

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30619
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID EUGENE DISHNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 00-CR-1-1

February 21, 2002

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

A jury convicted David Eugene Dishner of conspiracy to commit mail fraud and of eleven counts of mail fraud. Dishner appeals his forty-one-month sentence, arguing that the district court erred by increasing his offense level pursuant to U.S.S.G. § 3B1.1(a), which provides for a four-level upward adjustment if the defendant was an organizer or leader of an offense involving five or more participants or that was otherwise extensive. Dishner argues that this upward adjustment is erroneous because

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

there is no evidence in the record to support a finding that five or more participants were involved in the offense.

At his sentencing hearing, Dishner's attorney argued that it would be "appropriate" for the district court to impose a three-level upward adjustment under U.S.S.G. § 3B1.1(b), which provides for a three-level upward adjustment if the defendant was a manager or supervisor of an offense involving five or more participants that was otherwise extensive. Dishner has thus waived any challenge to the number of participants in the offense, and his argument is not reviewable on appeal. See United States v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995); see also United States v. Olano, 507 U.S. 725, 733-34 (1993).

This appeal is frivolous; it is DISMISSED. 5TH CIR. R. 42.2.