

**FOR THE JUDICIAL COUNCIL
OF THE ELEVENTH CIRCUIT**

11-20-90023

FILED
ELEVENTH CIRCUIT
JUDICIAL COUNCIL

OCT 29 2020

CIRCUIT EXECUTIVE

**IN RE: COMPLAINT OF JUDICIAL
MISCONDUCT OR DISABILITY**

ON PETITION FOR REVIEW*

Before: WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, and LUCK, Circuit Judges; MERRYDAY, THRASH, COOGLER, DuBOSE, HALL, TREADWELL, WALKER, and MARKS, Chief District Judges.

The Judicial Council has considered petitioner's complaint filed on 5 March 2020, the order of then-Chief Judge Ed Carnes filed on 2 June 2020, and the petition for review filed by the petitioner on 15 June 2020. Two members of the Judicial Council voted for deny the petition for review for the reasons stated in the order of then-Chief Judge Ed Carnes. Thirteen members of the Council voted to deny the petition for review on other grounds. One member of the Council voted to deny the petition for both reasons, and one member voted to deny the petition without specifying a reason.

The Judicial Council hereby **AFFIRMS** the disposition of this matter by then-Chief Judge Ed Carnes. The petition for review is **DENIED**.

FOR THE JUDICIAL COUNCIL:


Chief United States Circuit Judge

* Circuit Judge Adalberto Jordán and Chief District Judge K. Michael Moore did not take part in the review of this petition.

MARTIN, ROSENBAUM, and JILL PRYOR, concurring in the denial of review:

██████████ was charged with a horrific crime: assault on a federal judge, arising out of a home-invasion robbery. ██████████

██████████ The victim judge was ██████████
██████████ . “[I]n the
interest of justice,” ██████████
ordered all district judges in that district to be recused from consideration of Mr.
██████████’s case. ██████████

Among those ██████████ district judges at the time was ██████████
██████████ .

Following ██████████’s order of recusal, the case was then assigned to ██████████ of the ██████████ . Following a trial, the jury acquitted Mr. ██████████ of the assault charge but convicted him of charges of being a felon in possession of a firearm. ██████████ .

Judge ██████████ sentenced Mr. ██████████ to a prison term of 272 months. *Id.*
At that time, Mr. ██████████ happened to be in state custody, pending resolution of his state cases. *Id.* The federal sentence did not indicate whether it was to run consecutively to or concurrently with any state sentence that might result from his then-pending state charges. *Id.*

In the meantime, the Bureau of Prisons took custody of Mr. [REDACTED] after he completed his state sentences. *Id.* Mr. [REDACTED] effectively sought from the Bureau of Prisons to receive credit from his service of his state sentence (approximately [REDACTED] years) for purposes of his federal sentence. *Id.*

In response to Mr. [REDACTED]'s request and in accordance with 18 U.S.C. § 3621(b)(4), the Acting Chief of the Bureau's Designation and Sentence Computation Center sent a letter to Judge [REDACTED] seeking his thoughts on whether Mr. [REDACTED]'s request should be granted. *Id.* [REDACTED]. Although the Acting Chief addressed the letter to Judge [REDACTED] he sent it to Judge [REDACTED] at the [REDACTED] rather than [REDACTED]. *Id.* Upon the [REDACTED]'s receipt, [REDACTED], in a letter dated March 18, 2010, responded on his [REDACTED] letterhead,

I am in receipt of a copy of your letter to Judge [REDACTED], from the [REDACTED], who presided over the above-styled case here in [REDACTED]. As a review of the file will reveal, a judge [REDACTED], [REDACTED], was the victim in the case for which visiting Judge [REDACTED] sentenced Mr. [REDACTED] to 272 months. Mr. [REDACTED] was also sentenced in state court to a 20 year term for multiple counts of armed robbery and kidnapping.

To now grant retroactive credit to Mr. [REDACTED] for the time served in state custody would drastically reduce the sentence that visiting Judge [REDACTED] properly imposed. As the [REDACTED] where Judge [REDACTED] honorably served until his recent retirement, I strongly oppose the defendant's request for the Bureau of Prisons to give him credit for the time he served in state prison on an unrelated violent crime.

Unfortunately, Federal Judges have been the recipients of many threats in today's society. When a threat results in an actual attack, the offenders should be severely sanctioned. To now allow Mr. [REDACTED] to be released on January 8, 2015 rather than October 19, 2018 is not only dangerous to the public but an insult to the victim in the federal case, Judge [REDACTED], let alone the victims of the armed robbery in the state case. I hope that you deny his request for retroactive credit.

He signed the letter, [REDACTED] and copied Judge [REDACTED], Judge [REDACTED] and all district and magistrate judges of the [REDACTED].

Following receipt of Judge [REDACTED]'s letter, the Bureau of Prisons denied Mr. [REDACTED]'s request. In response, among other things, Mr. [REDACTED] filed two complaints of judicial misconduct. We describe the proceedings concerning each complaint below.

Complaint No. 11-15-90105

In August 2015 Mr. [REDACTED] filed a Complaint of Judicial Misconduct or Disability against Judge [REDACTED] No. 11-15-90105. In the complaint, Mr. [REDACTED] generally took issue with Judge [REDACTED]'s letter to the Bureau of Prisons. He contended, among other things, that (1) Judge [REDACTED] wrote the letter in violation of an order that had recused him from Mr. [REDACTED]'s case; (2) Judge [REDACTED] committed malfeasance by failing to forward the letter to its original intended recipient; (3) the letter included misrepresentations; and (4) the letter was malicious and violated Mr. [REDACTED]'s constitutional rights.

On November 19, 2015, the then-Chief Judge of this Court issued an order dismissing Complaint No. 11-15-90105 as merits-related and based on allegations lacking sufficient evidence to raise an inference that misconduct had occurred. Mr. [REDACTED] filed a petition for review, and in February 2016 the Judicial Council Review Panel affirmed the dismissal of the complaint.

Complaint No. 11-20-90023

In March 2020 Mr. [REDACTED] filed another complaint against Judge [REDACTED] No. 11-20-90023, in which he again took issue with Judge [REDACTED]'s March 2010 letter to the Bureau. Mr. [REDACTED] alleged that Judge [REDACTED] who was recused from the matter, intercepted the letter from the Bureau and wrote a malicious response recommending that his motion for retroactive designation be denied, which resulted in the denial of his motion. He contended Judge [REDACTED]'s actions were illegal and unethical, defied a recusal order, and violated his constitutional rights.

To his complaint, Mr. [REDACTED] attached, among other things, a May 2016 opinion issued by the [REDACTED] reversing the dismissal of Mr. [REDACTED]'s 28 U.S.C. § 2241 petition for writ of habeas corpus in which he had challenged the BOP's denial of his request for retroactive designation. [REDACTED]. The [REDACTED] held in part that the Bureau acted contrary to 18 U.S.C. § 3621(b)(4) when it considered

the letter from Judge [REDACTED] as he was both recused from Mr. [REDACTED]'s case and was not the sentencing judge.¹ The court stated Judge [REDACTED] presented his recommendation under the guise of a neutral adjudicator by sending his letter in place of the sentencing judge's recommendation, and noted the Bureau adopted "the recused judge's recommendation" and denied Mr. [REDACTED]'s application. In the [REDACTED]'s view, those actions "d[id] not satisfy the appearance of justice" and did not afford Mr. [REDACTED] his due-process right to neutral adjudication. Therefore, the court held, "as a matter of both statute and due process," the Bureau should not have considered Judge [REDACTED]'s letter.

On June 2, 2020, the then-Chief Judge of this Court issued an order noting that all of Mr. [REDACTED]'s allegations had already been considered in connection with his earlier Complaint of Judicial Misconduct or Disability and dismissing the complaint as directly related to the merits of a decision or procedural ruling, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and JCDR 11(c)(1)(B).

Mr. [REDACTED] filed a timely petition for review in which he stated that the dismissal order did not mention the [REDACTED]'s opinion, which was entered after his earlier complaint. According to Mr. [REDACTED] the [REDACTED]'s

¹ Section 3621(b) provides that the Bureau shall designate the place of a prisoner's imprisonment after considering, among other things, "any statement by the court that imposed the sentence" concerning the purposes for which the sentence was imposed or recommending a type of facility. 18 U.S.C. § 3621(b)(4).

decision was “especially important” because the court “made a clear finding” that Judge ██████ acted under the guise of a neutral adjudicator despite a standing recusal order, intercepted a letter addressed to the sentencing judge, and caused Mr. ██████ to “over-serve” his sentence.

Today, the Judicial Council Review Panel affirms that dismissal. We concur in that dismissal and write separately to explain why. Whatever else may be said about Judge ██████’s letter, as we explain below, it does not qualify as actionable under the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

We begin by noting that the commentary to Canon 1 of the Code of Conduct for U.S. Judges warns that “[n]ot every violation of the Code should lead to disciplinary action. . . . Many of the restrictions in the Code are necessarily cast in general terms, and *judges may reasonably differ in their interpretation.*” (emphasis added). Indeed, other courts have also recognized that “[t]he [Judicial Councils Reform and Judicial Conduct and Disability Act of 1980] is not designed to enforce the Code of Judicial Conduct for United States Judges.” *In re Charge of Judicial Misconduct*, 62 F.3d 320, 321 (9th Cir. 1995).

Canon 3 “certainly qualif[ies] as [a] provision[] cast in general terms.” *Matter of Charge of Judicial Misconduct or Disability*, 85 F.3d 701, 703-04 (9th Cir. 1996) (citing *In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. 1995); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991)). Canon 3(C)(1) states

that [a] judge shall disqualify himself or herself in a *proceeding* in which the judge's impartiality might reasonably be questioned" (emphasis added). Canon 3(C)(3)(d), in turn, defines "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation."

According to the dissent in [REDACTED], J., concurring in part and dissenting in part), "The recusal statutes apply only to in-court 'proceedings,' and "[i]ndubitably, the [Bureau of Prisons's] designation of a prisoner's place of confinement is not a court 'proceeding.'" Judge [REDACTED] further opined, "More importantly, the letter-writing judge is not the decision-making authority. Thus, at best, it is highly questionable whether the recusal statutes apply to § 3621 determinations by the [Bureau of Prisons]." *Id.* Then he stated, "In fact, in the usual case, the [Bureau of Prisons's] designation decision is not subject to judicial review under the [Administrative Procedure Act]." *Id.* at [REDACTED].

All of this is to say that, because of the definition of "proceeding," and as exemplified by Judge [REDACTED]'s opinion in [REDACTED] we cannot say that this is one of those times that reasonable judges could not disagree. So ultimately, the complaint here is not actionable.

CONFIDENTIAL

**FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT**

JUN 02 2020

**David J. Smith
Clerk**

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

Judicial Complaint No. 11-20-90023

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against United States District Judge
_____ of the United States 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”).

Background

The record shows that in August 1994 a federal grand jury in the United States District Court for the _____ District of _____ indicted Complainant on multiple counts. After that, the acting chief district judge entered an order of recusal for all of the district judges in the _____ District of _____. A judge from another district was designated to sit as the presiding district judge in the case.

After various proceedings, the case proceeded to trial, and in January 1995 the jury found Complainant guilty on certain counts and not guilty as to one count. Complainant moved for a judgment of acquittal, and in March 1995 the district judge granted the motion, stating that the court would enter a judgment of acquittal or dismissal as to one count. The next month, Complainant was sentenced to a total term of 272 months of imprisonment. This Court affirmed the district court’s judgment.

With his Complaint of Judicial Misconduct or Disability, Complainant provided, among other things, a February 2010 letter from the Acting Chief of the Bureau of Prisons (BOP) to the district judge who had presided in Complainant’s case. The letter stated that the BOP was considering Complainant’s request for retroactive credit for the time he had served in state custody. He also provided a March 2010 letter from the Subject Judge to the BOP generally objecting to Complainant’s request for relief.

Present Complaint

In his present Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge, who was recused from the matter, intercepted the letter from the BOP and wrote a malicious response recommending that Complainant's motion for retroactive credit be denied, which resulted in the denial of his motion. Complainant contends that the Subject Judge's actions were "illegal, deplorable, unethical," defied a recusal order, and callously violated Complainant's constitutional rights. He attached various documents to his Complaint.

Earlier Complaint

In August 2015 Complainant filed a Complaint of Judicial Misconduct or Disability against the Subject Judge raising the same allegations. (Complaint No. _____). In November 2015 that Complaint was dismissed as merits-related and based on allegations lacking sufficient evidence. Complainant filed a petition for review, and the Judicial Council affirmed the dismissal in February 2016.

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."

Furthermore, when a complaint repeats the allegations of a previously dismissed complaint, it is appropriate to dismiss those repeated allegations and address only allegations that have not previously been considered. See JCDR 11(c)(2).

All of Complainant's allegations have already been considered in connection with his earlier Complaint of Judicial Misconduct or Disability.

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**.



Chief Judge