

MAR 5 1998

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PATRICK FISHER
Clerk

RICHARD A. LUMPKIN,

Plaintiff - Appellant,

v.

JOEL H. KNOWLES,

Defendant - Appellee.

No. 97-1385

(D. Colorado)

(D.C. No. 97-X-33)

ORDER AND JUDGMENT*

Before **ANDERSON, McKAY, and LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Richard Allen Lumpkin appeals the district court's order denial of his petition pursuant to Fed. R. Civ. P. 27(a)(1) to preserve an audio recording that is

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

relevant to an ineffective assistance of counsel claim that Lumpkin plans to assert in a future 28 U.S.C. § 2255 motion. Lumpkin contends that the district court erred in assuming that he should or could have raised any ineffective assistance issue in his ongoing direct appeal in the Sixth Circuit.

In his answer brief, the appellee concedes that the district court erred in its analysis, and he has cited us to United States v. Frazier, 936 F.2d 262, 267 (6th Cir. 1991), for the Sixth Circuit's rule that an ineffective assistance of counsel claim will not be considered on direct appeal. Noting that he has no objection to preserving the evidence under appropriate conditions, the appellee has requested a remand in the interest of a just resolution of the matter.

Accordingly, we VACATE the district court's denial of Lumpkin's motion, and REMAND for further consideration.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge