

FILED
JUDICIAL COUNCIL
OF THE
ELEVENTH CIRCUIT

FEB - 5 2016

CIRCUIT EXECUTIVE

**FOR THE JUDICIAL COUNCIL
OF THE ELEVENTH CIRCUIT**

111590105

**IN RE: COMPLAINT OF JUDICIAL
MISCONDUCT OR DISABILITY**

ON PETITION FOR REVIEW*

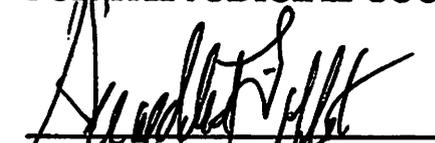
Before: TJOFLAT, HULL, MARCUS, WILSON, PRYOR, MARTIN, JORDAN, ROSENBAUM, and JULIE CARNES, Circuit Judges; MOORE, MERRYDAY, THRASH, BOWDRE, LAND, STEELE, RODGERS, WATKINS, and WOOD, Chief District Judges.

Upon consideration of the petitioner's complaint by a review panel consisting of Judges Tjoflat, Wilson, Pryor, Steele, and Rodgers, the order of Chief Judge Ed Carnes filed on 19 November 2015, and of the petition for review filed by the complainant on 1 December 2015, with no non-disqualified judge on the Judicial Council Review Panel having requested that this matter be placed on the agenda of a meeting of the Judicial Council,

The Judicial Council Review Panel hereby determines that the disposition of this matter was proper and said disposition is hereby **AFFIRMED**.

The foregoing actions are **APPROVED**.

FOR THE JUDICIAL COUNCIL:



United States Circuit Judge

* Chief Circuit Judge Ed Carnes did not take part in the review of this petition.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 19 2015
Amy C. Nerenberg
Acting Clerk of Court

CONFIDENTIAL
BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT

Judicial Complaint No. 11-15-90105

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. District Judge for the U.S. District Court for the _____ District of _____, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States District Judge _____ (the “Subject Judge”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).

Background

The record shows that in August 1994, a federal grand jury indicted Complainant in the United States District Court for the _____ District of _____ on one count of assaulting a federal judge (Count One), one count of using and carrying a firearm during a crime of violence (Count Two), and two counts of being a felon in possession of a firearm (Counts Three and Four). After that, the acting chief district judge entered an order of recusal for all of the district judges in the _____ District of _____. Judge _____, who is now retired, was designated as the presiding district judge in the case.

After various proceedings, the case proceeded to trial, and in January 1995 the jury returned a verdict of not guilty as to Count One and guilty as to Counts Two, Three, and Four. Complainant moved for a judgment of acquittal, and in March 1995 Judge _____ granted the motion, stating that the court would enter a judgment of acquittal or dismissal as to Count Two. In April 1995 Judge _____ sentenced Complainant to a total term of 272 months of imprisonment. This Court affirmed. Judge _____ later entered an order amending the judgment to give Complainant credit for time he spent in state custody from July 24, 1994 to September 1, 1994.

The record also shows that in December 2003 Complainant filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, which was later dismissed as time-barred. In March 2009 he moved for a sentence reduction under 18 U.S.C. § 3582(c)(2). Judge _____ denied the motion, and this Court affirmed that judgment.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant generally takes issue with a letter the Subject Judge wrote to the Bureau of Prisons (BOP), responding to a letter that the BOP had addressed to Judge _____, in which the Subject Judge recommended that the BOP deny Complainant's request for retroactive credit for time he served in state custody. Complainant initially contends that by responding to the letter, the Subject Judge "disregarded and violated a Judicial order of recusal against" the _____ District of _____. He also alleges that the Subject Judge and a clerk, "in an act of blatant malfeasance," failed to forward the BOP's letter to Judge _____.

Complainant asserts that the Subject Judge's "unlawful response was highly prejudicial and not fact based or indicative of jury verdict," and that the Subject Judge's "reckless prevarication . . . was a malicious and direct assault" on Complainant's constitutional rights. Complainant alleges that the Subject Judge misrepresented Judge _____ intent, which caused Complainant to suffer a loss of liberty and prevented him from being released from custody. He also asserts that the Subject Judge misrepresented a "state judgment" in the response letter. Finally, Complainant argues that the letter was "pure libel," illegal, and "highly unbecoming." He included a "Statement of Facts" in which he generally reiterated his contentions, stated that Judge _____ had never opposed nunc pro tunc designation, and noted that he was "acquitted of any conduct against the Honorable _____."

To his Complaint, Complainant attached a February 2010 letter from _____, the _____ "_____" to Judge _____. In the letter, _____ noted that Complainant had requested credit toward his federal sentence for time he spent in state custody, and that the BOP considers an inmate's request for credit in such a case as a "request for a retroactive (concurrent) designation." _____ requested that Judge _____, as the sentencing judge, give his position with respect to a retroactive designation, which the BOP would consider in its review of the factors in 18 U.S.C. § 3621(b). _____ noted that if the designation were granted, Complainant's approximate release date would change from _____ to _____.

Complainant also attached a March 2010 letter from the Subject Judge to _____ in which the Subject Judge stated that he was in receipt of _____ letter to Judge _____, and that Judge _____ was a judge from an _____ district court who presided as a visiting judge over Complainant's case in _____. The letter indicated that a copy was sent to Judge _____. In the letter, the Subject Judge stated that a review of the file would reveal that a judge in his court, "_____" was the victim in the case for which Judge _____ sentenced Complainant to a term of 272 months, and noted that Complainant also was sentenced in state court to a 20-year term

for multiple counts of armed robbery and kidnapping. The Subject Judge stated that to grant Complainant retroactive credit for time served in state custody would drastically reduce the sentence that Judge _____ had imposed, and that, as the chief judge of the district court where Judge _____ served until his recent retirement, the Subject Judge “strongly oppose[d]” Complainant’s request. In conclusion, the Subject Judge stated:

To now allow [Complainant] to be released on _____ rather than _____ is not only dangerous to the public but an insult to the victim in the federal case, Judge _____, let alone the victims of the armed robbery in the state case. I hope that you deny his request for retroactive credit.

In addition to attaching a copy of that March 2010 letter, Complainant included a letter from a warden noting that a Request for Administrative Remedy was denied, and stating that a request to receive credit for time served in state custody was denied in April 2010 as recommended by the Subject Judge. Also attached was an August 2010 “Response,” which noted that it had been determined that a retroactive designation would be inconsistent with the goals of the criminal justice system, based in part on the court’s objection to that result.

Discussion

Section 3621(b) of Title 18 of the United States Code provides that the BOP shall designate the place of a prisoner’s imprisonment after considering, among other things, “any statement by the court that imposed the sentence” concerning the purposes for which the sentence was imposed or recommending a type of facility.

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” *Id.* (emphasis added). The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

Furthermore, the “Commentary on Rule 3” provides that “[t]he phrase ‘decision or procedural ruling’ is not limited to rulings issued in deciding Article III cases or controversies.”

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions and March 2010 letter to the BOP, the allegations are directly related to the merits of the Subject Judge’s decisions or procedural rulings. Apart from the decisions or procedural rulings that Complainant challenges, he provides no credible facts or evidence in support of his allegations that the Subject Judge engaged in misconduct.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



Chief Judge