IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5016
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY OAKLEY,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 92-60032-14

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(March 24, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Larry Oakley argues that his sentence for possession with intent to distribute cocaine base, or "crack," was unjustifiably harsh in comparison with the sentences of his co-defendants. He did not raise this issue in the district court. New facts may not be presented for the first time on appeal. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

The Government has moved to strike the factual bases of the co-defendants included in the record excerpts on the ground that

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

they were not part of the record of the instant case in the district court and, as such, are not proper record excerpts. Because this Court reviews only the record that was before the district court, material included in the record excerpts that was not part of the record before the district court is not considered. See Abbott v. Equity Group, Inc., 2 F.3d 613, 629 & n.57 (5th Cir. 1993). The Government's motion to strike is granted.

Even if the issue were cognizable and this Court were to consider the stricken documents, any comparison based thereon would be unproductive. They describe the offenses of some of the co-defendants. They do not describe adjustments in offense level that might apply, criminal history categories, or departures. See U.S.S.G. § 1B1.1. Furthermore, the Government asserts that Oakley has compared his sentence only to those co-defendants who received sentences lighter than his. He has omitted others whose sentences are harsher than his, states the Government.

Moreover, even if Oakley's comparisons had been before the district court and the stricken documents included all of the factors considered in calculating the sentences of all of Oakley's co-defendants, the comparison of sentences is still unavailing for Oakley. A defendant cannot rely upon his co-defendants' sentences as a "yardstick" for his own. United States v. Devine, 934 F.2d 1325, 1338 (5th Cir. 1991), cert. denied, 112 S. Ct. 911, 952, 1164, 1197 (1992).

Oakley also argues that his criminal history category was too high because its calculation included many minor offenses,

which he concedes had to be considered under the Sentencing Guidelines. This Court, however, has often approved the inclusion of minor offenses in a defendant's criminal history calculation. E.g., United States v. Haymer, 995 F.2d 550, 552-53 (5th Cir. 1993); United States v. Follin, 979 F.2d 369, 375-76 (5th Cir. 1992), cert. denied, 113 S. Ct. 3004 (1993); United States v. Hardeman, 933 F.2d 278, 279 (5th Cir. 1991).

Finally, Oakley argues that, by prescribing harsher penalties for offenses involving crack cocaine than for offenses involving powdered cocaine, the Sentencing Guidelines discriminate against blacks, who use crack cocaine more commonly than persons of other races. This Court has expressly rejected the same argument. United States v. Galloway, 951 F.2d 64, 65-66 (5th Cir. 1992).

Oakley has shown no factual or legal error in the application of the Guidelines. Accordingly, the judgment must be affirmed. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990).

MOTION TO STRIKE GRANTED; JUDGMENT AFFIRMED.