No. 99-5983

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

DAVID W. LANIER,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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STATEMENT CONCERNING ORAL ARGUMENT

The United States does not believe that oral argument is necessary in this case.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court entered its order denying defendant's motion for a new trial on June 28, 1999 (R. 305: Order).[1/] Defendant filed a timely notice of appeal on July 8, 1999 (R. 307: Notice of Appeal). District court jurisdiction was based on 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in denying defendant's motion for a new trial.

[1/] References to "R. __" are to docket numbers on the district court docket sheet.

STATEMENT OF THE CASE[2/]

A. Lanier's Indictment, Conviction, And Initial Appeal

In May 1992, defendant David Lanier was indicted by a federal grand jury on 11 counts of violating 18 U.S.C. 242 (deprivation of rights under color of law) (R. 1: Indictment). At that time, Lanier was the elected Chancery Court Judge for Dyer and Lake Counties, Tennessee. The indictment alleged that between 1988 and 1991 Lanier sexually assaulted eight women who either worked for him at the court, otherwise worked in the court system, or had a case before him. In each instance, the sexual assault took place in Lanier's chambers during the day when the victim was with Lanier either as a result of her job duties or because of her pending case.

On December 18, 1992, Lanier was convicted on five misdemeanor and two felony counts of violating Section 242 (R. 99: Verdict). On April 12, 1993, he was sentenced to a total of 25 years' imprisonment (R. 148: Sentencing).

On April 17, 1993, Lanier filed a notice of appeal of his conviction and sentence (R. 166: Notice of Appeal). On September 27, 1993, during the pendency of that appeal, Lanier filed a pro se motion for a new trial based on newly discovered evidence, which raised several grounds in support of the motion (R. 185: Motion for a New Trial; see also R. 214: Motion for a New Trial). The district court withheld ruling on that motion

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[2/]Because, in view of the issue presented in this appeal, the procedural history of the case and underlying facts are essentially the same, we present them in a single narrative.

pending the outcome of the appeal. See generally R. 305: Order at 1.

On August 31, 1994, a unanimous panel of this Court affirmed the convictions and sentence. United States v. Lanier, 33 F.3d 639 (6th Cir. 1994). The panel rejected Lanier's arguments in each of the 15 issues raised on appeal.

B. The Court's En Banc Decision And Lanier's Release From Custody

On October 13, 1994, Lanier, through counsel, filed a petition for rehearing and suggestion for rehearing en banc. See Sixth Circuit Docket Entry dated 10/13/94. The petition raised two issues (severance and whether he acted "under color of law"). On January 4, 1995, the Court granted Lanier's petition for rehearing en banc and vacated the previous decision and judgment of the Court. United States v. Lanier, 43 F.3d 1033 (6th Cir. 1995) (en banc).

On February 13, 1995, this Court granted Lanier's motion to file a pro se supplemental brief. Docket Entry dated 2/13/95. On March 6, 1995, Lanier filed his supplemental brief. Docket Entry dated 3/6/95. In this brief Lanier stated (Brief at ix) that he was "adopt[ing] by reference and incorporat[ing] all issues presented in the initial and reply briefs" and requested that the Court "consider all arguments."

On March 20, 1995, counsel for the United States sent a letter to this Court seeking clarification on whether all issues were before the Court on rehearing en banc, or only the two issues raised in Lanier's counsel's initial petition for

rehearing en banc. On March 23, 1995, this Court responded by letter to counsel and Lanier clarifying that the Court's grant of en banc review was not limited to any specific issues, and that counsel should be prepared to address "all issues which are germane to the appeal." On May 18, 1995, Lanier filed another pro se brief (titled Supplemental Reply Brief), which also emphasized (see p. iii) that all issues previously raised on appeal remained before the Court. Docket Entry dated 5/18/95.

The case was reargued en banc on June 14, 1995. The next day, by order of this Court, Lanier was released on his own recognizance pending the decision of the en banc Court. Docket Entry dated 6/15/95.

On January 23, 1996, a divided en banc Court reversed the judgment of the district court and instructed the district court to dismiss the indictment. United States v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (en banc). The Court held that prior case law had not made it sufficiently clear that the right to be free from sexual assault by a state actor constituted a constitutional right protected by Section 242.

C. The Supreme Court's Decision And Remand

The United States sought review of the Court's en banc decision in the Supreme Court. On June 17, 1996, the Supreme Court granted the United States' petition for a writ of certiorari. United States v. Lanier, 518 U.S. 1004 (1996). On March 31, 1997, the Supreme Court issued its decision vacating this Court's en banc judgment and remanding the case for

application of the proper legal standard for whether Lanier had fair warning that his conduct violated Section 242. United States v. Lanier, 520 U.S. 259 (1997).

On May 13, 1997, in light of the Supreme Court's decision, this Court vacated the en banc decision of the Court, restored the case to the docket as a pending appeal, ordered further briefing in the case, and instructed the clerk to schedule the case for oral argument. United States v. Lanier, 114 F.3d 84 (6th Cir. 1997) (en banc).

D. This Court Orders Lanier To Surrender Himself Into Custody Pending Resolution Of His Appeal

On May 27, 1997, the United States moved this Court to vacate its June 15, 1995, order releasing Lanier from custody pending resolution of his appeal. Docket Entry dated 5/28/97. The United States noted that the Court released Lanier from custody after the en banc argument because it found at that time that the en banc proceeding was "likely to result in reversal." The United States further noted that in view of the Supreme Court's decision there was no current basis for the Court to know what the outcome of the case was likely to be, and that therefore the Bail Reform Act of 1984's presumption of detention again applied and Lanier must be detained pending resolution of the appeal.[3/]

[3/]The United State also noted that prior to the en banc argument (and Lanier's release the following day), this Court had denied Lanier's motions for release pending appeal on three occasions. See Docket Entries dated 10/5/93 (denying motion for release pending appeal); 2/10/94 (denying motion to reconsider previous

(continued...)

On August 14, 1997, the en banc Court issued an order vacating its order of June 15, 1995, which had released Lanier from custody pending appeal. United States v. Lanier, 120 F.3d 640 (6th Cir. 1997) (en banc). The en banc Court "directed [Lanier] to surrender himself to the United States Marshal for the Western District of Tennessee not later than noon on Friday, August 22, 1997." Id. at 640.

E. Lanier Flees To Mexico: His Appeal Is Dismissed

Instead of surrendering himself as directed, Lanier fled to Mexico. On August 28, 1997, this Court issued an order noting that Lanier had not surrendered by August 22 as directed and that as a result the district court had issued a warrant for his arrest. Docket Entry dated 8/28/97. The Court directed Lanier to show cause why his appeal should not be dismissed for failure to surrender under the fugitive disentitlement doctrine, citing, inter alia, In re Prevot, 59 F.3d 556 (6th Cir. 1995), cert. denied, 516 U.S. 1161 (1996). The Court stated that Lanier must respond by September 10, 1997, or the appeal would be dismissed without further notice. Lanier, through counsel, filed a response on August 29, 1997; the response acknowledged that the "circumstances surrounding his failure to appear and his present whereabouts are unknown." Docket Entry dated 8/29/97.

On September 10, 1997, the Court issued an order addressing "[t]he sole issue * * * whether this appeal should be dismissed

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[3/](...continued)
order denying motion for release pending appeal); 4/7/95 (denying motion for release pending en banc decision).

because the appellant is currently a fugitive." United States v. Lanier, 123 F.3d 945, 946 (6th Cir. 1997) (en banc). Pursuant to the "doctrine of fugitive disentitlement" and "the established practice of this court," the Court dismissed Lanier's appeal with prejudice. Ibid. Such dismissal was to be effective 30 days from the date of the order (and when the mandate issued at that time), unless Lanier surrendered himself to the United States Marshal. Ibid.

On September 11, 1997, Lanier filed a pro se motion for reconsideration of the Court's August 14, 1997, order (which vacated the order releasing Lanier from custody pending appeal). Docket Entry dated 9/11/97. The next day the Court denied the motion. Docket Entry dated 9/12/97.

On October 10, 1997, the Court issued an order noting that Lanier had not surrendered himself and therefore dismissing the appeal with prejudice, effective that date. Docket Entry dated 10/10/97. The Court further stated that "[t]he judgment of the United States District Court * * * remains undisturbed."

On that same date, the Court issued the mandate. Docket Entry dated 10/10/97. On October 27, 1997, the Court issued an order denying Lanier's request to withdraw the mandate. Docket Entry dated 10/27/97.[4/]

[4/]Lanier sought review in the Supreme Court of this Court's September 10, 1997, decision dismissing his appeal with prejudice under the fugitive disentitlement doctrine. On March 19, 1998, the Supreme Court denied Lanier's petition for a writ of certiorari. Lanier v. United States, 118 S. Ct. 1200 (1998).

F. Lanier Is Captured In Mexico And Returned To The United States

On October 13, 1997, Lanier was arrested by Mexican police at an Ensenada, Mexico post office, where he had gone to pick up a packet of fake identity documents. See generally The Tennessean (Oct. 19, 1997) at 1B. Lanier was subsequently turned over to the United States Marshal. On December 30, 1997, Lanier pled guilty to violating 18 U.S.C. 3147 in connection with his failure to surrender as directed. His appeal of his sentence for that violation is pending in this Court. United States v. Lanier, No. 98-5447 (argued 9/15/99).[5/]

G. The District Court Dismisses Pending Motions As A Result Of This Court's Dismissal Of Lanier's Appeal

As a result of this Court's September 10, 1997, order invoking the fugitive disentitlement doctrine and dismissing the appeal, the district court entered an order on September 30, 1997, stating that all of Lanier's pending motions would be denied if he failed to surrender himself by the time prescribed by this Court (R. 266: Order). Since Lanier did not surrender by the prescribed time, on October 10, 1997 (the same date this

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[5/]Although Lanier was represented by counsel in the appeal of his sentence, the Court permitted him to file a pro se supplemental brief. In that brief, Lanier argued that his "conviction" for failure to appear should be reversed because the court lacked "jurisdiction" in that case. That argument rested entirely on his view that this Court's August 14, 1997, en banc order directing him to surrender himself to the United States Marshal (i.e., vacating the earlier order releasing him on his own recognizance) was invalid because the en banc Court was improperly constituted. This argument, which is frivolous, was addressed by the United States in its Brief as Appellee in that appeal (pp. 11-13).

Court ultimately dismissed the appeal with prejudice), the district court issued an order denying all of Lanier's pending motions, which included his motion for a new trial based on newly discovered evidence (R. 267: Order).

H. Lanier Again Moves The District Court For A New Trial

On April 7, 1998, Lanier filed a new motion for a new trial based on newly discovered evidence. (R. 281: Motion for a New Trial). The district court's denial of that motion is the subject of this appeal.

In the motion for a new trial, Lanier presents 15 different (and somewhat overlapping) grounds that he argues support his motion. Most of these grounds relate to alleged government misconduct in the investigation and prosecution of the case. The "newly discovered evidence" on which he bases the motion consists of his own affidavit and the affidavits of seven others. In addition, Lanier filed with the district court six supplements to his motion for a new trial (See R. 285: Criminal Supplement to Rule 33 Motion for a New Trial; R. 286: Criminal Supplement to Motion for a New Trial; R. 291: Criminal Supplement; R. 296: Supplement of Recent Decisions; R. 297: Criminal Supplement; R. 302: Notice of Filing Recent Decisions), one of which (R. 285) also challenges his sentence and the fine imposed upon his conviction.

The United States opposed the motion, asserting that Lanier was attempting to relitigate issues that had been dismissed with prejudice by this Court and the district court (R. 287: Response

by United States to Motion for New Trial at 6-11). The United States argued that this Court and the district court properly dismissed all pending matters with prejudice pursuant to the fugitive disentitlement doctrine after Lanier violated this Court's order to surrender, and that the dismissal constituted final judgment on the merits. The United States further asserted that, as a result, Lanier was barred from relitigating any issues that were pending before the Courts at the time of dismissal. The United States then showed that each of the 15 issues raised in the motion for a new trial had been raised in a previous filing that either this Court or the district court had dismissed (R. 287 at 7-11). The United States concluded that since all issues raised by Lanier in the motion for a new trial had been dismissed with prejudice, Lanier's motion must be denied.

I. The District Court's Decision Denying The Motion For A New Trial

On June 28, 1999, the district court entered its Order denying Lanier's motion for a new trial (R. 305: Order on Defendant's Motion for a New Trial). The court first questioned whether many of the issues raised in Lanier's motion were in fact based on newly discovered evidence (R. 305 at 4-5). The court did not reach this issue, however, because it concluded that "all of the grounds raised in Lanier's motion * * * have been raised with and either denied by this court or dismissed by the Sixth Circuit with prejudice" (R. 305 at 5). In reaching this conclusion the court noted that "Lanier does not contest the government's assertion that several of the issues currently set

forth in support of his motion for a new trial were previously argued in support of his motion for a new trial filed September 27, 1993, and denied by this court October 10, 1997" (R. 305 at 5-6). With regard to the issues pending before this Court when it dismissed Lanier's appeal, the district court rejected Lanier's argument that the only issues then pending before this Court were the two issues raised by his court-appointed attorney. The court explained that the Supreme Court's decision vacated this Court's en banc decision, and that this Court subsequently reinstated the case as a pending appeal, so that all of the issues raised by counsel and in Lanier's pro se briefs were pending before the court (R. 305 at 6-7).

The court concluded that:

> all of Lanier's current arguments have already been made and either denied by this court or dismissed by the Sixth Circuit. The new evidence relied on by Lanier does not appear to support any new arguments, nor does Lanier argue that it does. Rather, Lanier uses it to rehash arguments made in his earlier motion and appeal.

R. 305 at 7. The court, therefore, denied Lanier's motion without addressing the merits of the issues he raised.

On July 8, 1999, Lanier filed a notice of appeal of the court's denial of his motion for a new trial (R. 307: Notice of Appeal).

SUMMARY OF THE ARGUMENT

In late summer 1997, during the pendency of his appeal in this Court (after remand from the Supreme Court), Lanier fled to Mexico rather than surrender himself to federal authorities as

directed by the Court. As a result, this Court dismissed Lanier's appeal with prejudice, and the district court in turn dismissed all of Lanier's pending motions (including a motion for a new trial), under the fugitive disentitlement doctrine. After Lanier was captured in Mexico and returned to the United States to serve the remainder of his sentence, he filed a motion for a new trial based, allegedly, on "newly" discovered evidence.

The district court correctly denied this motion. This Court's dismissal of Lanier's appeal with prejudice under the fugitive disentitlement doctrine, and the district court's resulting dismissal of his pending motions in that court, constitute final judgments on the issues then pending, and Lanier is therefore barred from relitigating those issues. Thus, even assuming Lanier has presented "newly discovered evidence" (which is by no means apparent), unless that evidence is directed at issues not previously raised and dismissed, there is no basis for the court to address those issues anew. Here, the district court correctly found that all of the issues presented in the motion were previously raised and pending either in this Court or the district court at the time he failed to surrender himself as ordered. For this reason, this Court should affirm the denial of Lanier's motion and, like the district court, need not address the merits of any of these issues.

ARGUMENT

BECAUSE THE ISSUES RAISED IN LANIER'S MOTION FOR A NEW TRIAL ARE ISSUES THAT WERE PREVIOUSLY DISMISSED BY THIS COURT AND THE DISTRICT COURT UNDER THE FUGITIVE DISENTITLEMENT DOCTRINE, THE DISTRICT COURT CORRECTLY DENIED LANIER'S MOTION FOR A NEW TRIAL

A. In "keeping with the established practice of this [C]ourt," this Court dismissed Lanier's appeal of his conviction and sentence with prejudice under the fugitive disentitlement doctrine when Lanier failed to surrender himself to federal authorities as ordered. United States v. Lanier, 123 F.3d 945, 946 (6th Cir. 1997) (en banc), cert. denied, 118 U.S. 1200 (1998). In light of this order, the district court denied all pending motions in that court (R. 266: Order; R. 267: Order). This Court's reliance on the fugitive disentitlement doctrine in these circumstances to dismiss Lanier's appeal is consistent with numerous cases recognizing -- and applying -- the general principle that when a convicted defendant who seeks review becomes a fugitive his escape "disentitles [him] to call upon the resources of the Court for determination of his claims." Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam); see also Ortega-Rodriguez v. United States, 507 U.S. 234 (1993); Estelle v. Dorrough, 420 U.S. 534 (1975); Brown v. O'Dea, Nos. 97-6355 & 97-6425, 1999 WL 587209, at *8-*11 (6th Cir. Aug. 5, 1999) (Merritt, J., concurring) (explaining that the fugitive disentitlement doctrine "limits access to courts in the United States by a fugitive who has fled a criminal conviction in a court in this country," and citing Lanier as an example of the

application of the doctrine); In re Prevot, 59 F.3d 556 (6th Cir. 1995), cert. denied, 516 U.S. 1161 (1996); Parretti v. United States, 143 F.3d 508 (9th Cir. 1998) (en banc); United States v. Perisco, 853 F.2d 134 (2d Cir. 1988).[6/] Likewise, the same general principles also supported the district court's dismissal of pending motions after this Court dismissed the appeal. See generally In re Prevot, 59 F.3d at 564 (addressing power of district court to apply fugitive disentitlement doctrine); cf. United States v. Sacco, 571 F.2d 791 (4th Cir.), cert. denied, 435 U.S. 999 (1978).

Lanier does not challenge the courts' application of the fugitive disentitlement doctrine in this case. Nor does he appear to challenge that, as the district court found, the dismissal with prejudice of the pending issues bars him from relitigating these claims. See generally Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 362 (6th Cir. 1967). It follows that the only issue presented in this appeal is whether the district court correctly found that all of the issues raised in Lanier's motion for a new trial had previously been raised -- and dismissed -- by either this Court or the district court.

[6/]These are but a very few of the large number of reported cases applying the fugitive disentitlement doctrine to dismiss a pending appeal with prejudice. The Tenth Circuit recently observed that "with two very narrow exceptions, [it] has not found a single case declining to apply the disentitlement doctrine in the context of a direct appeal from conviction." United States v. Hanzlicek, No. 97-5172, 1999 WL 617668 n.1 (10th Cir. Aug. 16, 1999).

B. The 15 issues Lanier presented in his motion for a new trial center on allegations of governmental misconduct and that the victim in the felony counts (Vivian Archie) was a drug addict, perjurer, and was paid for her testimony. As set forth below, the district court correctly found that these issues, along with the others raised by Lanier in his motion, were previously raised either in the district court or on appeal in this Court prior to Lanier's failure to surrender. Therefore, the district court correctly held that Lanier was barred from relitigating these issues. The 15 issues are summarized as follows:

1. In paragraph 1. Lanier asserted that the United States engaged in "[p]rosecutorial and outrageous governmental misconduct" from the inception of the case through sentencing (R. 281: Motion for a New Trial at 1). This generalized assertion is not further supported in this paragraph, although more specific allegations of alleged misconduct are set forth in the subsequent numbered paragraphs. Lanier repeatedly made this claim in this Court and the district court prior to his failure to surrender. See, e.g., Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 39-42; Supplemental Reply Brief of Defendant David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 5/18/95) at 5; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 2-6.

2. Lanier next challenged the exclusion of evidence that Vivian Archie was a drug addict and perjurer (R. 281 at 1-2). Lanier raised this argument in both his original and supplemental en banc briefs in this Court. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 32-36; Supplemental Reply Brief of Defendant David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 5/18/95) at 11-12.

3. In this paragraph Lanier asserted the government prevented or attempted to prevent a number of witnesses from testifying in his defense (R. 281 at 2). Lanier raised this argument in the original pro se en banc brief and in the district court prior to his failure to surrender. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 39-41; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 2-5.

4., 5., and 6. In these three paragraphs Lanier alleged further government misconduct by threatening and intimidating witnesses and having them fabricate testimony (R. 281 at 2-4). Lanier made these same allegations in this Court and (in part almost word-for-word) in the district court. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 40-42; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 2-4. Indeed, five of the eight affidavits attached to Lanier's present motion for a new trial are the same ones attached to Lanier's

September 27, 1993, motion for a new trial (affidavits of Becky Richards, Donna McDivitt, Helen Moss, Leigh Anne Johnson, Robert Couch Harrell).

7. Lanier alleged that the government engaged in misconduct involving attorney Tim Naifeh (R. 281 at 4-5). Lanier made the same argument in this Court and (almost word-for-word) in the district court. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 39; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 3-4.

8. Lanier alleged that the government tried to conceal Colleen Fleming during the trial (R. 281 at 5). Lanier raised this argument in both this Court and (almost word-for-word) in the district court prior to failing to surrender. See United States v. Lanier, 33 F.3d at 660 (original panel decision addressing this issue); Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 39-40; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 4.

9. Lanier asserted that FBI Special Agent Castleberry engaged in misconduct involving a government witness (R. 281 at 6). Once again, Lanier raised this argument in both this Court and (almost word-for-word) in the district court prior to failing to surrender. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 40;

Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 4-5.

Lanier also argued in paragraph 9. of his motion to dismiss that the government paid witnesses in this case. Lanier raised this issue in this Court and the district court and thus it has been dismissed. See Supplemental Reply Brief of Defendant David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 5/18/95) at 11; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 5.

10. Lanier argued that he was not acting "under color of law" with respect to any of the victims (R. 281 at 8). This was one of the central issues raised in his appeal, and thus has been dismissed with prejudice. See, e.g., United States v. Lanier, 33 F.3d at 653 (original panel decision addressing this issue).

11. In this paragraph Lanier challenged the credibility of Vivian Archie through her Grand Jury testimony (R. 281 at 8-9). Lanier presented this same issue to both this Court and (almost word-for-word) the district court. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 7; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 6-7. Indeed, Lanier attached excerpts from the testimony as an exhibit to the motion for a new trial he filed in September 1993.

12. In paragraph 12 Lanier reargues that he did not act "under color of law" with regard to the custody of Vivian Archie's child (R. 281 at 9). This issue was litigated at length

before Lanier fled. See, e.g., United States v. Lanier, 33 F.3d at 653 (original panel decision addressing this issue). Further, Lanier made the same argument (almost word-for-word) in his September 1993 motion for a new trial. See Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 7.

13. Lanier alleged that the government engaged in a selective prosecution based on a personal vendetta by the United States Attorney (R. 281 at 9-10). Again, this issue was previously presented in both this Court and (almost word-for-word) the district court. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 39; Supplemental Reply Brief of Defendant David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 5/18/95) at 6-7; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 7-8.

14. In Paragraph 14. Lanier rehashes several arguments previously made in the same motion attacking Vivian Archie's credibility, e.g., that she was paid by the government and that she committed perjury (R. 281 at 10-11). As noted above, these issues were previously raised. Further, Lanier made this same argument (almost word-for-word) in his September 1993 motion for a new trial. See Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 8-9.

15. Lanier's last assertion in his motion for a new trial is that the government's closing argument was improper (R. 281 at

11-12). This argument was raised in his direct appeal and addressed in the panel's decision. See United States v. Lanier, 33 F.3d at 659 (original panel decision addressing this issue and finding nothing improper).

Lanier raised several other arguments in the various supplements he filed to his motion for a new trial. In his first supplement (R. 285: Criminal Supplement to Rule 33 Motion for a New Trial) he challenged the fine imposed by the district court, including the cost of incarceration. This issue was raised in his direct appeal. See United States v. Lanier, 33 F.3d at 663-664 (original panel decision addressing this issue). Therefore, it has been dismissed with prejudice. In his second supplement (R. 286: Criminal Supplement to Motion for a New Trial) Lanier rehashed many of the arguments listed above, and challenged his sentence calculation under the sentencing guidelines. Lanier also challenged his sentence in his direct appeal. United States v. Lanier, 33 F.3d at 662-663 (original panel decision addressing this issue).

In sum, since all of the issues raised in Lanier's motion for a new trial were previously before either this Court or the district court and dismissed as a result of his failure to surrender, Lanier is barred from relitigating them. Accordingly, the district court properly denied the motion for a new trial.

C. In his Pro Se Appellant's Brief in this Court, Lanier principally reargues the merits of the issues raised in the motion for new trial. As we have noted, however, the issue

before this Court is not the merits of these issues, but whether the district court erred in ruling that these issues were presented prior to his failure to surrender, and thus were dismissed with prejudice. On that question, Lanier makes two assertions: that this Court's dismissal of the appeal dismissed only the two issues raised in his counsel's petition for rehearing en banc (and thus not all issues pending before this Court), and that his March 1988 affidavit accompanying his motion for a new trial and Judy Forsythe's September 1997 affidavit attached to that motion presented newly discovered evidence.

The first assertion is frivolous. As the district court correctly found in rejecting the same argument (R. 305: Order at 5-7 & n.4), this Court's granting of Lanier's petition for rehearing en banc vacated the panel decision and placed all issues before the en banc Court. See United States v. Lanier, 43 F.3d at 1034 (order granting rehearing en banc). This, of course, as noted above (pp. 3-4), was exactly what Lanier expressly -- and repeatedly -- urged the Court to do, i.e., reconsider all issues en banc. Moreover, if there was any doubt on this point it was laid to rest by this Court when, by letter dated March 23, 1995, to Lanier and counsel, the Court made clear that the en banc review was of all issues presented on appeal. See pp. 3-4, supra (describing correspondence with Court on this question)

The second assertion is similarly without merit. The factual allegations in the affidavits of Lanier (Vivian Archie

perjured herself and used drugs; victims were paid by the government) and Judy Forsythe (threats by FBI agent Bill Castleberry to prevent her from testifying) are essentially the same as those Lanier had previously raised in this Court and the district court, and thus they were dismissed with prejudice. See Brief of David W. Lanier, Pro Se, pending rehearing en banc, No. 93-5608 (Docket Entry dated 3/6/95) at 39-42; Motion for a New Trial Based on Newly Discovered Evidence, filed 9/27/93 (R. 185) at 2-5; see generally pages 15-19, supra.

CONCLUSION

The judgment of the district court denying defendant's motion for a new trial should be affirmed.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief for the United States as Appellee by first class mail on the following counsel of record:

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This 12th day of October, 1999.

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