IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ELAN C. LEWIS,	:	
	:	
Petitioner	:	
	:	
VS.	:	**3:CV-00-1291**
	:	
DONALD ROMINE, Warden,	:	**(CHIEF JUDGE VANASKIE)**
Respondent	:	

M E M O R A N D U M

Elan C. Lewis, an inmate confined at the United States Penitentiary, Lewisburg, Pennsylvania, has brought this habeas corpus proceeding pursuant to 28 U.S.C. § 2241 to challenge the validity of a life sentence imposed by the United States District Court for the Eastern District of Virginia. Lewis contends that his sentence is invalid under Apprendi v. New Jersey, 530 U.S. 466 (2000), because the jury was not delegated the authority to decide beyond a reasonable doubt whether he was responsible for the distribution of at least 50 grams of cocaine base, the threshold amount upon which to premise a maximum prison term of life. Lewis contends that he is entitled to file a § 2241 petition in the federal judicial district in which he is confined because he pursued a motion under 28 U.S.C. § 2255 in the sentencing court before Apprendi was decided and he cannot now satisfy the stringent requirements for filing a second § 2255 motion imposed by Congress in the Antiterrorism and Effective Death Penalty

Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). In support of his position, he relies upon In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997), which held that a federal prisoner barred from using a § 2255 motion under the AEDPA standards for successive motions could resort to a § 2241 petition if the prisoner "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate . . . ." Because Lewis' Apprendi claim does not fall within Dorsainvil's narrow exception to the general rule that challenges to a federal court conviction or sentence must be pursued in the sentencing court under § 2255, his § 2241 habeas corpus petition will be dismissed.

BACKGROUND

On November 1, 1994, a grand jury in the Eastern District of Virginia returned a multi-count indictment against Lewis, charging him with drug trafficking crimes involving the distribution of crack cocaine, in violation of 21 U.S.C. §§ 841 and 846, use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c), possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). According to the jury instructions appended to Lewis' Supplement to Petitioner's Traverse (Dkt. Entry 16), Count II of the indictment charged Lewis with possessing with intent to distribute 5 or more grams of a substance containing a detectible level of cocaine base, commonly known as "crack," Count III charged Lewis with possession with intent to distribute 50 or more grams of a substance containing a detectible amount of

crack cocaine, and Count VII charged Lewis with possession with intent to distribute 50 or more grams of a substance containing a detectible amount of crack cocaine. On January 10, 1995, Lewis was convicted on all counts submitted to the jury. The jury, however, was neither instructed that it had to make nor did it make a specific finding that the government had proven beyond a reasonable doubt that Lewis was responsible for the distribution of at least 50 grams of cocaine base.[1]

According to the "Government's Answer to Petition for Writ of Habeas Corpus" (Dkt. Entry 12), the presentence report attributed 94 kilograms of crack cocaine to Lewis. After enhancements in offense level for role in the offense and obstruction of justice, Lewis was assigned the maximum offense level of 43 under the United States Sentencing Commission Guidelines, with the applicable guideline prison range being life. On July 28, 1995, the court imposed the prison term of life without parole.

On Lewis' direct appeal, the Fourth Circuit, in an unpublished opinion, affirmed both the conviction and the sentence. United States v. Lewis, 103 F.3d 121, 1996 WL 721892 (4th Cir. 1996). In particular, the court rejected Lewis' attacks on the sufficiency of the evidence to sustain the drug trafficking convictions and his challenge to the increase in offense level for

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[1]Under the pertinent statutory scheme, if the amount of cocaine base attributable to a defendant is at least 50 grams, the maximum authorized sentence is life in prison; if the defendant is responsible for at least 5 grams of cocaine base, the maximum penalty is 40 years in prison; and if the defendant is responsible for less than 5 grams of cocaine base, the maximum prison term is 20 years. See 21 U.S.C. § 841(a)(1)(A)(B) and (C).

obstruction of justice. Lewis apparently did not attack the district court's determination of the amount of crack cocaine attributable to him.

Lewis subsequently filed in the Eastern District of Virginia a motion under 28 U.S.C. § 2255 challenging the validity of his conviction and sentence based upon alleged ineffective assistance of counsel. According to Lewis' pro se § 2241 petition, the district court denied the § 2255 motion on July 2,1999. The Fourth Circuit affirmed the district court decision, United States v. Lewis, 199 F.3d 1329 (4th Cir. 1999), and on March 20, 2000, the Supreme Court denied Lewis' petition for a writ of certiorari. 529 U.S.1031(2000).

On June 26, 2000, the Supreme Court issued its decision in Apprendi, which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. On July 20, 2000, Lewis filed a § 2241 petition with this Court. On August 21, 2000, United States Magistrate Judge Raymond J. Durkin, to whom this matter had been referred, issued a Report and Recommendation proposing that the petition be dismissed without requiring a response because a § 2255 motion was Lewis' exclusive procedural device for attacking his conviction and sentence. Lewis took exception to this recommendation, contending that his claim fits within Dorsainvil's narrow exception to the general rule that challenges to a sentence or conviction must be pursued by way of a § 2255 motion. While I had held in Enigwe v. Zenk, No.3:CV-00-1103 (M.D.Pa.,Nov.13, 2000), that

Apprendi claims did not fall within Dorsainvil, I directed that the respondent answer Lewis' petition because another court had held that an Apprendi-based claim is one of the few instances where Dorsainvil operates to permit a § 2241 challenge to the lawfulness of a federal sentence where relief under § 2255 is foreclosed. See Harris v. United States, 119 F.Supp. 2d 458 (D. N.J. 2000). I concluded that the existence of this precedent precluded summary dismissal of Lewis' petition.

On December 20, 2000, the respondent answered the petition, contending that Lewis' exclusive avenue of relief was a § 2255 motion in the sentencing court. Thereafter, Lewis filed a Traverse and a Supplement to his Traverse. This matter is ripe for disposition.

DISCUSSION

With respect to challenges to the validity of a federal court conviction or sentence, section 2255 expressly supersedes relief under § 2241 "unless it . . . appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of . . . detention."[2] Thus,

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[2]28 U.S.C. § 2255, in pertinent part, provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [section 2255], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it appears that the remedy by motion is inadequate or ineffective

(continued...)

"the usual avenue for federal prisoners seeking to challenge the legality of their confinement" is a § 2255 motion in the sentencing court. In re Dorsainvil, 119 F.3d at 249. In this respect, a § 2255 motion "supersedes habeas corpus and provides the exclusive remedy" to one in custody pursuant to a federal court conviction. Strollo v. Alldredge, 463 F.2d 1194, 1195 (3d Cir.), cert. denied, 409 U.S. 1046 (1972). "Section 2241 'is not an additional, alternative or supplemental remedy to 28 U.S.C. § 2255.'" Myers v. Booker, 232 F.3d 902, 2000 WL 1595967, at *1 (10th Cir. Oct. 26, 2000) (citing Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996)).

Only if it is shown that a § 2255 motion "is inadequate or ineffective to test the legality of . . . detention," may a federal inmate resort to § 2241 to challenge the validity of the conviction or sentence. "It has long been the rule of this circuit that 'the remedy by motion [under § 2255] can be "inadequate or ineffective to test the legality of . . . detention" only if it can be shown that some limitation of scope or procedure would prevent a Section 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention.'" United States v. Brooks, 230 F.3d 643, 648 (3d Cir. 2000) (citing United States ex rel. Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954)); see also Application of Galante, 437 F.2d 1164, 1165 (3d Cir.

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[2](...continued)
to test the legality of his detention. (Emphasis added.)

The underlined part of the statutory language is sometimes referred to as § 2255's "savings clause."

1971) (per curiam) (same). It is the petitioner's burden to prove that the remedy afforded by § 2255 is inadequate or ineffective. Reyes-Requena v. United States, 243 F.3d 893, 901 (5th Cir. 2001) (citing Pack v. Yusuff, 218 F.3d 448, 452 (5th Cir. 2000)).

A petitioner cannot meet this burden by showing that a prior § 2255 motion has been denied. In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998); Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.), cert. denied, 488 U.S. 982 (1988); Litterio v. Parker, 369 F.2d 395, 396 (3d Cir. 1966) (per curiam). Moreover, as a general rule, the limitations on filing a second or successive § 2255 motion imposed by the AEDPA do not establish the inadequacy or ineffectiveness of the remedy.[3] See United States v. Barrett, 178 F.3d 34, 50 (1st Cir. 1999)("A petition under § 2255 cannot become 'inadequate or ineffective,' thus permitting the use of § 2241, merely because a petitioner cannot meet the AEDPA 'second or successive' requirements. Such a result would make Congress's AEDPA amendment of § 2255 a meaningless gesture."), cert. denied, 528 U.S. 1176 (2000); Davenport, 147 F.3d at 608 ("Congress did not change [the 'inadequate or ineffective'] language when in the Antiterrorism Act it imposed limitations on the filing of successive § 2255 motions. The retention of the old language opens the way to the argument

[3]Under the "gatekeeping" provision of the AEDPA, a defendant seeking to file a second § 2255 motion must obtain from the court of appeals having jurisdiction over the sentencing court an order authorizing the sentencing court to consider the second motion. A court of appeals may grant leave to file a second § 2255 petition only if the defendant presents (a) newly discovered evidence undermining the guilty verdict or (b) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." 28 U.S.C. § 2255, ¶ 8.

that when the new limitations prevent the prisoner from obtaining relief under § 2255, his remedy under that section is inadequate and he may turn to § 2241. That can't be right; it would nullify the limitations."); Dorsainvil, 119 F.3d at 251 ("We do not suggest that § 2255 would be 'inadequate or ineffective' so as to enable a second petition to invoke § 2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255. Such a holding would effectively eviscerate Congress's intent in amending § 2255."). Thus, a denial of permission to file a successive § 2255 motion, in itself, does not render the § 2255 remedy ineffective or inadequate. See Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999) (per curiam) (concluding that a habeas petitioner may not avoid the limitations imposed on successive petitions by styling his petition as one pursuant to § 2241 rather than § 2255), cert. denied, 120 S.Ct. 1214 (2000).

Indeed, the denial of permission to file a second or successive § 2255 motion divests a district court of jurisdiction to entertain another, similarly based, § 2255 motion. 28 U.S.C. § 2244(a). Furthermore, a decision by the court of appeals denying permission to file a second or successive application is not appealable. 28 U.S.C. § 2244(b)(3)(E). To allow a person to file a collateral challenge in the district of confinement that is barred in the sentencing court would render nugatory these congressional attempts to promote finality in criminal cases.

Lewis asserts that his claims fall within a narrow exception to the general prohibition against § 2241 petitions to challenge federal convictions or sentences recognized by our Court

of Appeals in Dorsainvil, supra. In Dorsainvil, the court held that a federal prisoner barred from using a § 2255 motion under the AEDPA standards for successive motions could resort to a § 2241 petition if the prisoner "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate . . . ." 119 F.3d at 251.[4] The court stressed that the holding was a "narrow one" based on the unusual circumstance of a Supreme Court precedent decriminalizing conduct that the petitioner could not have presented in his first § 2255 proceeding. Id. at 251-52.

Fundamental to the decision in Dorsainvil was the fact that the petitioner may actually be innocent of the crime charged. In this case, Lewis has failed to present any allegations suggesting that he was not responsible for the distribution of at least 50 grams of cocaine base. In this regard, Lewis' direct appeal apparently did not take issue with the sentencing court's

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[4]In Dorsainvil, the court was concerned that the petitioner could not benefit from the Supreme Court's ruling in Bailey v. United States, 516 U.S. 137 (1995), which held that a defendant could not be convicted of using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924 (c)(2) absent evidence of active employment of the firearm in connection with a drug transaction. Claiming that at the time of his conviction active employment of a firearm was not required to prove use of a firearm in relation to a drug trafficking crime and that there was insufficient evidence to show active employment, Dorsainvil asserted that he was convicted for conduct that was determined in Bailey not to be illegal. Dorsainvil, however, had already pursued one § 2255 motion before the opinion in Bailey was issued, and he had not raised the issue decided in Bailey. His second § 2255 motion did not fall within the AEDPA exceptions for a successive § 2255 motion because Bailey did not announce a new rule of constitutional law, but merely interpreted the applicable statute. The court held that under these unique circumstance a federal prisoner barred from using a § 2255 motion under the AEDPA standards for successive motions could resort to a § 2241 petition.

finding that Lewis was responsible for the distribution of nearly 100 kilograms of crack cocaine. Lewis' failure to articulate any facts disputing the trial court's determination as to drug quantity makes his reliance on Dorsainvil suspect.

Furthermore, Dorsainvil was based on a type of Supreme Court holding that was not contemplated by the congressional limitations on second or successive § 2255 motions. Congress has allowed exceptions to the general ban on successive § 2255 motions for (1) newly discovered evidence that exonerates the defendant, and (2) new rules of constitutional law made retroactive to cases on collateral review by the Supreme Court. At issue in Dorsainvil was the retroactive application of the Supreme Court's statutory construction of the elements of a crime. In Dorsainvil, the petitioner was arguably innocent, but had no right to review under § 2255. The holding in Apprendi is not similar to the Bailey holding considered in Dorsainvil. First, Apprendi did not de-criminalize the conduct at issue in this case. And second, Apprendi did not construe an ambiguous criminal statute; it announced a new rule of constitutional law. See In re Turner, ___ F. 3d ___, No. 00-2660, 2001 WL 1110349, *1 (3d Cir. Sept. 21, 2001).

The Third Circuit, as well as other courts, have recognized that congressional concerns with the finality of convictions are not offended when a prisoner's § 2241 petition is based upon a "retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a non-existent crime." Reyes-Requena, 243 F.3d at 904. Such a holding does not announce a new rule of constitutional law that has the potential to be applied

retroactively to cases on collateral review. Instead, it suggests a construction of a statute that makes the defendant's conduct non-criminal. Under the gatekeeping provisions of § 2255, a person who has lost one round of § 2255 proceedings but who is arguably innocent of criminal conduct as a result of a subsequent change in the elements of the crime charged could not obtain access to a federal court to seek relief based on that subsequent charge.

By way of contrast, Congress has afforded a forum for defendants like Lewis who claim that a new rule of constitutional law established by the Supreme Court redounds to their favor. To be sure, for defendants like Lewis who have already pursued a § 2255 motion, the announcement of a new rule of constitutional law does not automatically open the federal courthouse doors. The defendant must make a prima facie showing to the appropriate appeals court that the new rule was "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255, ¶ 8. See generally In re: Turner, supra, 2001 WL 1110349, * 1. But this limitation is simply an extension of the pre-AEDPA general rule that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 489 U.S. 288, 310 (1989).[5] By requiring that

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[5]Thus, even before the AEDPA a defendant whose conviction was final usually could not benefit from a new rule of constitutional law pronounced by the Supreme Court. In Teague, the Court acknowledged two exceptions to the general rule that a new constitutional holding would not be applicable to cases on collateral review:

> "First, a new rule should be applied retroactively if it places 'certain

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the Supreme Court make the new rule of constitutional law applicable to cases on collateral review, Congress balanced the strong interest in finality of criminal convictions with the concern that the Court be able to determine that those exceptional holdings which "alter our understanding of the 'bedrock procedural elements' essential to the fairness of a proceeding," Tyler, at 2483, be made applicable to those persons who have already exhausted the § 2255 remedy. The interest in finality is more compelling where, as here, the prisoner has already pursued one collateral challenge to a conviction and sentence. In such a situation, Congress has determined that the interest in finality may be overcome only if the Supreme Court has determined, through direct holding or by decisions that "logically permit no other conclusion than that the rule is retroactive," id. at 2486 (O'Connor, J., concurring), that a person who has

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[5](...continued)

> kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' Second, a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"

489 U.S. at 307. The second exception is "reserved for watershed rules of criminal procedure." Id. at 311. To fall within Teague's second exception, "a new rule must meet two requirements: Infringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must "'alter our understanding of the bedrock procedural elements'" essential to the fairness of a proceeding." Tyler v. Cain, 121 S. Ct. 2478, 2484 (2001) (emphasis in original). The Supreme Court has stated that it is "unlikely that many such components of basic due process have yet to emerge." Teague, 489 U.S. at 313; see also Tyler, at 2484 n. 7 (reiterating that "it is unlikely that any of these watershed rules 'ha[s] yet to emerge'").

already pursued a § 2255 motion may seek the benefit of a new rule of constitutional law.

The forum provided by Congress in which a defendant may present the argument that the new rule has been made applicable to the petitioner by the Supreme Court is the court of appeals having jurisdiction over the court of conviction. The fact that the appeals court determines that the new rule of constitutional law has not been made retroactive to cases on collateral review does not mean that the § 2255 remedy is "inadequate" or "ineffective." It simply means that a new rule of constitutional law is not of such extraordinary importance as to have prompted the Supreme Court to determine (directly or by inescapable logical application of prior precedent) that the finality of a conviction or sentence should yield to another round of litigation. In this event, the defendant's detention under precedent pre-existing the new rule is simply not wrongful.

In this regard, before enactment of the AEDPA the Court had recognized that interests of finality outweigh automatic retroactive application of every new rule of constitutional law. Teague, 489 U.S. at 309 ("Application of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."). Thus, a new rule of constitutional law did not render the inmate's detention wrongful even if application of the new rule may have produced a different result in terms of the conviction or sentence. Congress has applied that principle in requiring that, before a second or successive § 2255 motion may be filed based on a new

constitutional rule, the Court determine that the rule should be applied retroactively to cases on collateral review. Congress has afforded a forum for obtaining a determination as to whether the defendant has made a prima facie showing that the new rule has been made retroactive to cases on collateral review by the Supreme Court. If such a prima facie showing is made, then the defendant has the opportunity to litigate the question of whether the Supreme Court precedent has indeed been made retroactive to § 2255 proceedings by the Supreme Court.[6] Thus, § 2255 continues to afford a prisoner a "'full hearing and adjudication of his claim of wrongful detention.'" Brooks, 230 F.3d at 648.[7]

The fact is that a new rule of constitutional law does not necessarily render detention effected under the old rule wrongful. Only if the new rule is of such a dimension as to apply

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[6]The difference between the Court of Appeals' decision to allow the filing of a second or successive § 2255 motion based upon a new rule of constitutional law and the trial court's decision on whether the movant has shown that the rule has been made applicable to cases on collateral review by the Supreme Court is explained in Tyler, 121 S.Ct. at 2481 n.3.

[7]In Harris v. United States, 119 F. Supp. 2d 458, 461 (D. N.J. 2000), the Court found that an Apprendi claim "is one of the few instances where Dorsainvil operates to permit a § 2241 challenge to the lawfulness of a federal sentence." In reaching this conclusion, the district court focused on the fact that a prisoner could not have anticipated the holding in Apprendi. The district court failed to consider, however, the difference between the factual underpinnings of Dorsainvil and that presented when a § 2241 petition raises an Apprendi issue that does not claim that the trial court finding of drug quantity was erroneous. Nor did the court consider the fact that new rules of constitutional law are generally not applicable on collateral review, meaning that a new rule does not render detention under the old rule wrongful. Finally, it did not address the fact that § 2255 does provide a forum to litigate the retroactivity question. For these reasons, Harris is not persuasive. It should also be noted that Harris is apparently the only reported opinion to have found that an Apprendi claim falls within the savings clause of § 2255.

retroactively to cases on collateral review is the detention under the old rule arguably wrongful, and where a prisoner has already exhausted one collateral attack on the conviction or sentence, a Supreme Court determination of retroactive application, either explicit or by compelled implication, is required to open the doors of the district court to the prisoner.

The Third Circuit has recently concluded (a) that the Supreme Court did not make Apprendi retroactive to cases on collateral review, and (b) that a conclusion that Apprendi is entitled to retrospective application is not dictated by prior Supreme Court precedent. Turner, 2001 WL 1110349, * 4-5. To hold that § 2241 provides a procedural mechanism for litigating Apprendi issues foreclosed from review under a second § 2255 motion would, in the words of our Court of Appeals, "effectively eviscerate Congress's intent in amending § 2255." Dorsainvil, 119 F.3d at 251. In short, Lewis cannot invoke § 2241 to initiate another round of litigation over his sentence when the Fourth Circuit has not certified that he is entitled to litigate the Apprendi issues in a second or successive collateral challenge to an otherwise final sentence.[8]

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[8]It should be noted that the Fourth Circuit has ruled that Apprendi cannot be applied to initial § 2255 motions, finding that Apprendi fails to fall within the limited exceptions to the general rule established in Teague that a new rule of constitutional law does not apply retroactively on collateral review. See United States v. Sanders, 247 F.3d 139, 147 (4th Cir. 2001). Thus, Lewis could not benefit from Apprendi even had he been granted leave to file a second or successive § 2255 motion in the sentencing court. The holding in Sanders is consistent with the decisions from the Eighth, Ninth and Eleventh Circuits, see Dukes v. United States, 255 F.3d 912, 913 (8th Cir. 2001) ("Apprendi presents a new rule of constitutional law that is not of 'watershed' magnitude and 'consequently, petitioners may not raise Apprendi claims on collateral review'"); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001); Jones v.

(continued...)

CONCLUSION

Apprendi did not set a precedent sufficient to warrant a determination that the AEDPA restrictions on second or successive collateral challenges to a final conviction and sentence render the § 2255 remedy inadequate or ineffective. See McDougall v. United States, No. 3:CV-01-1165, slip. op. at 6-7 (M.D. Pa. Oct.15, 2001); United States v. Franco-Montoya, No. Crim. 89-33, 2001 WL 649471 (D. Me. June 8, 2001); Moya-Reyes v. Mallisham, No. Civ. A. 4:01-CV-0576, 2001 WL 1116276, * 3 (N.D. Tex. Sept. 13, 2001) ("Moya-Reyes' claims based on Apprendi, while raising a potential defect in the manner in which she was sentenced, do not

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[8](...continued)
Smith, 231 F.3d 1227, 1236 (9th Cir. 2000); McCoy v. United States, No. 00-16434, 2001 WL 1131653, * 8-9 (11th Cir. Sept. 25, 2001), as well as the overwhelming majority of district court opinions to have addressed the issue. See Moss, 252 F.3d at 997 n.4 (collecting cases); Levan v. United States, 128 F.Supp. 2d 270, 275-78 (E.D. Pa. 2001). Although our Court of Appeals has not yet addressed the issue directly, its recent en banc decision in United States v. Vazquez, No. 99-3845, slip. op. at 9-21 (3d Cir. Oct. 9, 2001), may presage its conclusion that application of Apprendi in collateral challenges to the validity of a conviction or sentence is barred by the Teague general rule of non-retroactivity. In Vazquez, the court applied plain error standards in holding that an Apprendi violation did not require that the conviction be set aside on direct appeal. Other courts, in holding that Apprendi may not be applied in a prisoner's first § 2255 proceeding, have considered it significant that, on direct appeal, Apprendi violations have been analyzed under plain error or harmless error standards. See Sanders, 247 F.3d at 150 ("Further supporting the view that Apprendi does not rise to the level of a watershed change in criminal procedure is the fact that the majority of the federal circuit courts have subjected Apprendi claims to harmless and plain error review."); Levan, 128 F.Supp. 2d at 278 (reasoning of courts that have applied harmless error analysis to Apprendi violations supports the decision not to apply Apprendi in a § 2255 proceeding). There is no need at this time to address the question of whether Apprendi falls within an exception to the Teague bar on non-retroactivity as it is clear that § 2241 is not an available procedural mechanism for avoiding the gatekeeping requirements of § 2255 in the circumstances presented here.

assert the sort of defect that can support a claim under the savings clause of § 2255.").

Accordingly, Lewis' § 2241 petition will be dismissed.[9] An appropriate Order follows.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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[9]Lewis's petition will be dismissed without prejudice so that he is not foreclosed from pursuing relief in the future in the event that the Supreme Court makes Apprendi retroactive to cases on collateral review. See Turner, supra, 2001 WL 1110349, * 5.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ELAN C. LEWIS,	:	
	:	
Petitioner	:	
	:	
VS.	:	**3:CV-00-1291**
	:	
DONALD ROMINE	:	**(CHIEF JUDGE VANASKIE)**
Respondent	:	

O R D E R

NOW, THIS 18th DAY OF OCTOBER, 2001, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT:**

1. The petition for a writ of habeas corpus is **DISMISSED, WITHOUT PREJUDICE**.

2. The Clerk of Court is directed to mark this matter **CLOSED**.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

FILED 10/18/01

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