IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

BRIAN KEITH ALFORD,

Plaintiff, : Case No. 3:10-cv-424

Chief Judge Susan J. Dlott
-vs- Magistrate Judge Michael R. Merz

:

WALTER HERBERT RICE,
CHIEF JUDGE, et al.,

Defendants.

SUPPLEMENTAL MEMORANDUM OPINION ON MOTION TO STAY; DECISION AND ORDER DENYING MOTION TO RECUSE

Objections

This case is before the Court on Plaintiff's Objection and Request for Recusal (Doc. No. 16). The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

Although Plaintiff styles his filing as "Objections to Magistrate's Recommendation to Deny Stay," the Magistrate Judge did not make a recommendation, but rather entered an Order denying the stay. A motion to stay is a non-dispositive pretrial motion on which a magistrate judge is authorized to rule, rather than making a recommendation. 28 U.S.C. § 636(b). Plaintiff certainly has the right to appeal that decision, but the order remains in effect pending a district court ruling.

Plaintiff asserts his § 2241 case in the Northern District of Ohio contains seeks to obtain his release from his conviction in this Court on the basis of evidence of actual innocence which is newly discovered (Motion, Doc. No. 14). Plaintiff has never furnished this Court with a copy of the § 2241 Petition, so the Court cannot evaluate directly the evidence of actual innocence or whether it

is in fact newly-discovered. However, Plaintiff says he is not seeking in that case to "set aside" his conviction in this Court and that his claims there have nothing to do with his § 2255 Motion is this Court. The Magistrate Judge is unaware of any authority under which one district court could ignore the limitations on second or successive § 2255 motions and grant habeas corpus relief under § 2241 on grounds of "actual innocence" to a person whose conviction has been affirmed on direct appeal. And if there were such authority and Plaintiff were released without having his conviction in this Court set aside, the bar of *Heck v. Humphrey*, 512 U.S. 477, 486-487(1994), would still exist.

Request for Recusal

Plaintiff "in addition request[s] that Chief Judge Susan J. Dlott recuse Magistrate Merz for bias, which can be more fully evidenced by his erroneous recommendations in not only the instant action, but in Plaintiff's prior § 2255 (see attached Exhibit A)." The attached Exhibit consists of copies of the Magistrate Judge's Report and Recommendations on the prior § 2255 Motion (Case No. 3:00-cr-065) and Mr. Alford's Objections to that Report.

In federal court requests to recuse are directed in the first instance to the judge sought to be removed. Motions to recuse under 28 U.S.C. §455 are to be decided in the first instance by the judicial officer sought to be disqualified. *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1988); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) *reh'g denied*, 869 F.2d 116; *MacNeil v. Americold Corp.*, 735 F. Supp. 32, 36 (D. Mass. 1990)(specifically applying rule to United States magistrate judges). Of course, a referring district judge has authority to terminate a reference to a magistrate judge with or without cause, but there is no basis for recusal for bias in this case.

A disqualifying prejudice or bias must ordinarily be personal or extrajudicial. *United States*

v. Sammons, 918 F.2d 592 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1250 (6th Cir. 1989). That is, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp*., 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L. Ed. 2d 778 (1966); *see also Youn v. Track, Inc.*, 324 F.3d 409 (6th Cir. 2003)*;Bradley v. Milliken*, 620 F.2d 1143 (6th Cir. 1980); *Woodruff v. Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979). The Supreme Court has written:

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias and prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for 'bias and prejudice' recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. ... [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). ... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Liteky v. United States, 510 U.S. 540 (1994); *see also Alley v. Bell*, 307 F. 3d 380, 388 (6th Cir. 2002)(quoting the deep-seated favoritism or antagonism standard). The Court went on to hold:

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration — even a stern and short-tempered judge's ordinary efforts at courtroom administration — remain immune.

Id.

The only evidence on which Mr. Alford relies is my allegedly erroneous recommendations in this case and in his prior case. He does not allege nor does there exist any extra-judicial bias, nor could he credibly do so since he and I have no acquaintance whatsoever beyond his involvement in

this and his prior criminal case in this Court. Whether or not the recommendations in this case are erroneous remains to be decided by the Court. In the prior case District Judge Rice adopted the Report and Recommendations in their entirety over Mr. Alford's Objections and denied him a certificate of appealability. In addition, the Sixth Circuit Court of Appeals found Judge Rice's conclusions were not debatable among reasonable jurists and denied him the privilege of appealing. *Alford v. United States*, Case No. 08-3186 (6th Cir. Sep. 3, 2008)(unreported). Thus Plaintiff's assertion that the two Reports and Recommendations in question are erroneous and demonstrate bias are Plaintiff's personal unexplained conclusory assertions. I therefore decline to recuse myself in this case.

January 8, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge