

April 24, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50775
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID EUGENE KESSLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-01-CV-223-DB
EP-97-CR-602-1-DB

Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

David Eugene Kessler, federal prisoner # 81016-080, convicted of conspiracy to possess with intent to distribute marijuana, appeals the district court's denial of his 28 U.S.C. § 2255 motion as time-barred. The district court determined that Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively to cases on collateral review and that Kessler's 28

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

U.S.C. § 2255 motion, filed more than a year following the date his conviction became final but within a year after Apprendi was decided, was untimely under the one-year limitations period applicable to filing of 28 U.S.C. § 2255 motions. See 28 U.S.C. § 2255(3).

Kessler argues that Apprendi should be applied retroactively to 28 U.S.C. § 2255 motions and that his motion was thus timely. Kessler's arguments are foreclosed by our recent decision in United States v. Brown, 305 F.3d 304, 310 (5th Cir. 2002), petition for cert. filed, (U.S. Feb. 3, 2003)(No. 02-9606). The district court's denial of Kessler's 28 U.S.C. § 2255 motion is AFFIRMED.