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David J. Smith
Clerk

CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint Nos. 11-17-90039 through 11-17-90041

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against U.S. Circuit Judges _____ and _____ of the U.S. Court of Appeals for the _____ Circuit, and U.S. Circuit Judge _____ of the U.S. Court of Appeals for the _____ Circuit, 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 Circuit Judges _____, _____, and _____ (collectively, “the Subject Judges”), 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 January 2013 Complainant filed a 28 U.S.C. § 2254 petition for writ of habeas corpus challenging certain state court convictions. In September 2013 a magistrate judge issued a report recommending that the § 2254 petition be denied and that no certificate of appealability (COA) issue. A couple of months later, the district judge entered an order adopting the report and recommendation, denying the § 2254 petition, and stating that no COA would issue. Complainant appealed and sought a COA from this Court.

In September 2014 a circuit judge who is not one of the Subject Judges denied the motion for a COA, and Complainant filed a motion for reconsideration. In December 2014 a two-judge panel, which did not include any of the Subject Judges, granted the motion for reconsideration as to one of Complainant’s ineffective-assistance-of-counsel claims. Complainant then filed a pro se initial brief and reply brief. After that, Judge _____ issued an order appointing counsel to represent Complainant and directing counsel to file a brief that would replace the previously filed pro se brief, if counsel deemed it appropriate to do so.

In January 2016 appointed counsel filed a replacement brief and later a reply brief on Complainant’s behalf. In September 2016 a panel comprised of the Subject Judges

issued an opinion affirming the denial of Complainant's § 2254 petition. Complainant filed a pro se petition for rehearing en banc, which was denied. In February 2017 Complainant submitted a "Notice of Inquiry" in which he inquired about rules pertaining to ineffective assistance of appellate counsel.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant states that he filed his initial and reply briefs on appeal addressing the issues for which he was granted a COA. He contends that, instead of ruling on those issues, the Subject Judges appointed an attorney "to replace" his initial and reply briefs. Complainant states that he "did not ask" to have the issues he raised replaced and that he paid the filing fees "to ensure review." He states that he filed a Notice of Inquiry concerning the rules on ineffective assistance of counsel, which was "met with flat denial." He is seeking "appropriate corrective action" because he believes the issues discussed in his briefs should have been ruled upon. He attached documents to his Complaint.

Discussion

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. 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.

All of Complainant's allegations concern the substance of the Subject Judges' official actions, orders, and opinion issued on appeal, and the allegations are directly related to the merits of the Subject Judges' decisions or procedural rulings.

The allegations of this Complaint are "directly related to the merits of a decision or procedural ruling," JCDR 11(c)(1)(B). For that reason, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B) of the Rules for Judicial-Conduct and

Judicial-Disability Proceedings of the Judicial Conference of the United States, this
Complaint is **DISMISSED**.

A handwritten signature in black ink, appearing to read "E. A. Tamm", written in a cursive style.

Chief Judge