

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 19 2018

David J. Smith
Clerk

CONFIDENTIAL

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

Judicial Complaint Nos. 11-18-90097 through 11-18-90099

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,
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 2018 a federal grand jury indicted Complainant on six counts involving two bank robberies and two carjackings. He pleaded guilty to the bank robbery charges, and the case proceeded to trial on the remaining charges for carjacking and using or carrying a firearm during the commission of a crime of violence. On the second day of trial, Complainant’s counsel objected to certain testimony, challenging a search on Fourth Amendment grounds. The district court found that the search was consensual and overruled the objection to the testimony. The jury found Complainant guilty, and he was later sentenced to a term of imprisonment. He appealed his convictions.

In July 2010 a panel of this Court that included Judge _____ affirmed Complainant’s convictions. The panel rejected Complainant’s contention that the district court erred by denying his untimely motion to suppress evidence from the search of the home where he was hiding after the carjackings and bank robberies. Because Complainant had not filed a pre-trial motion to suppress, the panel held that he had waived a suppression challenge, and he had not sought relief from the waiver by showing good cause.

In April 2011 Complainant filed a second amended 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, contending that his counsel had been ineffective

for failing to properly raise the suppression issue so that it could be considered on direct appeal. In July 2012 the district court denied Complainant's § 2255 motion, generally finding that he had not established that he was entitled to relief. A judge of this Court who is not one of the Subject Judges denied a certificate of appealability.

The record also shows that Complainant has filed in this Court multiple applications for leave to file second or successive § 2255 motions. In April 2016 he filed an application claiming that his counsel was ineffective for failing to file a motion to suppress before trial. A panel of this Court that included Judge _____ denied Complainant's application, generally determining that he had not made the requisite showing under § 2255.

In September 2017 Complainant filed another application to file a second or successive § 2255 motion. He argued, among other things, that this Court had made a clerical error on direct appeal when it held that he had waived his ability to challenge the denial of his motion to suppress. A panel comprised of the Subject Judges denied his application. The panel determined that: (1) while Complainant labeled his claim as a request to correct a clerical error, it was clear he was attempting to use Fed. R. Crim. P. 36 to make a substantive change to his sentences; and (2) even construing his claim as a challenge under § 2255, the Court lacked jurisdiction to consider his claim because it had previously been considered. Judge _____ and Judge _____ concurred in the judgment.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant states that the Subject Judges "are not following the law," which resulted in a fundamental miscarriage of justice. He states that on direct appeal the Court declined to consider the suppression issue, even though he asserts that he raised the issue in his appellate brief. He notes that he raised the issue in an application to file a second or successive § 2255 motion, and he contends that the Subject Judges have a duty to act but are "spinning." He attached various documents to his Complaint. In one attachment, Complainant alleges that the prosecutor engaged in misconduct and caused his constitutional rights to be violated.

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.

To the extent Complainant’s allegations concern the substance of the Subject Judges’ orders and opinions in Complainant’s appeals and orders on his applications to file second or successive § 2255 motions, the allegations are directly related to the merits of the Subject Judges’ 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 Judges 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