UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 17-6373, *Phillip Kenner v. USA*
Originating Case No. : 3:16-cv-01451 : 3:96-cr-00088-1

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Keith Throckmorton

Enclosure

No mandate to issue

No. 17-6373

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILLIP ANTHONY KENNER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
May 10, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Phillip Anthony Kenner, a federal prisoner proceeding through counsel, appeals the district court's order denying his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. He has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 1996, Kenner pleaded guilty to kidnapping, in violation of 18 U.S.C. § 1201(a)(1), and interstate transport of a stolen motor vehicle, in violation of 18 U.S.C. § 2312. Kenner's presentence report assigned him a career-offender enhancement, *see* USSG § 4B1.1, and a guidelines imprisonment range of 324 to 405 months. The district court sentenced Kenner to a 405-month term of imprisonment. This court affirmed. *United States v. Kenner*, No. 97-5093, 1998 WL 246041 (6th Cir. May 7, 1998) (per curiam).

In 2016, Kenner, proceeding through counsel, filed the current motion, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his career-offender designation was no longer valid. In *Johnson*, the Supreme Court held that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. Kenner was not

sentenced under the ACCA, but argued that the residual clause of the definition of crime of violence in USSG § 4B1.2 was subject to a similar vagueness challenge and that his conviction for kidnapping could not count towards his career-offender designation in light of the alleged invalidity of section 4B1.2's residual clause. The government moved to dismiss Kenner's § 2255 motion as barred by the one-year limitations period in § 2255(f).

The district court denied Kenner's motion. The court recognized that, in *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court determined that the guidelines are not subject to vagueness challenges. *See id.* at 890. The district court noted, however, that *Beckles* was not dispositive of Kenner's motion because Kenner was sentenced when the guidelines were mandatory, prior to *United States v. Booker*, 543 U.S. 220 (2005). *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (noting that the majority's opinion "leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*] . . . may mount vagueness attacks on their sentences"). Although the district court found that *Beckles* did not resolve Kenner's claim, the court found the claim to be untimely. The court therefore denied Kenner's motion and declined to issue a COA.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA from the denial of a motion to vacate on procedural grounds, an applicant must show that reasonable jurists would find it "debatable whether the petitioner states a valid claim of the denial of a constitutional right" and "would find it debatable whether the district court was correct in its procedural ruling." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate whether the district court was correct in finding that Kenner's motion was time-barred. Actions arising under § 2255 have a one-year limitations period, with the period ordinarily commencing on the date on which the movant's judgment

became final. *See* 28 U.S.C. § 2255(f)(1). Because Kenner appealed his sentence to this court, but did not petition for a writ of certiorari, his judgment became final when his time for filing for a writ of certiorari expired. *See Clay v. United States*, 537 U.S. 522, 532 (2003). Kenner's judgment therefore became final in 1998, long before he filed the current motion in 2016. To the extent that Kenner relied on a right that "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," however, his motion would have been timely. 28 U.S.C. § 2255(f)(3). But this court has held that *Johnson* did not create such a right for federal habeas petitioners, like Kenner, who maintain that that the pre-*Booker* mandatory guidelines are unconstitutional. *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017) (holding that, because the constitutionality of the pre-*Booker* mandatory guidelines after *Beckles* "is an open question," *Johnson* did not recognize a new right for petitioners attacking the constitutionality of the pre-*Booker* guidelines and the habeas petition was untimely). Kenner argues that the rule in *Raybon* is debatable among jurists of reason because other circuits and some district courts have disagreed with the rule. But this court may not overrule a prior decision of a published panel "in the absence of en banc review or an intervening opinion on point by the Supreme Court," *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015), and the rule in *Rayon* is therefore not debatable within this circuit. Kenner has not otherwise clearly identified any basis on which his motion was timely. Accordingly, reasonable jurists would not debate whether the district court was correct in dismissing Kenner's motion as untimely. *See Slack*, 529 U.S. at 484.

For the foregoing reasons, Kenner's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk