

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 17-13334-J

JOSEPH WITCHARD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-13335-J

JOSEPH WITCHARD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

**Appeals from the United States District Court
for the Middle District of Florida**

ORDER:

Joseph Witchard is a federal prisoner serving a total 331-month sentence for mail fraud (Counts 1 through 9); filing false claims (Counts 10 through 15); theft of government property (Counts 16 through 21); and aggravated identity theft (Counts 22 through 30). He received a 115-month sentence for each of Counts 1 through 21, to run concurrently with one another; a

2-year sentence for each of Counts 22 through 30 (for a total of 216 months' imprisonment) to run consecutively from each other and the sentence imposed for Counts 1 through 21. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in the appeal of his 28 U.S.C. § 2255 proceedings.

As background, on April 30, 2014, an indictment was entered against Witchard by a grand jury. The indictment was signed by a foreperson. The government then moved to seal the indictment and all related documents, until Witchard was arrested. The government further requested that the district court allow the U.S. Marshals Service to release certified copies of the arrest warrant to the case agent and law enforcement officers. A magistrate judge granted the motion to seal the indictment and related documents. On May 1, 2014, the district court then entered a copy of the arrest warrant. The issuing officer's name was listed as "J. Thigpen." Ultimately, Witchard was convicted by jury trial, and this Court affirmed on direct appeal.¹ *United States v. Witchard*, 646 F. App'x 793 (11th Cir. 2016).

In July 2016, Witchard filed the instant motion to vacate, under § 2255, arguing that (1) the trial court lacked subject matter jurisdiction due to prosecutorial misconduct because the government manufactured and falsified the federal arrest warrant; and (2) his appellate counsel was ineffective for failing to raise Ground One on direct appeal. In an attached memorandum, Witchard argued that the court lacked subject matter jurisdiction because the prosecutor "knowingly used tainted evidence and testimony at both the grand jury proceedings and the trial

¹ Witchard had previously filed a § 2255 motion to vacate, prior to this Court ruling on his direct appeal. He moved to voluntarily dismiss that motion, and the district court dismissed it without prejudice.

by jury taken from two special agents whom willfully and criminally” falsified and filed a fraudulent federal arrest warrant, which led to his false arrest.²

Specifically, Witchard asserted that the court sealed the indictment and all of the related documents, and did not issue an arrest warrant on April 30, 2014. Nevertheless, he was arrested on May 1, 2014, on a fraudulently manufactured federal warrant. He contended that federal agents had induced a deputy clerk to stamp the warrant as of April 30, 2014, although it was fraudulent. He also asserted that it was signed “by a fictitious named person: J. Thigpen.” He stated that federal agents altered the warrant, by changing it from a “sealed” document to say that it was “unsealed,” by editing it with a marker. Witchard further argued that his court-appointed appellate counsel failed to argue that the court lacked subject matter jurisdiction because his federal arrest warrant was falsified.

Witchard attached, *inter alia*, copies of the motion to seal the indictment, the order granting the motion to seal, and his arrest warrant. Notably, the order granting the motion to seal explicitly stated that the sealed documents should be unsealed, as soon as Witchard was arrested. The arrest warrant authorized an officer to arrest Witchard, based on the indictment, and was signed by J. Thigpen.

Witchard also moved to recuse the district court judge, asserting that the district court judge had presided over his criminal trial, and he previously had filed a complaint with the judicial conference alleging that the district court judge had failed to protect his constitutional rights, was prejudiced, and showed bigotry. The district court denied the motion to recuse, determining that the complaint was based on the district court’s rulings, and adverse rulings were not evidence of bias. The district court stated that it did not harbor any bias against Witchard,

² Witchard did not specifically explain what evidence or testimony was tainted.

and Witchard had not shown that the district court had a personal bias or prejudice, or personal knowledge of disputed facts.

Witchard moved for “judicial notice” of certain facts related to his claims, and for emergency release from custody. Specifically, he appeared to argue that, through prosecutorial misconduct, the indictment itself was not authentic, which required his convictions and sentences to be vacated. The district court denied the motion, specifically noting that, to the extent that Witchard was attempting to amend his motion to vacate, he had not properly moved to amend.

The government responded to Witchard’s motion to vacate, arguing that his claims were meritless. Witchard replied, and asked for a preliminary injunction to expedite his § 2255 motion. Witchard once more argued that his arrest warrant and the grand jury indictment were fraudulent and falsified. He further argued that the government has covered up and concealed the unlawful acts of the special agents who fabricated the arrest warrant. Moreover, Witchard alleged, J. Thigpen was not a real person authorized to issue warrants. He attached, in relevant part, a copy of a complaint that he sent to the U.S. Department of Justice, Office of Professional Responsibility, alleging that various government officials—including the district court judge—conspired against him, and retaliated against him, for filing civil rights complaints by fabricating a criminal indictment. The district court denied the motion for a preliminary injunction.

Witchard moved for a judgment on the pleadings. He then filed a copy of a motion for an emergency recusal of the district court judge, directed to the Eleventh Circuit Judicial Council Board, arguing that the district court judge improperly entered an order on a motion for recusal and alleging that the district court had “extreme prejudice and racial animus” against him. He also alleged that the district court judge knew that J. Thigpen was a false name and that this person was not authorized to sign a federal warrant. Subsequently, he filed a copy of a request

for review of his judicial complaint, stating that the district court had failed to investigate J. Thigpen's authority to issue a warrant, and asking that the Eleventh Circuit Judicial Counsel investigate whether J. Thigpen was a judicial official authorized to issue an arrest warrant. Witchard then filed a second motion to recuse the district court judge.

Witchard also asked that the district court either release him or consolidate his § 2255 motion with a civil rights case he had pending in the district court.³ In that motion, Witchard alleged that the district court judge was involved in a conspiracy regarding his criminal charges, and he stated that the district court judge was originally named in his civil rights complaint. Furthermore, the district court judge was not ruling on his § 2255 motion. The motions to recuse and consolidate were denied.

Thereafter, the district court denied Witchard § 2255 motion to vacate. The district court determined that a grand jury returned an indictment against Witchard on April 30, 2014, and the arrest warrant was properly issued by the clerk of court. The court specifically concluded that J. Thigpen was a deputy clerk, who issued and signed the arrest warrant, which was permitted under Fed. R. Crim. P. 9. Accordingly, appellate counsel was not ineffective. The district court also stated that Witchard's summary conclusion that the government agents gave "tainted" testimony was conclusory and speculative. In the same order, the district court denied a COA and denied Witchard's motion for a judgment on the pleadings. Subsequently, the district court denied IFP status on appeal.

Witchard filed several notices of appeal, appealing the denials of: (1) his § 2255 motion to vacate; (2) the motion for a judgment on the pleadings; (3) the second motion to recuse; and (4) his motion to consolidate the cases or, alternatively, to be released. Witchard has now moved

³ Witchard cited to a civil rights case he filed in *Witchard v. Mosley*, U.S. Dist. Ct. of the M.D. Fla., case number 6:14-cv-02042.

for a COA on appeal, reiterating his claims, and arguing that the government did not properly hold a grand jury proceeding before a magistrate judge, as was required under law. He has also moved for IFP status on appeal.

DISCUSSION:

28 U.S.C. § 2255 motion to vacate:

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” or that the issues “deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). When reviewing a district court’s denial of a § 2255 motion, this Court reviews “findings of fact for clear error and questions of law *de novo*.” *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009).

Ground One:

In Ground One, Witchard argued that the federal arrest warrant against him was fraudulently and falsely entered, and it was falsely signed by “J. Thigpen,” who was not an individual authorized to sign federal warrants. In several of his other filings, Witchard appeared to allege that the government did not conduct a proper grand jury proceeding. Witchard also argued that the prosecutor “knowingly used tainted evidence and testimony,” at the grand jury proceedings and in his trial, although he provided no explanation for this claim.

The district court determined that J. Thigpen was a deputy clerk. According to Rule 9, a warrant may be issued on an indictment by a clerk. Fed. R. Crim. P. 9(b) (explaining that a warrant, issued pursuant to an indictment, “must be signed by the clerk”). Therefore, a deputy clerk is permitted, under the Federal Rules of Criminal Procedure, to sign a warrant, issued

pursuant to a valid indictment. Because Witchard has presented no evidence to show that the district court erred in determining that Thigpen was a deputy clerk, reasonable jurists would not debate the conclusion that Thigpen was authorized to sign his warrant.

Furthermore, Witchard's claim that the grand jury proceedings were not properly conducted was unsupported and speculative. The record shows that a grand jury indictment was entered against Witchard, and it was signed by a foreperson. Additionally, a magistrate judge granted the government's motion to seal the indictment, on the same day that it was entered against Witchard. Witchard presented no evidence, outside of his own unsupported allegations, to support the conclusion that anything improper occurred during his grand jury proceedings. Accordingly, as this is conclusory and speculative, it does not warrant relief. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (conclusory or speculative allegations do not warrant federal habeas relief).

Likewise, to the extent that Witchard argued that the prosecutor used "tainted" evidence and testimony, he has not explained what evidence or which testimony was problematic. Additionally, he has pointed to nothing in the record, nor provided any other evidence, to support this conclusion, and, therefore, this claim is conclusory and speculative. *See id.* Thus, reasonable jurists would not debate the district court's denial of this Ground, and no COA is warranted.

Ground Two:

In Ground Two, Witchard argued that his appellate counsel was ineffective for failing to argue that the arrest warrant was fraudulent. However, as discussed above, Witchard has failed to show that the arrest warrant was fraudulent and, therefore, he has not shown that his appellate counsel was ineffective for failing to raise this claim on direct appeal. *See Chandler v. Moore*,

240 F.3d 907, 917 (11th Cir. 2001) (holding that counsel is not ineffective for failing to raise non-meritorious issues). Accordingly, reasonable jurists would not debate the district court's denial of this claim, and no COA is warranted.

Therefore, reasonable jurists would not debate the district court's denial of Witchard's § 2255 motion to vacate, or the district court's decision to deny his motion for a judgment on the pleadings.

Recusal:

Witchard also states that he would like to appeal the denial of his motion to recuse the district court judge. A COA is not required to appeal the denial of a motion for recusal because it is not a "final order" in a habeas proceeding. *See* 28 U.S.C. § 2253(c)(2). However, because Witchard has moved for leave to proceed on appeal IFP, this aspect of his appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1951(e)(2)(B). "[A]n action is frivolous if it is without arguable merit either in law or fact." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quotations omitted).⁴ A judge's failure to recuse himself is reviewed for an abuse of discretion. *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir. 2001).

Recusal is governed by two federal statutes, 28 U.S.C. §§ 144 and 455. Under § 144, a judge must recuse himself when a party to a district court proceeding "files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. "To warrant recusal under § 144, the moving party must allege facts that would convince a reasonable person that bias actually exists." *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000).

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which

⁴ A review of Witchard's motion for IFP status indicates that he is indigent.

his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Section 455(b)(1) further provides that a judge shall also disqualify himself “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” *Id.* § 455(b)(1).

Thus,

[a] judge should disqualify himself only if a reasonable person would question his impartiality, or if he has a personal bias against a party. The bias must arise from an extrajudicial source, except in the rare case where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party. A judge should not recuse himself based upon unsupported, irrational, or tenuous allegations.

Giles v. Garwood, 853 F.2d 876, 878 (11th Cir. 1988) (quotations and citations omitted). “[A]s a general rule, a judge’s rulings in the same case are not valid grounds for recusal.” *Loranger v. Stierheim*, 10 F.3d 776, 780 (11th Cir. 1994). Furthermore, for personal knowledge of disputed evidentiary facts to warrant recusal, the facts must “derive from something other than that which the judge learned by participating in the case.” *United States v. Amedeo*, 487 F.3d 823, 829 (11th Cir. 2007) (quotation omitted).

There is no nonfrivolous argument that the district court abused its discretion in denying Witchard’s motion to recuse. In his second motion to recuse, Witchard moved to recuse the district court judge, arguing that the district court judge was potentially biased. In other filings, Witchard stated that: (1) the district court judge had acted in a prejudiced and bigoted manner during his criminal case; (2) he had filed complaints against the district court judge in the Eleventh Circuit Judicial Council; (3) the district court had failed to investigate the legality of J. Thigpen’s authority to issue an arrest warrant and that J. Thigpen was not a person authorized to issue warrants; and (4) the district court judge was originally named as a party in his civil rights case, and accused of conspiring with the government.

However, the “mere filing of a complaint of judicial misconduct is not grounds for recusal,” unless there is an impending formal investigation into the complaint. *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1266 (11th Cir. 2009) (addressing the propriety of sanctions for filing a motion to recuse in a bankruptcy proceeding). Although Witchard showed that he filed a complaint with the Eleventh Circuit Judicial Council, he did not show that there was a formal investigation into the matter.⁵ To the extent that Witchard sought to argue that the district court judge had personal knowledge of the case, because the district court judge had worked in the Middle District of Florida and was familiar with the clerks, knowledge of these facts would not warrant recusal. First, this is a fact that all district court judges in the Middle District of Florida would know, and a reasonable person would not question the district courts judge’s impartiality on this basis. Second, the district court’s knowledge that J. Thigpen signed the warrant came from this case because the warrant, showing J. Thigpen’s signature, was entered into the district court’s record in Witchard’s criminal case. *See Amedeo*, 387 F.3d at 829.

Moreover, to the extent that Witchard argued that the district court judge was involved in a judicial conspiracy to cover up and conceal a false warrant, this allegation was unsupported and irrational. As discussed above, Witchard has presented no evidence, outside of his own self-serving beliefs, to show that the arrest warrant or indictment were somehow obtained fraudulently, and the record contains no evidence of misconduct. Accordingly, any allegation that the district court judge should have recused himself because he was involved in a “judicial conspiracy” was unsupported and does not show that reasonable persons would question the district court’s impartiality. *See Giles*, 853 F.2d at 878. Furthermore, Witchard’s assertions that

⁵ An independent review of the judicial complaints filed by Witchard shows that this Court dismissed his complaints. *See Complaint of Judicial Misconduct or Disability*, Nos. 11-16-90002, 11-16-90101.

the district court judge was biased, prejudiced, or acted in a bigoted manner, were unsupported by specifics, and, therefore, did not show facts that would cause a reasonable person to believe bias actually existed.

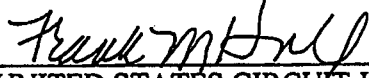
Motion to Consolidate:

Witchard also moved to consolidate his § 2255 motion with a civil rights suit, or, alternatively, to be released from custody. A COA is not required to appeal the denial of a motion for consolidation. *See* 28 U.S.C. § 2253(c)(2). However, a § 2255 motion to vacate provides relief that is separate and distinct from the relief available through a typical civil rights law suit. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (explaining that a habeas petition is the exclusive remedy for a prisoner who challenges the fact or duration of his confinement, whereas a 42 U.S.C. § 1983 complaint is appropriate when a prisoner seeks to challenge something other than the fact of his confinement). Accordingly, the district court did not err in denying a motion to consolidate.

However, to the extent that Witchard seeks to appeal the district court's denial of his alternative motion for immediate release, that would require a COA. *See Pagan v. United States*, 353 F.3d 1343, 1345-46 (11th Cir. 2003) (requiring a COA to appeal the denial of a motion for release on bond). Nevertheless, because he did not appeal this denial until after the district court denied his § 2255 motion—and reasonable jurists would not debate the district court's denial of Witchard's § 2255 motion, as discussed above—no COA is warranted. *See Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990) (explaining that prisoner seeking release pending habeas relief can be granted bail under two sets of circumstances: (i) by demonstrating a likelihood of success on the merits of a substantial constitutional claim; and (ii) extraordinary

and exceptional circumstances that make the grant of bail necessary to preserve the effectiveness of the habeas corpus relief sought).

Therefore, Witchard's motion for a COA is DENIED. His motion for IFP status, as it relates to his § 2255 motion to vacate or his motion for immediate release, is DENIED AS MOOT, as any appeal on that basis would require a COA. Witchard's motion for IFP status, as it relates to the appeal of his motion to recuse or to consolidate—which does not require a COA—is DENIED, as any appeal would be frivolous.


UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 20, 2017

Elizabeth Warren
U.S. District Court
401 W CENTRAL BLVD
ORLANDO, FL 32801

Appeal Number: 17-13334-J
Case Style: Joseph Witchard v. USA
District Court Docket No: 6:16-cv-01254-RBD-GJK
Secondary Case Number: 6:14-cr-00112-RBD-GJK-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C. Burney-Smith, J/gmp
Phone #: (404) 335-6183

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

**Additional material
from this filing is
available in the
Clerk's Office.**