

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41119
Conference Calendar

TERRYONTO MCGRIER,

Petitioner-Appellant,

versus

ERNEST CHANDLER, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:01-CV-427

December 12, 2002

Before JOLLY, JONES, and CLEMENT, Circuit Judges.

PER CURIAM:*

Terryonto McGrier, federal prisoner #02469-087, appeals the district court's dismissal of his 28 U.S.C. § 2241 petition, in which he challenged his 1995 conviction for conspiracy to distribute cocaine base and heroin. He argues that he should be allowed to bring a 28 U.S.C. § 2241 petition under the savings clause of 28 U.S.C. § 2255. McGrier asserts that his conviction violated Apprendi v. New Jersey, 530 U.S. 466 (2000), because his indictment did not contain, and the jury was not instructed to find, a drug quantity.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

"[T]he savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001). This court has recently rejected a petitioner's savings clause argument based on Apprendi, holding that the petitioner could not satisfy the first prong of Reyes-Requena because Apprendi is not retroactive on collateral review. See Wesson v. U.S. Penitentiary, Beaumont, TX, 305 F.3d 343, 347-48 (5th Cir. 2002).

Accordingly, the district court's dismissal of McGrier's petition is AFFIRMED.