2005 WL 233799 (N.D.Tex.)
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United States District Court,
N.D. Texas, Fort Worth Division.
Henry Jen LINDSEY, Petitioner,
v.
Cole JETER, Warden, FMC-Fort Worth, Respondent.
No. Civ.A.4:04-CV-652-Y.
Jan. 31, 2005.

Henry Jen Lindsey, Fort Worth, TX, pro se.
Angie L. Henson, US Attorney's Office, Fort Worth, TX, for Respondent.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

BLEIL, Magistrate J.

***1** This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The findings, conclusions, and recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a federal prisoner pursuant to 28 U.S.C. § 2241.

B. PARTIES

Petitioner Henry Jen Lindsey, Reg. No. 08239-002, is a federal prisoner incarcerated in FMC-Fort Worth in Fort Worth, Texas.

Respondent Cole Jeter is Warden of FMC-Fort Worth.

C. PROCEDURAL HISTORY

Apparently, in the Middle District of Alabama, Case No. CR-90-177, Lindsey was convicted of various drug-related offenses in 1990 and is serving a 360- month sentence. (Petition at 1-2.) He has filed one or more motions to vacate his convictions and/or sentence under 28 U.S.C. § 2255 in that court. *See* PACER, U.S. Party/Case Index, Civil Name Search Results for Lindsey, Henry Jen. Lindsey filed his petition under § 2241 in this division, where he is currently serving his sentence.

D. DISCUSSION

By the instant habeas corpus action, Lindsey challenges his sentence on the basis of the Supreme Court's decisions in *Blakely v. Washington,* --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker,* --- U.S. ----, ----, 125 S.Ct. 738, 756, --- L.Ed.2d ----, ---- (2004) (reaffirming holding in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"). Specifically, he contends his 360-month sentence was unconstitutionally enhanced under the federal sentencing guidelines based on additional fact-finding by the trial court. (Petition at 2-3.)

The threshold question is whether Lindsey's claim is properly raised in a § 2241 habeas petition. Typically, § 2241 is used to challenge the manner in which a sentence is executed. *See* *Warren v. Miles,* 230 F.3d 688, 694 (5th Cir.2000). Section 2255, on the other hand, is the primary means under which a federal prisoner may collaterally attack the legality of his conviction or sentence. *See* *Cox v. Warden, Fed. Det. Ctr.,* 911 F.2d 1111, 1113 (5th Cir.1990). However, § 2241 may be used by a federal prisoner to challenge the legality of his conviction or sentence if he can satisfy the mandates of the so-called § 2255 "savings clause." *See* *Reyes-Requena v. United States,* 243 F.3d 893, 901 (5th Cir.2001). Section 2255 provides that a prisoner may file a writ of habeas corpus if a remedy by § 2255 motion is "inadequate or ineffective to test the legality of his detention." *See* 28 U.S.C. § 2255. To establish that a § 2255 motion is inadequate or ineffective, the prisoner must show that: (1) his claim is based on a retroactively applicable Supreme Court decision which establishes that he may have been convicted of a nonexistent offense, and (2) his claim was foreclosed by circuit law at the time when the claim should have been raised in his trial, appeal, or first § 2255 motion. *Reyes-Requena,* 243 F.3d at 904. [FN1] The petitioner bears the burden of demonstrating that the § 2255

remedy is inadequate or ineffective. *Jeffers v. Chandler,* 253 F.3d 827, 830 (5th Cir.2001); *Pack v. Yusuff,* 218 F.3d 448, 452 (5th Cir.2000). A prior unsuccessful § 2255 motion, or the inability to meet the statute's second or successive requirement, does not make § 2255 inadequate or ineffective. *Jeffers,* 253 F.3d at 830; *Toliver v. Dobre,* 211 F.3d 876, 878 (5th Cir.2000).

FN1. Lindsey contends it is erroneous for this court to rely on *Reyes-Requena,* a judicially created precedent, in deciding the issue. (Pet'r Reply at 2-3.) A federal district court, however, is bound by the precedent set forth by the higher courts. *See Gacy v. Welborn,* 994 F.2d 305, 309 (7th Cir.1993).

***2** Lindsey has not provided any valid reason why the § 2255's remedy is either inadequate or ineffective. He contends that he is entitled to seek § 2241 relief under the § 2255 savings clause based on the subsequent change in the law as articulated in *Blakely* and *Booker,* and made retroactive to his case, because he is not "guilty" of the sentence imposed. (Pet'r Reply at 3-7.) Although the Supreme Court's decisions in *Blakely* and *Booker* had not yet been decided at the time of Lindsey's trial, appeal, and/or prior § 2255 motions, Lindsey's claim does not implicate his conviction for a substantive offense. Nor has the Supreme Court expressly declared *Blakely* or *Booker* to be retroactive to cases on collateral review. *See Booker,* --- U.S. at ----, 125 S.Ct. at 769 (Op. by Breyer, J.) (expressly extending holding "to all cases on direct review"); *Schriro v. Summerlin,* --- U.S. ----, ----, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004) (holding *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which extended application of *Apprendi* to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review). The fact that Lindsey may be precluded from raising his claim in a second or successive § 2255 motion does not make that remedy "inadequate or ineffective." *See Jeffers,* 253 F.3d at 830. Under these circumstances, Lindsey is precluded from challenging the legality of his sentence under § 2241.

II. RECOMMENDATION

Because Lindsey has not made the showing required to invoke the savings clause of § 2255 as to the claim presented in this habeas corpus proceeding, it is recommended that Lindsey's petition for writ of habeas corpus under § 2241 be denied.

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation until February 21, 2005. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(B)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir.1996) (en banc op. on reh'g); *Carter v. Collins,* 918 F.2d 1198, 1203 (5th Cir.1990).

IV. ORDER

***3** Under 28 U.S.C. § 636, it is ORDERED that each party is granted until February 21, 2005, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

N.D.Tex.,2005.

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