IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-00906-BNB

ANDRE J. TWITTY, also known as
ANDRE TWITTY, also known as
A. J. TWITTY,

Applicant,

v.

RONNIE WILEY,

Respondent.

ORDER GRANTING LEAVE TO PROCEED PURSUANT TO 28 U.S.C. § 1915,
DENYING MOTION TO RECUSE IN PART, AND
DIRECTING APPLICANT TO SHOW CAUSE

Applicant, Andre J. Twitty, also known as Andre Twitty and as A. J. Twitty, is a prisoner in the custody of the United States Bureau of Prisons who currently is incarcerated at the United States Penitentiary, Administrative Maximum, in Florence, Colorado. Mr. Twitty filed a ***pro se*** application for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1994) and a prisoner's motion and affidavit for leave to proceed ***in forma pauperis*** pursuant to 28 U.S.C. § 1915 (2006). He is granted leave to proceed pursuant to § 1915.

Mr. Twitty also filed a motion titled "Motion for Writ of Habeas Corpus. Judgment Void, the Recusal of Judges Weinshienk, Boland, Take Judicial Notice of the Law, Records, Exhibit 5 Which Support Prove Petitioner's Actual Innocence Brief in Support." To the extent he seeks my recusal, the motion is denied.

Mr. Twitty fails to allege why he believes I should recuse. Apparently, he believes I am biased against him because he has attached to the recusal motion an order filed on December 31, 2008, in ***Twitty v. Wiley***, No. 08-cv-02823 (D. Colo. Feb. 13, 2009), ***appeal filed***, No. 09-1007 (10th Cir. Mar. 12, 2009), in which I granted him leave to proceed pursuant to 28 U.S.C. § 1915 and directed him to show cause why his habeas corpus application should not be denied and the action dismissed because he had an adequate and effective remedy pursuant to 28 U.S.C. § 2255 in the United States District Court for the Northern District of Georgia (Northern District of Georgia).

Title 28 U.S.C. § 144 provides a procedure whereby a party may request the judge before whom a matter is pending to recuse based upon personal bias or prejudice either against the moving party or in favor of any adverse party. Section 144 requires the moving party to submit a timely and sufficient affidavit demonstrating personal bias and prejudice. ***See Green v. Branson***, 108 F.3d 1296, 1305 (10th Cir. 1997). "The affidavit must state with required particularity the identifying facts of time, place, persons, occasion, and circumstances." ***Hinman v. Rogers***, 831 F.2d 937, 939 (10th Cir. 1987). Although a court must accept the facts alleged in the supporting affidavit under § 144 as true, the affidavit is construed strictly against the party seeking recusal. ***See Glass v. Pfeffer***, 849 F.2d 1261, 1267 (10th Cir. 1988). "[T]here is a substantial burden on the moving party to demonstrate that the judge is not impartial." ***United States v. Burger***, 964 F.2d 1065, 1070 (10th Cir. 1992).

Title 28 U.S.C. § 455(a) provides that a judge "shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned." The goal of this

provision is to avoid even the appearance of partiality. ***See Liljeberg v. Health Servs. Acquisition Corp.***, 486 U.S. 847, 860 (1988). Pursuant to § 455, a court is not required to accept all factual allegations as true "and the test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." ***Glass***, 849 F.2d at 1268 (internal quotation marks omitted). The standard is completely objective and the inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. ***See United States v. Cooley***, 1 F.3d 985, 993 (10th Cir. 1993).

Mr. Twitty's suggestion that I am biased against him because I ordered him to show cause in a prior habeas corpus case is not sufficient to demonstrate that disqualification is appropriate pursuant to either 28 U.S.C. § 144 or § 455(a). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994). Therefore, to the extent he seeks my recusal, the motion to recuse is denied.

I must liberally construe the habeas corpus application because Mr. Twitty is representing himself. ***See Haines v. Kerner***, 404 U.S. 519, 520-21 (1972); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991). However, I should not be the ***pro se*** litigant's advocate. ***See Hall***, 935 F.2d at 1110. For the reasons stated below, Mr. Twitty will be ordered to show cause why the application should not be denied.

A review of this Court's docketing records reveals that this is the sixth § 2241 habeas corpus application that Mr. Twitty has filed in this Court challenging his conviction in the Northern District of Georgia. "[T]he court is permitted to take judicial

notice of its own files and records, as well as facts which are a matter of public record." ***Van Woudenberg ex rel. Foor v. Gibson***, 211 F.3d 560, 568 (10th Cir.2000), ***abrogated on other grounds by McGregor v. Gibson***, 248 F.3d 946, 955 (10th Cir. 2001). Therefore, some of the information in this order is taken from prior § 2241 actions Mr. Twitty has initiated in this Court.

In 1999, Mr. Twitty was convicted, following a jury trial in the Northern District of Georgia, in criminal case number 98-00374-CR-1-1, of wilfully communicating a bomb threat via the telephone and threatening federal law enforcement officers and their immediate family members. He was sentenced to 180 months in prison followed by three years of supervised release. On direct appeal, the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) affirmed both his conviction and sentence. ***See United States v. Twitty***, No. 99-12706, 31 Fed. Appx. 934 (11th Cir. Jan. 8, 2002) (unpublished), ***cert denied***, No. 01-9256, 535 U.S. 1029 (Apr. 22, 2002). In 2002, the Northern District of Georgia denied his motion pursuant to 28 U.S.C. § 2255 (2006) to vacate, set aside, or correct sentence. On appeal, the Eleventh Circuit denied a certificate of appealability. ***See Twitty v. United States***, No. 04-12805 (11th Cir. Apr. 25, 2005) (unpublished order).

In 2006, in a prior § 2241 action initiated in this Court, Mr. Twitty attacked his Northern District of Georgia conviction and sentence. ***See Twitty v. Wiley***, No. 06-cv-00177-ZLW (D. Colo. Mar. 29, 2006), ***aff'd***, No. 06-1234 (10th Cir. July 17, 2006), ***cert. denied***, No. 06-6290, 549 U.S. 967 (Oct. 10, 2006). In 2007, he again attacked his conviction and sentence. ***See Twitty v. Wiley***, No. 07-cv-02441-ZLW (D. Colo. Mar. 3,

2008), ***appeal dismissed***, No. 08-1118 (10th Cir. June 11, 2008), ***appeal dismissed***, No. 08-1277 (10th Cir. Oct. 29, 2008). In 2008, he again attacked his conviction and sentence. ***See Twitty v. Wiley***, No. 08-cv-02119-ZLW (D. Colo. Nov. 17, 2008), ***appeal filed***, No. 09-1008 (10th Cir. Dec. 31, 2008); ***Twitty v. Wiley***, No. 08-cv-02717-ZLW (D. Colo. Mar. 25, 2009); and ***Twitty v. Wiley***, No. 08-cv-02823-BNB (D. Colo. Feb. 13, 2009), ***appeal filed***, No. 09-1007 (10th Cir. Mar. 12, 2009). In the instant action Mr. Twitty once again attacks his conviction and sentence.

The purposes of an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a motion pursuant to 28 U.S.C. § 2255 are distinct and well established. "A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined." ***Bradshaw v. Story***, 86 F.3d 164, 166 (10th Cir. 1996). "A 28 U.S.C. § 2255 petition attacks the legality of detention . . . and must be filed in the district that imposed the sentence." ***Id.*** (citation omitted). "The purpose of section 2255 is to provide a method of determining the validity of a judgment by the court which imposed the sentence, rather than by the court in the district where the prisoner is confined." ***Johnson v. Taylor***, 347 F.2d 365, 366 (10th Cir. 1965) (per curiam). A habeas corpus application pursuant to 28 U.S.C. § 2241 "is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing court under § 2255." ***Williams v. United States***, 323 F.2d 672, 673 (10th Cir. 1963) (per curiam). "The exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255." ***Johnson***, 347 F.2d at 366.

Courts have found the remedy provided in 28 U.S.C. § 2255 to be inadequate or ineffective only in extremely limited circumstances. ***See, e.g., Spaulding v. Taylor***, 336 F.2d 192, 193 (10th Cir. 1964) (§ 2255 remedy is ineffective when the sentencing court is abolished); ***Stirone v. Markley***, 345 F.2d 473, 475 (7th Cir. 1965) (suggesting that § 2255 remedy might be ineffective when the sentencing court refuses to consider the § 2255 petition altogether or when the court inordinately delays consideration of the petition) (dictum); ***Cohen v. United States***, 593 F.2d 766, 771 n.12 (6th Cir. 1979) (noting that § 2255 remedy is ineffective when petitioner is sentenced by three courts, none of which could grant complete relief) (dictum).

The fact that Mr. Twitty previously was denied relief in the sentencing court pursuant to 28 U.S.C. § 2255 does not mean that the remedy provided in § 2255 is inadequate or ineffective. ***See Williams***, 323 F.2d at 673. Furthermore, the fact that Mr. Twitty may be barred from filing a second or successive § 2255 motion also does not mean that the remedy available pursuant to § 2255 is inadequate or ineffective. ***See Caravalho v. Pugh***, 177 F.3d 1177, 1179 (10th Cir. 1999). Therefore, Mr. Twitty must show cause why the application should not be denied because he has an adequate and effective remedy pursuant to § 2255 in the Northern District of Georgia. Accordingly, it is

ORDERED that the prisoner's motion and affidavit for leave to proceed ***in forma pauperis*** pursuant to 28 U.S.C. § 1915 is granted. It is

FURTHER ORDERED that, to the extent Mr. Twitty seeks my recusal through the motion he has filed titled "Motion for Writ of Habeas Corpus. Judgment Void, the

Recusal of Judges Weinshienk, Boland, Take Judicial Notice of the Law, Records, Exhibit 5 Which Support Prove Petitioner's Actual Innocence Brief in Support," it is denied. It is

FURTHER ORDERED that Mr. Twitty is ordered to show cause **within thirty (30) days from the date of this order** why the habeas corpus application should not be denied and the action dismissed because he has an adequate and effective remedy pursuant to 28 U.S.C. § 2255 in the United States District Court for the Northern District of Georgia. It is

FURTHER ORDERED that if Mr. Twitty fails to show cause to my satisfaction within the time allowed, the application will be denied and the action will be dismissed without further notice. It is

FURTHER ORDERED that process shall not issue until further order of the Court.

DATED May 8, 2009, at Denver, Colorado.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 09-cv-00906-BNB

Andre J. Twitty
Reg. No. 18558-018
ADX – Florence
PO Box 8500
Florence, CO 81226-8500

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 5/8/09

GREGORY C. LANGHAM, CLERK

By:_____
Deputy Clerk