff-Appellant,

D.C. No. 2:16-cr-00761-R-1

v.

MEMORANDUM\*

FREDERICK LIMA, AKA Negro,

Defendant-Appellee.

Appeal from the United States District Court  
for the Central District of California  
Manuel L. Real, District Judge, Presiding

Submitted November 14, 2018\*\*  
Pasadena, California

Before: GOULD and MURGUIA, Circuit Judges, and AMON,\*\*\* District Judge.

Frederick Lima pled guilty to one count of possession with intent to  
distribute and one count of possession of a firearm in furtherance of drug

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\* 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 Carol Bagley Amon, United States District Judge for  
the Eastern District of New York, sitting by designation.

trafficking. The first count carries a five-year mandatory minimum. 21 U.S.C. § 841(b)(1)(B)(viii). The second count carries a five-year mandatory minimum that must be served consecutively. 21 U.S.C. §§ 924(c)(1)(A), (D). At sentencing, the government sought 92 months on count one (the low end of the Guidelines range) followed by five years on count two. Mr. Lima sought the ten-year minimum. The district court sentenced Mr. Lima to 80 months on count one and 60 months on count two, to be served concurrently. Despite an opportunity to do so, the government did not object after the sentence was announced.

The government now has appealed the below-minimum sentence. We need not decide whether the government forfeited or preserved its claim of error under Federal Rule of Criminal Procedure 51. For even under plain error review, which applies to forfeited claims of error, *Puckett v. United States*, 556 U.S. 129, 135 (2009), the below-minimum sentence must be vacated. *See United States v. Gonzalez-Zotelo*, 556 F.3d 736 (9th Cir. 2009). Our precedent forecloses Mr. Lima's Eighth Amendment and sentencing disparity arguments. *See United States v. Mausali*, 590 F.3d 1077, 1081–82 (9th Cir. 2010); *United States v. Wipf*, 620 F.3d 1168, 1169–70 (9th Cir. 2010).

Mr. Lima's sentence is VACATED and the matter REMANDED for resentencing in accordance with the mandatory minimums.