

MAY 23 2016

CIRCUIT EXECUTIVE

FOR THE JUDICIAL COUNCIL
OF THE ELEVENTH CIRCUIT

111590170

IN RE: COMPLAINT OF JUDICIAL
MISCONDUCT OR DISABILITY

ON PETITION FOR REVIEW*

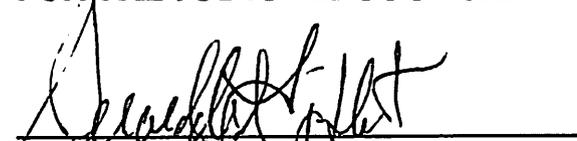
Before: TJOFLAT, HULL, MARCUS, WILSON, PRYOR, MARTIN, JORDAN, ROSENBAUM, and JULIE CARNES, Circuit Judges; MOORE, MERRYDAY, THRASH, BOWDRE, LAND, STEELE, WATKINS, and WOOD, Chief District Judges.

Upon consideration of the petitioner's complaint by a review panel consisting of Judges Tjoflat, Wilson, Pryor, Land, and Watkins, the order of Chief Judge Ed Carnes filed on 4 March 2016, and of the petition for review filed by the complainant on 28 March 2016, 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 and Chief District Judge Casey Rodgers did not take part in the review of this petition.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 04 2016
Amy C. Nerenberg
Acting Clerk of Court

CONFIDENTIAL
BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT

Judicial Complaint No. 11-15-90170

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”). The Subject Judge became a federal judge in _____.

Background

The record shows that in November 2007 Complainant filed a 28 U.S.C. § 2254 petition for writ of habeas corpus challenging certain 2001 state court convictions. A district judge then entered an order allowing Complainant to proceed in forma pauperis, but holding the § 2254 petition in abeyance while he exhausted his claims in state court. In September 2008 Complainant filed a motion to reopen the case and a motion to amend his petition. The district judge then entered an order granting the motion to reopen, granting the motion to file an amended petition, and transferring the case to the Subject Judge for all further proceedings.

In October 2008 Complainant filed an amended § 2254 petition raising four grounds for relief. In December 2008 the Subject Judge entered an order directing the respondent to state whether there was any reason why the Subject Judge should recuse herself from the case. The respondent filed a response in which it stated that it could find no indication that the Subject Judge participated in the state court proceedings at issue in the habeas case. In September 2009 the Subject Judge denied Complainant’s amended § 2254 petition, finding that the claims were procedurally barred and did not otherwise establish a basis for relief. Complainant filed a motion for reconsideration, which the Subject Judge denied. He appealed, and this Court denied him a certificate of appealability because he failed to make a substantial showing of the denial of a constitutional right.

The record also shows that in September 2015 Complainant filed a motion for relief under Fed. R. Civ. P. 60(b), generally challenging his state court convictions, and the case was transferred to the Subject Judge. That same month, the Subject Judge entered an order construing Complainant's motion as a successive habeas petition and dismissing it for lack of jurisdiction because he had not obtained this Court's authorization to file a successive petition. Complainant filed a motion for reconsideration, which the Subject Judge denied as "incomprehensible."

After that, Complainant filed multiple motions seeking various types of relief, including a motion to disqualify the Subject Judge. In the motion to disqualify, Complainant alleged that during an evidentiary hearing in the state court proceedings, the Subject Judge, in her role as _____, stated, "The U.S. Government is opposed to any relief that [Complainant] is entitled too [sic]," which showed that she was biased against him. In November 2015 the Subject Judge denied Complainant's motions. With respect to the motion to disqualify, the Subject Judge found that an examination of the record demonstrated that there was no basis on which she should be disqualified.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge, "during her employment as _____ in her previous employment, denied [Complainant] Equal Protection of Law, Due Process, and a fair and speedy appeal decided on the merits of [his] claim, through intimidation, corruption by 'fixing' [his] case to cover-up corruption in state Judicial system." Complainant then alleges that at an evidentiary hearing in his state court proceedings, the Subject Judge, in her role as an "_____ from the _____," stated that the "U.S. government is opposed to any relief [Complainant] is entitled too [sic]." He contends that the statement "intimidated the trial court," "defeated public confidence in the integrity of the judicial process," denied Complainant his Constitutional rights, and constituted misconduct.

Complainant then discusses his federal cases to which the Subject Judge was assigned, and he notes that the Subject Judge denied his § 2254 petition and his Rule 60(b) motion. Complainant again cites the Subject Judge's alleged statement made as an _____, and he asserts that, "[b]y her own admission," regardless of his claims, "a fair and speedy appeal would be denied, due to her prior involvement in [his] case and voicing her already formed opinion of denial of Equal Protection, Due Process, and a fair and Speedy Appeal." He asserts that "her involvement in any facet of [his] case is a violation of" various statutes and "Judicial Conduct Rules." Complainant then asserts that he established "the elements of the 3 prong recusal test," that the Subject Judge was biased against him, and that she conspired with the prosecutor and government officials to deny Complainant his rights "through corruption." He attached various documents to his Complaint.

Discussion

Rule 4 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides, “A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.”

Rule 3(h)(3)(A) 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.* 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.

To the extent Complainant’s allegations concern the Subject Judge’s actions in her capacity as _____, before she became a United States district judge, even if Complainant had presented any basis for the allegations, which he has not, they are not cognizable under the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States. To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, findings, and orders entered in Complainant’s federal cases, including her decision not to recuse, the allegations are directly related to the merits of the Subject Judge’s decisions or procedural rulings. Complainant’s remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge was biased against him or otherwise 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), 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), and the Complaint “is otherwise not appropriate for consideration under the Act,” JCDR 11(c)(1)(G). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii), and Rule 11(c)(1)(B), (D), and (G) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**. The dismissal of this

Complaint in part to the extent it concerns actions taken before the Subject Judge became a federal judge in no way implies that the Subject Judge engaged in any misconduct in her capacity as _____.

A handwritten signature in black ink, appearing to read "S. H. Kerner", written over a horizontal line.

Chief Judge