

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60038
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DARON DEMETRIS KENNEY, also known as "Tall Dog,"

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC Nos. 3:01-CV-102-S and
4:93-CR-134-8-S

February 20, 2003

Before WIENER, EMILIO M. GARZA, and CLEMENT, Circuit Judges.

PER CURIAM:*

Daron Demetris Kenney, federal prisoner # 02255-112, pleaded guilty to conspiracy to possess with the intent to distribute and distribution of cocaine and cocaine base. He now appeals the district court's denial of his FED. R. CIV. P. 60(b) motion for reconsideration of the denial as untimely of his 28 U.S.C. § 2255 motion. He argues that his 28 U.S.C. § 2255 motion was timely based on Apprendi v. New Jersey, 530 U.S. 466 (2000). Kenney has

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

also requested leave to file an out-of-time reply brief in further support of his argument.

Kenney's Apprendi argument is foreclosed by this court's decision in United States v. Brown, 305 F.3d 304, 310 (5th Cir. 2002), wherein the court held that Apprendi "is not retroactively applicable to initial petitions under § 2255." Accordingly, the district court's judgment denying Kenney's Rule 60(b) motion is affirmed. In light of the foregoing, Kenney's motion to file an out-of-time reply brief is denied.

JUDGMENT AFFIRMED; MOTION DENIED.