

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40991
Summary Calendar

ALFRED LEE APODACA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA; EARNEST V. CHANDLER, Warden,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:00-CV-427

October 26, 2001

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Alfred Lee Apodaca, federal prisoner #03359-091, appeals the district court's dismissal of his 28 U.S.C. § 2241 habeas corpus petition. Apodaca asserts that, pursuant to the "savings clause" of 28 U.S.C. § 2255, he is entitled to assert in a habeas corpus petition his claim based on Richardson v. United States, 526 U.S. 813, 815-16 (1999). Apodaca contends that he was not found guilty of every element of his continuing criminal enterprise offense because the jury was not properly instructed under

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Richardson that it was required to unanimously agree on which specific acts constituted his continuing series of violations.

To trigger the savings clause of 28 U.S.C. § 2255, a habeas petitioner's claim: (1) must be "based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense" and (2) must have been "foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first [28 U.S.C.] § 2255 motion." Reyes-Reguena v. United States, 243 F.3d 893, 904 (5th Cir. 2001). Because Apodaca's arguments do not amount to a claim that he was convicted for conduct that did not constitute a crime, he has failed to satisfy the first prong of the savings clause test. See Jeffers v. Chandler, 253 F.3d 827, 830-31 (5th Cir. 2001), petition for cert. filed, (U.S. Aug. 27, 2001) (No. 01-6026). The district court's judgment dismissing Apodaca's habeas corpus petition is AFFIRMED.