

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40615
Summary Calendar

JAMES ALEX MINNIFIELD,

Petitioner-Appellant,

versus

JONATHAN DOBRE, Warden,

Respondent-Appellee.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:01-CV-253
- - - - -
September 26, 2001

Before DAVIS, DUHÉ, and DENNIS, Circuit Judges.

PER CURIAM:¹

James Alex Minnifield, federal prisoner # 43482-078, appeals the district court's denial of his 28 U.S.C. § 2241 petition. Minnifield argues that his convictions for possession of an unregistered weapon and using or carrying a firearm during and in relation to a drug-trafficking offense should be vacated because the jury instructions given for these counts were unconstitutional under Staples v. United States, 511 U.S. 600 (1994), and Bailey v. United States, 516 U.S. 137 (1995). He contends that his claims fall within the savings clause in 28 U.S.C. § 2255, and he argues

¹ 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

for the first time on appeal that review is necessary to prevent a fundamental miscarriage of justice.

"[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). Minnifield filed a 28 U.S.C. § 2255 motion on June 5, 1996, after Bailey and Staples were decided. Therefore, his present petition does not fall within the savings clause because he has not shown that these claims were foreclosed by circuit law when he filed his 28 U.S.C. § 2255 motion.

AFFIRMED.