

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

LUISE GRAF,	:	
Petitioner,	:	
	:	
v.	:	PRISONER
	:	Case No. 3:01CV947(CFD)(WIG)
	:	
KUMA J. DEBOO, ¹ WARDEN,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Luise Graf (“Graf”), is currently confined at the Federal Correctional Institution in Danbury, Connecticut. She brings this action for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. The court concludes that it lacks jurisdiction under section 2241 to entertain Graf’s claims.

Procedural Background

Graf was convicted in the United States District Court for the Southern District of Florida on the charge of unlawful importation of cocaine in violation of 21 U.S.C. § 952(a) and possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a). She was sentenced to a term of imprisonment of 78 months followed by five years of supervised release. Graf’s conviction was affirmed on direct appeal without opinion. See United States v. Graf, 163 F.3d 1360 (11th Cir. 1998) (table). In addition, she filed a motion to vacate or set aside her sentence, pursuant to 28 U.S.C. § 2255, on the ground that she was afforded ineffective assistance of counsel. The motion was denied and the decision was affirmed without opinion on direct appeal. See Graf v. United States, 237 F.3d

¹Kim Reid, the named respondent, has been replaced as warden at FCI Danbury by Kuma J. Deboo. Deboo has been substituted for Reid as the respondent in this action pursuant to Fed. R. Civ. P. 25(d).

636 (11th Cir. 2000) (table). In December 2000, Graf sought certification from the Eleventh Circuit to file a second section 2255 motion to raise her Apprendi claim. The Eleventh Circuit denied certification.

By petition dated April 26, 2001, Graf commenced this action pursuant to 28 U.S.C. § 2241. She challenges her conviction on the ground that, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), her sentence was improperly enhanced based upon elements not included in the indictment or determined by the jury in violation of her rights under the Fifth and Sixth Amendments.

Discussion

As an initial matter, the court must determine whether it has jurisdiction to entertain Graf's claim in a petition filed pursuant to 28 U.S.C. § 2241. For the reasons that follow, the court concludes that it does not have jurisdiction to entertain her claim.

Since the enactment of the Judiciary Act of 1789, the federal court in the district in which a prisoner is incarcerated has been authorized to issue a writ of habeas corpus if the prisoner was in custody under the authority of the United States. See Triestman v. United States, 124 F.3d 361, 373 (2d Cir. 1997). Today, this authority is codified at 28 U.S.C. § 2241(c)(3). In 1948, however, Congress enacted 28 U.S.C. § 2255. This statute “channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently.” Id.

Currently, “[a] motion pursuant to [section] 2241 generally challenges the *execution* of a federal prisoner’s sentence, including such matters as the administration of parole, computation of a prisoner’s sentence by prison officials, prison disciplinary actions, prison transfers, type of detention

and prison conditions.” Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (citing Chambers v. United States, 106 F.3d 472, 474-75 (2d Cir. 1997) (describing situations where a federal prisoner would properly file a section 2241 petition)). A section 2255 motion, on the other hand, is considered “the proper vehicle for a federal prisoner’s challenge to [the imposition of] his conviction and sentence.” Id. at 146-47. Thus, as a general rule, federal prisoners challenging the imposition of their sentences must do so by a motion filed pursuant to section 2255 rather than a petition filed pursuant to section 2241. See Triestman, 124 F.3d at 373.

In her section 2241 petition, Graf challenges the sentencing court’s imposition of a sentence, a claim properly raised in a section 2255 motion, and, hence, with the sentencing court in Florida. To avoid this prohibition, Graf relies on an exception to the strictures of section 2255 which “permits the filing of a [section] 2241 petition when [section] 2255 provides *an inadequate or ineffective remedy* to test the legality of a federal prisoner’s detention.” Jiminian, 245 F.3d at 147 (emphasis added). This exception is known as the “savings clause” of section 2255. See, e.g., Tucker v. Nash, No. 00-CV-6570(FB), 2001 WL 761198, at *1 (E.D.N.Y. June 29, 2001) (referring this section as the “‘savings clause’ of § 2255”). Specifically, Graf claims that section 2255 is inadequate and ineffective because she has been denied certification to file a second section 2255 motion.

In determining whether a section 2255 motion would be inadequate or ineffective, and hence would authorize Graf’s section 2241 petition, the court must consider the limitations for filing such motions. Section 2255 contains a one-year limitations period commencing at the latest of the dates on which the judgment of conviction becomes final, “the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed...,” or “the

right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255.

The exception permitting an inmate to file a section 2241 petition is not available, i.e., a motion pursuant to section 2255 is not inadequate or ineffective, simply because a prisoner is procedurally barred from filing a section 2255 motion. Triestman, 124 F.3d at 376. Section 2255 “may be inadequate or ineffective in circumstances in which ‘the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions.’” Jiminian, 245 F.3d at 147 (quoting Triestman, 124 F.3d at 377).

The Second Circuit has afforded relief under the exception where a section 2255 motion was not available and the petitioner was claiming “actual innocence” of the crime of which he was convicted. See id. at 380. Other circuits also have construed narrowly the applicability of the exception. For instance, the Fifth Circuit has held

that the savings clause of [section] 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 [section] 2255 motion.

Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001). See also Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999) (“[section] 2255 remedy is not considered inadequate or ineffective simply because [section] 2255 relief has already been denied . . . or because the petitioner is procedurally barred from pursuing relief under [section] 2255 . . .”) (citations omitted); Wofford v. Scott, 177 F.3d 1236, 1245 (11th Cir. 1999) (agreeing with other courts that section 2241 cannot be

used “to free a prisoner of the effects of his failure to raise an available claim earlier”) (citations omitted); In re Vial, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (“the remedy afforded by [section] 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision or because an individual is procedurally barred from filing a [section] 2255 motion”).

Against this backdrop, the court now considers Graf’s ground for relief to determine whether section 2255 is inadequate or ineffective to address her claims, and hence, whether the District of Connecticut has jurisdiction to entertain her section 2241 petition.

Because Apprendi was not decided until June 2000, it was not available to Graf during the limitations period for filing her initial 2255 motion. In addition, Apprendi establishes a new rule of constitutional law. As Graf has recognized, however, the Supreme Court has not yet addressed the retroactivity of its decision in Apprendi. See Harris v. United States, __ U.S. __, 122 S. Ct. 2406, 2427 (2002) (“No Court of Appeals, let alone this Court, has held that Apprendi has a retroactive effect.”) (Thomas, J., dissenting); Clarke v. United States, No. 01 CIV.9040RCC, 2002 WL 31207338, at *3-4 (S.D.N.Y. Oct. 2, 2002) (noting that the Supreme Court has not ruled on the issue and that several circuit courts have held that Apprendi is “not retroactively available on collateral review”). If Apprendi applies retroactively, then Graf would be able to file another successive section 2255 petition because such petitions are permitted when based “on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” See Tucker v. Nash, No. 00-CV-6570(FB), 2001 WL 761198, at *1 (E.D.N.Y. June 29, 2001). Thus, should the Supreme Court decide that Apprendi applies retroactively to cases on collateral

review, section 2255 would be neither inadequate nor ineffective and Graf would meet the requirements set forth in paragraph six of section 2255 and be able to file a second section 2255 motion in the Southern District of Florida. If Apprendi does not apply retroactively, then section 2255 would be unavailable. At that time, Graf could argue that § 2241 is appropriate.² At this time, however, Graf cannot satisfy the requirements to extend the inception date of the limitations period for filing a section 2255 motion beyond the date her conviction became final. Thus, until the Supreme Court addresses the retroactivity of Apprendi, this court cannot conclude that section 2255 has been shown to be inadequate or ineffective to test the legality of Graf's confinement.³ See Castro v. Schomig, 00 C 5015, 2001 WL 864266, at *4 (N.D. Ill. July 31, 2001) (dismissing habeas corpus petition without prejudice to raising an Apprendi claim should the rule announced in that case be interpreted as being retroactive). Cf. Forbes, 262 F.3d at 145 (denying leave to file a second 2255 motion based on Apprendi without prejudice to renewal in the event the Supreme Court makes a retroactivity determination). Because the court cannot conclude, at this time, that section 2255 relief would be inadequate or ineffective to address Graf's claim, a section 2241 petition is premature.

The Second Circuit has held that, where a petitioner already has filed a section 2255 motion,

²This Court does not reach the issue of whether this would raise a "serious constitutional issue," thus permitting relief under § 2241 under Triestman.

³Graf urges this court to determine that the decision in Apprendi should be applied retroactively to cases on collateral review. In light of the Supreme Court's holding that a decision is not retroactive to cases on collateral review unless that court so determines and the Second Circuit decision that Apprendi claims were not yet available in a section 2255 motion because the Supreme Court has not stated that the holding is retroactive to cases on collateral review, this court declines to make a retroactivity determination. See Tyler v. Cain, 533 U.S. 656 (2001); Forbes v. United States, 262 F.3d 143 (2d Cir. 2001).

the district court may construe a petition filed pursuant to section 2241 as a second section 2255 motion and transfer the motion to the Court of Appeals to enable that court to determine whether certification to file a second petition should be granted. See Jiminian, 245 F.3d at 148-49. Here, Graf was convicted in the United States District Court for the Southern District of Florida. Thus, transferring this case to the Second Circuit would serve no purpose. In addition, Graf states that she has been denied certification to file a second section 2255 motion on this ground. Thus, the court concludes that to construe this petition as filed pursuant to section 2255 and transfer it to the Southern District of Florida would be futile at this time.

Conclusion

Based on the foregoing, the court concludes that it lacks jurisdiction to entertain Graf's petition pursuant to section 2241. Accordingly, the petition for a writ of habeas corpus [Doc. # 2] is DENIED, without prejudice to refiling in light of any future Supreme Court decision determining whether Apprendi is retroactive.

SO ORDERED this _____ day of November, 2002, at Hartford, Connecticut.

Christopher F. Droney
United States District Judge