

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 95-20970  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN "JAY" F. BAKER, JR.;  
JAMES A. GILBERT,

Defendants-Appellants.

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Appeal from the United States District Court  
For the Southern District of Texas'  
(CR-H-93-120-2)

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August 7, 1996

Before POLITZ, Chief Judge, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:\*

John "Jay" F. Baker, Jr. and James A. Gilbert appeal the sentences imposed on remand of their case to the district court. Baker and Gilbert contend that the district court considered superfluous and inaccurate information and failed to comply with Fed.R.Crim.P. 32. Gilbert maintains that the district court also failed to take into account the time that he had already served and imposed a vindictive

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\* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

sentence.

Having read the briefs and reviewed the record in light of the contentions of the parties, we find neither error nor abuse of discretion. The district court was not required to make a finding regarding the time served by Gilbert; that is a matter to first be addressed administratively by the Attorney General.<sup>1</sup> Further, we find neither plain error by the district court nor a basis for concluding that Gilbert's sentence was vindictive.<sup>2</sup>

The record does not reveal that the sentencing judge relied upon inaccurate or inappropriate information in imposing the challenged sentences.<sup>3</sup>

This matter is returned to the district court so it might append to the PSR the sentencing transcript containing the findings and determinations regarding the disputed material.<sup>4</sup>

The sentences are **AFFIRMED** and the matter is returned to the district court

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<sup>1</sup>**United States v. Morgan**, 425 F.2d 1388 (5th Cir. 1970).

<sup>2</sup>**United States v. Calverley**, 37 F.3d 160 (5th Cir. 1994) (*en banc*), cert. denied, 115 S.Ct. 1266 (1995); **United States v. Moore**, 997 F.2d 30 (5th Cir.), cert. denied, 114 S.Ct. 647 (1993).

<sup>3</sup>**United States v. Tooker**, 747 F.2d 975 (5th Cir. 1984), cert. denied, 471 U.S. 1021 (1985); **United States v. Lewis**, 743 F.2d 1127 (5th Cir. 1984).

<sup>4</sup>Fed.R.Crim.P. 32(c)(3)(D) (pre-1987 version); **United States v. Castillo-Roman**, 774 F.2d 1280 (5th Cir. 1985).

for compliance herewith.