

CONFIDENTIAL

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

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

JAN 22 2020

David J. Smith
Clerk

Judicial Complaint No. 11-19-90074

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against United States Circuit Judge _____
of the United States 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 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 January 2018 a federal grand jury indicted Complainant on six counts involving multiple crimes. He initially pleaded guilty to four counts, but the district court later granted his motion to withdraw his plea as to two of them. Following a trial, a jury found Complainant guilty of the four remaining counts. In September 2009 the district court sentenced him to a term of imprisonment, and he appealed. A panel of this Court that did not include the Subject Judge later affirmed Complainant’s convictions. The panel held, among other things, that Complainant had waived his challenge to the district court’s denial of his untimely motion to suppress and that he had failed to request relief from the waiver by showing good cause.

After additional proceedings, in January 2019 Complainant filed in the district court a motion to recall the mandate contending that: (1) the government’s key witness committed perjury at the suppression hearing; (2) the government misled this Court by stating that Complainant had first raised the issue on appeal; and (3) the appellate court needed to correct the record. He also filed two motions seeking an acquittal. The district court denied the motions, finding that there was no legal basis for the requested relief, and Complainant appealed.

In March 2019 Complainant filed in this Court a motion for appointment of counsel. He also filed a motion to recall this Court’s mandate in his earlier appeal, contending that the prosecutor had engaged in misconduct by arguing that this Court

should not consider Complainant's Fourth Amendment issue because he raised it for the first time on appeal. The government filed a response in opposition to Complainant's motions, arguing they were barred by the law-of-the-case doctrine. Complainant then filed a motion for leave to proceed in forma pauperis (IFP).

In May 2019 the Subject Judge entered an order: (1) denying Complainant's IFP motion because the appeal was frivolous; (2) denying the motion to recall the mandate because he had failed to demonstrate there was an extraordinary circumstance arising from a grave, unforeseen contingency; and (3) denying his motion for appointment of counsel because he did not present any novel or complex facts or legal issues. This Court later clerically dismissed the appeal for want of prosecution.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge acted as an "accomplice[]" to prosecutorial misconduct, perjury, and the denial of constitutional rights. He contends that the government improperly argued that he failed to previously raise a Fourth Amendment issue. He asserts that the Subject Judge was made aware that the record on appeal was inaccurate and breached his duty to correct the record. He attached documents to his Complaint.

Discussion

Rule 4(b)(1) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, "Allegations Related to the Merits of a Decision or Procedural Ruling," provides in part that "[c]ognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse." The "Commentary on Rule 4" states in part:

Rule 4(b)(1) 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 authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related.

To the extent Complainant's allegations concern the substance of the Subject Judge's order in Complainant's appeal, 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 as an “accomplice” to misconduct, breached his duty, 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