

APR 12 2023

David J. Smith
Clerk

CONFIDENTIAL

Before the Chief Judge of the
Eleventh Judicial Circuit

Judicial Complaint No. 11-23-90031

ORDER

An individual has filed a Complaint against a United States district judge under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States.

Background

The record shows that in 2008 a federal grand jury returned a superseding indictment charging Complainant with six crimes. The case proceeded to trial where a jury found Complainant guilty on three counts and not guilty on three counts. The presentence investigation report stated that Complainant's criminal history points established a criminal history category of IV, but that, because he was an armed career criminal, his criminal history category was VI. The Subject Judge later sentenced Complainant to a

term of imprisonment on each count, with all counts to run concurrently. This Court affirmed Complainant's convictions and sentences.

Complainant filed a motion to vacate, set aside, or correct sentence, 28 U.S.C. § 2255, raising various challenges, including that he was erroneously sentenced as an armed career criminal. The Subject Judge denied Complainant's motion to vacate, and this Court denied his motion for a certificate of appealability. The Supreme Court later granted Complainant's petition for writ of certiorari, vacated this Court's judgment, and remanded the case for further consideration, and this Court then remanded the case to the district court.

Afterward, the Subject Judge issued an order that found Complainant no longer qualified as an armed career criminal as to one count and stated that all other provisions of the earlier judgment and sentence remained in full force and effect. An amended judgment was then entered again sentencing Complainant to the same total term of imprisonment as before. This Court affirmed.

In 2021, Complainant filed in the district court a motion to reduce his sentence, 18 U.S.C. § 3582(c)(2), in the light of Amendments 782 and 788 to the United States Sentencing Guidelines. The docket entry included a date for referral to the Subject Judge if a response was not filed earlier. Before the date for referral, and with no response having been filed on the docket, the Subject Judge issued an order denying the motion on the ground that Amendment

782 did not have the effect of lowering Complainant's guideline range. Complainant did not appeal the order.

The record also shows that before filing the motion to reduce his sentence, Complainant filed in another court a lawsuit alleging the United States Department of Justice failed to do an adequate search under the Freedom of Information Act for *ex parte* communications that were made in his criminal case. After various proceedings, the defendant filed a motion in which it noted it had provided certain materials to Complainant, including "three *ex parte* communications" between the government and "Court Clerk staff members." The communications were described as an email from court staff to the government to inform the attorneys that the presentence report and sentencing memorandum were being sent to Complainant; an email from the government to court staff seeking a "Determination Memo" relating to Amendment 782; and an email from the government to court staff to determine whether the government was expected to respond to Complainant's motion.

Complaint

Complainant states that, in connection with his lawsuit under the Freedom of Information Act, the Department of Justice produced an email and "admitted that it constitutes an *ex parte* communication between the prosecutor and [the Subject Judge] and/or court staff." Complainant attached an email from an Assistant United States Attorney to two individuals, including the Subject Judge's law clerk, stating that a memorandum from the

probation office was attached and that, if the district court still would like a response to Complainant's motion after reviewing the memorandum, the government would file one.

Complainant contends the email was an improper *ex parte* communication that violated Canon 3A(4) of the Code of Conduct for United States Judges. He also states the email evidenced the Assistant United States Attorney attempting to influence the Subject Judge's decision upon substantive matters and that the Assistant United States Attorney "utilized court personnel . . . to pass along an outdated memo" that incorrectly stated that his criminal history category was VI when he was no longer an armed career criminal. He contends that his due process rights were denied and that "all Jurists of Reason" could "readily determine" that his guideline range had changed and that he was entitled to relief.

Complainant contends that the Subject Judge utilized the improper *ex parte* communication to deny his motion, as confirmed by the government's failure to file a response to the motion, the Subject Judge's denial of the motion days before the deadline for the government's response, and the Subject Judge's denial of the motion "by incorporating verbatim the memo [the Assistant United States Attorney] had forwarded to him *ex parte*." Complainant states that he is seeking additional communications and that "logic suggests a plethora of more unethical *ex parte* communications will be discovered." Complainant also attached an email from the Assistant United States Attorney to a probation officer asking whether the probation office had prepared a memorandum to the

court about Complainant's eligibility for relief under Amendment 782.

Subject Judge's Response

Judicial-Conduct Rule 11(a) requires the Chief Judge to review complaints of judicial misconduct or disability and determine what actions should be taken on them. Judicial-Conduct Rule 11(b) states in part, "In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with . . . the subject judge . . ." *See also* 28 U.S.C. § 352(a). In conducting the limited inquiry, the Chief Judge "must not determine any reasonably disputed issue." Judicial-Conduct Rule 11(b).

As part of a limited inquiry, I asked the Subject Judge to respond to the allegations in the Complaint. In response, the Subject Judge states that one of the emails at issue was unsolicited and disregarded by staff, and that neither its existence nor contents were made known to the Subject Judge. The Subject Judge states that, under the procedures previously adopted by the judges of the district, the probation office undertook to identify all cases that could be affected by Amendment 782, prepared memoranda concerning proper application of the Amendment, and forwarded those memoranda to the presiding judge in each matter. The Subject Judge states that the Assistant United States Attorney's email involving the probation office's memorandum "was of no consequence."

With respect to the assertion that the language in the court's order was similar to language in the probation office's memorandum, the Subject Judge states that similar language was used by probation and the district court in every similar case because "There is no better language to state the results." The Subject Judge then states that the fact that the government did not respond to Complainant's motion "has no significance" because the government was invited, not required, to respond. The Subject Judge states that the issue of Complainant's criminal-history category was "a question to be decided by the Court upon a proper motion." Finally, the Subject Judge states that the Subject Judge's staff "did nothing improper or unethical in the handling" of Complainant's motion, and that whatever "others may or may not have done in no way influenced my decision in the matter."

Discussion

Judicial-Conduct Rule 4(b)(1) 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 explains the rationale for this rule as follows:

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.

The Complaint fails to present a basis for a finding of misconduct. To the extent Complainant's allegations concern the substance of the Subject Judge's official actions, rulings, findings, and orders in the above-described cases, the allegations are directly related to the merits of the Subject Judge's decisions or procedural rulings. Judicial-Conduct Rule 11(c)(1)(B). Complainant's remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge engaged in improper *ex parte* communications, violated the Code of Conduct for United States Judges, or otherwise engaged in misconduct. Judicial-Conduct Rule 11(c)(1)(D). For these reasons, this Complaint is **DISMISSED**.

/s/ William H. Pryor Jr.
Chief Judge