No. 04-5526

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID W. LANIER,

Petitioner-Appellant

v.

CAMERON LINDSAY,

Respondent-Appellee

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

BRIEF FOR RESPONDENT-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Respondent believes that this appeal should be referred to a panel of this Court, pursuant to Federal Rule of Appellate Procedure 34(a), and Rule 34(j)(1) of the Rules of Sixth Circuit, for affirmance on the briefs without oral argument.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over petitioner Lanier's application for a writ of habeas corpus under 28 U.S.C. 2241. This Court has appellate jurisdiction over the district court's dismissal of the application because it is a final decision appealable under 28 U.S.C. 1291. The judgment appealed from was entered on April 20, 2004, and a timely notice of appeal was filed on April 26, 2004.

STATEMENT OF THE ISSUE

Whether petitioner was entitled to file an application for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, because his remedy by motion under 28 U.S.C. 2255 is "inadequate or ineffective to test the legality of his detention."

STATEMENT OF THE CASE

On February 26, 2004, David W. Lanier, an inmate in the Federal Correctional Institution in Lompoc, California, filed a petition under 28 U.S.C. 2241 in the United States District Court for the Central District of California. In that petition, Lanier sought to challenge his conviction based upon his "actual innocence" of crimes for which he was convicted in 1992. 4/6/04 Order at 1-2 (attached as Addendum A).

The district court for the Central District of California issued an order on March 3, 2004, construing the petition as a motion pursuant to 28 U.S.C. 2255 and transferring it to the United States District Court for the Western District of Tennessee, where it was docketed on March 19, 2004. 4/6/04 Order at 1.

On April 6, 2004, the district court (W.D. Tenn.) determined that this Court's precedent precluded the recharacterization of Lanier's Section 2241 petition as a motion under Section 2255. 4/6/04 Order at 6-7 (citing, *inter alia*, *Anderson* v. *Warden, FCI Texarkana*, 48 Fed. Appx. 118, 120 (6th Cir. 2002), and *In re Shelton*, 295 F.3d 620 (6th Cir. 2002) (per curiam)). The court then dismissed Lanier's Section 2241 petition on the grounds that he had not demonstrated entitlement to invoke Section 2241. 4/6/04 Order at 10.[1] This appeal followed.

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[1] The district court also certified, pursuant to Federal Rule of Appellate Procedure 24(a)(3)(A), that any appeal from its order would not be taken in good faith, and thus found that Lanier was not entitled to proceed in forma pauperis. 4/6/04 Order at 10-12. Lanier states, however, that he does not seek to proceed in forma pauperis and has paid the filing fee in this Court. Br. 7. Accordingly, that portion of the district

(continued...)

STATEMENT OF THE FACTS

1. Factual And Procedural Background

On December 18, 1992, petitioner, a former Chancery Court Judge for two counties in rural Tennessee, was convicted on five misdemeanor counts and two felony counts of violating 18 U.S.C. 242 (deprivation of constitutional rights under color of law) for sexually assaulting several women who worked in the court system and one woman who was a party to a case before him. He was sentenced to 25 years' imprisonment.

On August 31, 1994, a panel of this Court affirmed Lanier's convictions and sentence. *United States* v. *Lanier*, 33 F.3d 639 (6th Cir.). The Court subsequently granted rehearing en banc and vacated the panel's decision. *United States* v. *Lanier*, 43 F.3d 1033 (6th Cir. 1995) (en banc). Following oral argument before the en banc court, the Court ordered Lanier released on his own recognizance. 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, 1393 (6th Cir.) (en banc) (holding that criminal liability may

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[1](...continued)
court's judgment is not at issue here.

The district court further fined Lanier $500 for violating its November 26, 2001, order, which prohibits him from filing further documents in this case attempting to attack his conviction or sentence without obtaining this Court's permission. See 28 U.S.C. 2244(b)(3)(A), 2255. 4/6/04 Order at 14. Lanier claims (Br. 7) that he did not have access to the entire November 26, 2001, order when he filed his Section 2241 motion in California. The United States takes no position concerning the propriety of the fine.

be imposed under Section 242 only when the constitutional right said to have been violated had previously been recognized in a decision of the Supreme Court, and when that right had previously been held to apply in a factual situation fundamentally similar to the case at bar).

The Supreme Court granted the United States' petition for a writ of certiorari, and issued a decision on March 31, 1997, holding that the en banc court of appeals had employed an incorrect standard for determining whether Lanier's conduct violated Section 242. *United States* v. *Lanier*, 520 U.S. 259, 270-272. The Court accordingly vacated the en banc judgment and remanded the case for a determination under the proper standard. *Id.* at 272.

On remand, the en banc court vacated its prior decision, restored the case to the docket as a pending appeal, ordered further briefing, and instructed the clerk to schedule the case for oral argument. *United States* v. *Lanier*, 114 F.3d 84 (6th Cir. 1997) (en banc). The en banc court also granted the motion of the United States to vacate its June 15, 1995, order releasing petitioner from custody pending resolution of his appeal, *United States* v. *Lanier*, 120 F.3d 640 (6th Cir. 1997) (en banc), and directed Lanier to surrender to the United States Marshal by August 22, 1997.

Instead of surrendering as directed, petitioner fled to Mexico. The district court issued a warrant for his arrest, and ultimately, this Court dismissed his appeal with prejudice based on the fugitive-disentitlement doctrine. *United States* v. *Lanier*, 123 F.3d 945, 946 (6th Cir. 1997) (en banc), cert. denied, 523 U.S. 1011 (1998). Because Lanier failed to surrender by the date prescribed by the district

court, the court issued an order denying all of his pending motions, including a motion under Federal Rule of Criminal Procedure 33 for a new trial based on newly discovered evidence. After Lanier was taken into custody in Mexico and returned to the United States, he filed a second Rule 33 motion. That motion was denied by the district court, which concluded that all of Lanier's arguments had already been made and either denied by that court or dismissed by this Court. See *United States* v. *Lanier*, No. 99-5983, 2000 WL 1720917, at *2 (6th Cir. Nov. 6, 2000), cert. denied, 533 U.S. 904, reh'g denied, 533 U.S. 970 (2001) (attached as Addendum B). This Court affirmed, holding that Lanier had "failed to carry his burden * * * of demonstrating that the evidence in these 'new' affidavits could not have been discovered earlier with due diligence, is material and more than merely impeaching, and is likely to lead to an acquittal." *Id.*, at *5.

In the meantime, Lanier had filed a motion under 28 U.S.C. 2255, which the district court denied and for which it denied a certificate of appealability, pursuant to 28 U.S.C. 2253(c). *Lanier* v. *United States*, No. 98 Civ. 02746 (W.D. Tenn.). This Court also denied a certificate of appealability. *Lanier* v. *United States*, No. 99-5893 (6th Cir.) (2/10/00 Order). On November 21, 2000, Lanier filed a motion in this Court seeking leave, pursuant to 28 U.S.C. 2244(b)(3), to file a second or successive motion pursuant to 28 U.S.C. 2255. This Court denied the motion. *In re Lanier*, No. 00-6471 (6th Cir.) (10/29/01 Order).

On January 14, 2001, Lanier filed a motion pursuant to 18 U.S.C. 3582(c)(2), seeking reduction of his sentence on the grounds that, after sentence was imposed,

a guideline used to determine the sentencing range was amended to lower the sentencing range. The motion also raised issues concerning the constitutionality of his sentence under *Apprendi* v. *United States*, 530 U.S. 466 (2000). The district court denied Lanier's motion for reduction of sentence under Section 3582(c)(2) and refused to consider certain arguments made in support of that motion because such arguments "were either waived because the defendant forfeited his direct appeal or were previously determined adversely to the defendant in his Section 2255 motion." *United States* v. *Lanier*, 173 F. Supp. 2d 779, 784 (W.D. Tenn. 2001), aff'd, 41 Fed. Appx. 820 (6th Cir. 2002). The court also held that it was precluded from reaching the *Apprendi* argument because this Court had recently refused Lanier permission to file a second or successive Section 2255 motion raising that issue and had stated that the issue could not be raised in the district court. *Ibid*.

The district court's November 26, 2001, order also placed restrictions "on Lanier's filing further motions to vacate, habeas petitions related to his conviction, or motions seeking a reduction in his sentence." 173 F. Supp. 2d at 785 (quoted in the 04/06/04 Order at 12-13). Generally, the court ordered Lanier not to "file [any] further documents in this case," and directed the clerk not to accept "any other documents for filing in this action," and to return to Lanier any further documents submitted in this case. *Ibid*. The court stated that Lanier "must first seek authorization to file a successive application by filing his motion with the Sixth Circuit Court of Appeals." *Ibid*. Second, the court ordered Lanier not to file any

"further motions to vacate in this district attacking his conviction" or "the imposition, as opposed to the execution, of his sentence." *Ibid*.

Finally, the court ordered the clerk "not to file, open on th[e] Court's docket, assign a new docket number, or assign to a judge, any further case submitted by [Lanier] unless specifically directed to do so by a district judge or magistrate judge" of the Western District of Tennessee. 173 F. Supp. 2d at 785. The court stated that sanctions may be imposed, including a monetary fine, if Lanier submits any documents that do not comply with the court's order. *Ibid.*

On August 8, 2002, this Court affirmed the district court's order, pursuant to Rule 34(j)(2)(C) of the Rules of this Court. *In re Lanier*, 41 Fed. Appx. 820 (6th Cir.)[2]

2. The Decision Below

The district court found that Lanier's Section 2241 petition sought "to challenge his conviction, once again, on the basis of his purported actual innocence," and to raise again the argument rejected by this Court in 2002 that he is entitled to a reduction in his sentence pursuant to Amendment 591 of the Federal Sentencing Guidelines. 4/6/04 Order at 6. The court held that Lanier may only properly raise those arguments pursuant to 28 U.S.C. 2255, and cannot obtain habeas corpus relief unless he carries the burden of proving that "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his

[2] As the district court noted, Lanier does not appear to have sought appellate review of the imposition of restrictions on his filing privileges. 4/6/04 Order at 6 n.5.

detention." 4/6/04 Order at 8 (quoting the so-called "savings clause" found in the fifth paragraph of 28 U.S.C. 2255). The court found that "Lanier clearly does not qualify for habeas relief under any legitimate interpretation of the statute," because he did not argue that he "is entitled to the benefit of a retroactively applicable Supreme Court decision," but rather merely asserted in the petition "a repetition of claims that have previously been asserted and rejected." 4/6/04 Order at 9-10.

STANDARD OF REVIEW

This Court reviews *de novo* a district court judgment dismissing a habeas corpus petition filed under 28 U.S.C. 2241. *Charles* v. *Chandler*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam).

SUMMARY OF ARGUMENT

The district court properly held that Lanier failed to carry his burden of demonstrating that he is entitled to challenge his conviction and sentence pursuant to 28 U.S.C. 2241. That burden is to show that his remedy under 28 U.S.C. 2255 is "inadequate or ineffective to test the legality of his detention," *Charles* v. *Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam), and can be met only by showing that an intervening change in the law establishes his actual innocence. *Martin* v. *Perez*, 319 F.3d 799, 804 (6th Cir. 2003). As the district court correctly found, Lanier's Section 2241 petition raises solely issues that have previously been asserted and rejected in connection with prior post-conviction filings, and no intervening change of law establishes Lanier's actual innocence of the crimes for which he was convicted. Accordingly, the judgment below should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED LANIER'S APPLICATION FOR HABEAS CORPUS, PURSUANT TO 28 U.S.C. 2241, BECAUSE HE FAILED TO DEMONSTRATE THAT HE WAS ELIGIBLE TO INVOKE THAT REMEDY

The circumstances under which a federal prisoner may challenge his conviction and sentence under Section 2241, rather than Section 2255, are extremely limited. "[A] federal prisoner may bring a claim challenging his conviction or imposition of sentence under [Section] 2241 if it appears that the remedy afforded under [Section] 2255 is 'inadequate or ineffective to test the legality of his detention.'" *Charles* v. *Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam). Critically, a prisoner does *not* demonstrate that the Section 2255 remedy is inadequate or ineffective (i) "because [Section] 2255 relief has already been denied," (ii) "because the petitioner is procedurally barred from pursuing relief under [Section] 2255," or (iii) "because the petitioner has been denied permission to file a second or successive motion to vacate." *Ibid.* Rather, the Section 2255 remedy is inadequate or ineffective *only* if a prisoner can show that an intervening change in the law establishes his actual innocence (meaning factual innocence rather than mere legal insufficiency). *Martin* v. *Perez*, 319 F.3d 799, 804 (6th Cir. 2003). Moreover, it is the petitioner who bears the burden of establishing that the remedy provided under Section 2255 is inadequate or ineffective. *Charles*, 180 F.3d at 756.

Lanier does not come close to satisfying this high standard. As the district

court correctly found, the host of claims that Lanier raises in his lengthy brief are not new, but rather, "have previously been asserted and rejected." See 4/6/04 Order at 10. See also 4/6/04 Order at 6, 9. Indeed, in his petition, Lanier himself notes (Br. 9-10) that there is only one claim that he has never made to any court: that his defense counsel did not use an allegedly conflicting statement in the deposition of one of his victims in cross-examining her. Br. 6-7. Yet, several pages later, he admits that this issue previously was addressed at the time of sentencing. Br. 13.

Nor has Lanier shown that an intervening change of law establishes his actual innocence. To the extent that Lanier may be attempting to add such a claim under *United States* v. *Booker*, 125 S. Ct. 738 (2005) (see Br. 22-23), this effort is unavailing. This Court has held that *Booker* does not apply retroactively to cases that are already final on direct review. *Humphress* v. *United States*, 398 F.3d 855, 857, 860-863 (2005) (discussing *Teague* v. *Lane*, 489 U.S. 288 (1989), and *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2525-2526 (2004), which held, under analogous circumstances, that *Ring* v. *Arizona*, 536 U.S. 584 (2002), announced a new procedural rule that does not apply retroactively); see also *Goode* v. *United States*, 305 F.3d 378 (6th Cir.) (re *Apprendi*), cert. denied, 537 U.S. 1096 (2002).[3]

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[3] Lanier would also be barred from raising a *Booker* claim as a basis for a second or successive motion under Section 2255 because he could not show that *Booker* establishes 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(2). See *Tyler* v. *Cain*, 533 U.S. 656 (2001) (virtually identical provision governing collateral attacks by state prisoners, 28 U.S.C. 2244(b)(2)(A), means the Supreme Court itself must have issued a decision making the new rule retroactive to cases on collateral

(continued...)

Second, and more importantly, *Booker* does not address whether a defendant is actually innocent of a crime; rather, it is concerned only with the punishment a defendant should receive for the criminal act for which he has been convicted. Cf. *Bannerman* v. *Snyder*, 325 F.3d 722, 724 (6th Cir. 2003) (holding that a "challenge to a sentence based on *Apprendi* cannot be the basis for an actual innocence claim").

Thus, as the district court found, Lanier does not argue that he "is entitled to the benefit of a retroactively applicable Supreme Court decision," but rather, merely repeats "claims that have previously been asserted and rejected." 4/6/04 Order at 9-10. Accordingly, the district court was manifestly correct when it held that "Lanier clearly does not qualify for habeas relief under any legitimate interpretation of the statute." 4/6/04 Order at 9-10. Lanier cannot, therefore, use "[Section] 2241 (via [Section] 2255's 'savings clause') as a way of circumventing [Section] 2255's restrictions on the filing of second or successive habeas petitions." *Charles*, 180 F.3d at 757.

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[3](...continued)
review before a court of appeals may authorize the filing of a successive collateral attack).

CONCLUSION

For the foregoing reasons, the district court's order dismissing Lanier's Section 2241 petition should be referred to a panel of this Court, pursuant to Federal Rule of Appellate Procedure 34(a), and Rule 34(j)(1) of the Rules of Sixth Circuit, and affirmed on the papers without oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2005, I served two copies of the foregoing BRIEF FOR RESPONDENT-APPELLEE by first-class mail, postage prepaid, on the pro se defendant-appellant at the following address:

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