

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 04 2019

David J. Smith
Clerk

CONFIDENTIAL

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

Judicial Complaint No. 11-18-90104

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. Magistrate 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
Magistrate 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 November 2016 Complainant filed a petition for writ of habeas corpus, generally challenging a state court conviction and arguing that his constitutional rights had been violated. Later that month, the Subject Judge entered an order construing the petition as one filed under 28 U.S.C. § 2254 and directing Complainant to inform the court whether he wished to proceed on the claims in his original pleading, amend his pleading, or withdraw his petition. In December 2016 Complainant filed, among other things, a motion to amend his petition to be filed under 28 U.S.C. § 2241, and the Subject Judge entered an order again construing the petition as filed under § 2254 and directing the respondent to file a response. Complainant filed objections, which a district judge overruled. The respondent filed an answer in December 2016.

In late December 2016 Complainant appealed the order overruling his objections. He also filed a motion to disqualify the Subject Judge, alleging in part that she was part of a conspiracy and had engaged in fraud, and the district judge denied the motion. In January 2017 Complainant filed a reply to the respondent’s answer. He then filed multiple motions seeking various types of relief, including motions to stay the proceedings pending appeal and for immediate relief. Most of the motions were denied, either by the Subject Judge or by the district judge, and the Subject Judge granted his

motion to amend his reply to the respondent's answer. In April 2017 this Court dismissed Complainant's appeal for lack of jurisdiction.

In late April 2017 Complainant filed in the district court a document in which he alleged the court had caused undue delay in the case. The next month, he filed a motion for the court to take judicial notice concerning the court's "limited jurisdiction" over his state court judgment and sentence. Several days later, the Subject Judge entered an order construing the motion as a motion to supplement his habeas petition and granting the motion.

In June 2017 Complainant filed in this Court a petition for writ of mandamus and/or prohibition, arguing, among other things, that the district court had caused undue delay in the case. He also filed a motion to proceed in forma pauperis (IFP). This Court denied the IFP motion because the mandamus petition was frivolous and there was no arguable claim of unreasonable delay. Complainant filed a motion for reconsideration, which was denied. In September 2017 this Court clerically dismissed the mandamus petition for want of prosecution.

In October 2017 Complainant filed in the district court an "Objection to this Court's Deliberate Delay," and the district judge overruled the objection, stating that there was no evidence of deliberate delay and the court was experiencing high caseloads. Complainant filed a motion for reconsideration, which the district judge denied.

In April 2018 Complainant filed in this Court a petition for writ of mandamus and prohibition, again arguing in part that the district court had caused unreasonable delay in the case. In July 2018 this Court determined that Complainant had established a non-frivolous claim of unreasonable delay, held his petition for writ of mandamus in abeyance for 60 days to allow the district court to rule on his § 2254 petition, and denied his petition for a writ of prohibition.

In July 2018 the Subject Judge issued a report recommending that Complainant's § 2254 petition be dismissed as time-barred, finding that he had asserted no basis for equitable tolling in the case. Over Complainant's objections, the district judge adopted the recommendation and the habeas petition was denied as time-barred. Complainant filed a notice of appeal, and the district court denied him leave to appeal IFP and denied him a certificate of appealability. In October 2018 this Court dismissed as moot Complainant's mandamus petition.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge caused or assisted in causing undue delay in his case. He states that the Subject Judge's recommendation that his § 2254 petition be dismissed as untimely

appears to be based on “vindictiveness and maliciousness for Complainant’s mandamus filing because [she] has purposefully ignore[d] pertinent facts” that he contends entitled him to equitable tolling. Complainant alleges that the Subject Judge’s actions are based on “personal bias and personal interest” in the outcome, and he argues that she should be recused from all his cases because of his fear of retaliation. Complainant also alleges the Subject Judge’s actions violated his rights, her oath of office, and the Code of Conduct for United States Judges.

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.

In addition, Rule 3(h)(3)(B) provides that cognizable misconduct does not include “an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.” The “Commentary on Rule 3” provides that “a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge—in other words, assigning a low priority to deciding the particular case.”

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, rulings, findings, orders, and recommendations in the case, 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 claims that the Subject Judge acted with an illicit or improper motive, was biased against Complainant, violated her oath of office or the Code of Conduct for United States Judges, 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), 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