

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40905
Conference Calendar

EDUARDO DELGADO SALAZAR,

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-137

February 20, 2002

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Eduardo Delgado Salazar, federal prisoner # 66865-079, appeals the district court's dismissal of his 28 U.S.C. § 2241 petition. He argues that he cannot bring a claim based on Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), in a 28 U.S.C. § 2255 motion because it would be barred by requirements for filing a successive 28 U.S.C. § 2255 motion. He argues that his only remedy is to bring a 28 U.S.C. § 2241 petition under the savings clause of 28 U.S.C. § 2255. Salazar has not shown that

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

the district court erred in dismissing his petition as he has not shown that his Apprendi claim is "based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense." See Reyes-Requena v. United States, 243 F.3d 893, 900 (5th Cir. 2001). Therefore, he has not shown that his claim falls within the savings clause of 28 U.S.C. § 2255. Further, a prior unsuccessful 28 U.S.C. § 2255 motion or the inability to meet the requirements for filing a second or successive 28 U.S.C. § 2255 motion does not make 28 U.S.C. § 2255 inadequate or ineffective. See Tolliver v. Dobre, 211 F.3d 876, 877 (5th Cir. 2000).

Salazar also argues that the district court's dismissal of his 28 U.S.C. § 2241 petition violated his rights under the Suspension Clause. Because he did not raise this claim in the district court, review is limited to plain error. See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc); Robertson v. Plano City of Tex., 70 F.3d 21, 23 (5th Cir. 1995). The savings clause of 28 U.S.C. § 2255 does not violate the Suspension Clause. Reyes-Requena, 243 F.3d at 901 n.19.

AFFIRMED.