

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

---

J.C. No. 03-14-90077

---

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

---

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

---

MEMORANDUM OPINION

---

(Filed: December 4, 2014)

PRESENT: McKEE, Chief Judge.

This complaint is filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the “Subject Judge”). For the reasons discussed below, the complaint will be dismissed.

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, after review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

Complainant was a defendant in a criminal proceeding before the Subject Judge. He pleaded guilty and the Subject Judge sentenced him to a lengthy term of imprisonment

and ordered payment of a substantial amount of restitution. The Court of Appeals affirmed. Complainant filed a motion to dismiss portions of the indictment, which the Subject Judge dismissed as untimely filed. Complainant appealed that decision, and the appeal is pending. Later, Complainant filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence. The Subject Judge denied the motion and Complainant did not appeal.

Although Complainant states that this complaint of misconduct “do[es] not encompass ‘the merits’ of any decision which was rendered by [the Subject Judge],” it is nonetheless apparent that many of the allegations are merits-related. Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.”).

Among other things, Complainant disagrees with the Subject Judge’s imposition of a sentencing enhancement, arguing that the presentence report did not adequately support the enhancement and that the Subject Judge improperly relied upon “statements [that] were not evidence as a matter of law.” In addition, Complainant argues that the Subject Judge improperly dismissed as untimely his motion to dismiss portions of the indictment, because the Subject Judge did not provide notice of the intent to dismiss and did not conduct an evidentiary hearing on the issue of timeliness. Finally, Complainant argues that the Subject Judge should have recused himself from considering Complainant’s post-judgment motions, including the motion to dismiss portions of the indictment and the

§ 2255 motion.<sup>1</sup> Complainant argues that these alleged errors deprived Complainant of his constitutional rights and therefore “support[ ] the contention that [the Subject Judge] did not comply with the law of this country.”

This is not the appropriate forum for raising merits-related allegations, as they do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. See 28 U.S.C. § 352(b)(1)(A)(ii) (chief judge may dismiss a complaint if he or she finds that it is directly related to the merits of a decision or procedural ruling); Rule 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings (a complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint is directly related to the merits of a decision or procedural ruling). Accordingly, Complainant’s merits-related allegations are subject to dismissal.

Indeed, Complainant has raised many of the same allegations in proceedings before the Court of Appeals, including a pending petition for a writ of mandamus. The “misconduct procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges’ rulings.” In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 561

---

<sup>1</sup> Complainant did not file a motion for the Subject Judge’s recusal. Such a motion should be presented to the Subject Judge in the first instance, however, and a decision on a recusal motion is merits-related and is not cognizable misconduct. See Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings (“[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related”).

(U.S. Jud. Conf. 2008). This administrative proceeding does not provide an additional opportunity to present the same arguments that Complainant is currently pursuing before the Court of Appeals.

Apart from his merits-related allegations, Complainant alleges that the Subject Judge “abandoned his role as an impartial arbiter and engaged in an act of advocacy.” Specifically, Complainant alleges that, in response to Complainant’s statement during his sentencing hearing that he intended to file an appeal, the Subject Judge stated, “you waived your right to appeal, so I don’t think you have any right to appeal unless the Government appeals, and they’re not going to appeal, so that remains to be seen.”

Complainant argues that this statement was erroneous, inasmuch as the plea agreement contained several exceptions permitting an appeal. In addition, Complainant argues that only the Government had the ability to assert waiver as an affirmative defense to Complainant’s appeal, and the Subject Judge’s statement was therefore improper. Finally, Complainant contends that the Subject Judge made this statement “because of his self motivation in attempting to uphold the judgment of sentence he had just imposed . . . [and] constitutes circumstantial evidence of [the Subject Judge’s] lack of impartiality in **MY CRIMINAL MATTER** and shows his favoritism on behalf of **THE GOVERNMENT.**”

The single statement in question does not reasonably support Complainant’s claim of a lack of impartiality or inappropriate advocacy on behalf of the prosecution. At the time Complainant entered his guilty plea, the Subject Judge conducted a lengthy colloquy

in which he reviewed in detail the terms of the plea agreement. Accordingly, the Subject Judge's subsequent reiteration during the sentencing hearing of aspects of the plea agreement – specifically, the appellate waiver – does not give rise to an inference that misconduct has occurred. Notably, although Complainant was represented by counsel at the sentencing hearing, counsel did not object to the Subject Judge's statement. Moreover, Complainant did file a direct appeal, which was fully briefed before the Court of Appeals.<sup>2</sup> Accordingly, Complainant's remaining non-merits-related allegations are subject to dismissal as frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

For the foregoing reasons, the complaint is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

s/ Theodore A. McKee  
Chief Judge

---

<sup>2</sup> The Court of Appeals rejected Complainant's arguments that the appellate waiver did not apply. Any disagreement with that decision is merits-related. See 28 U.S.C. § 352(b)(1)(A)(ii); Rule 11(c)(1)(B), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

---

J.C. No. 03-14-90077

---

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

---

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

---

ORDER

---

(Filed: December 4, 2014)

PRESENT: McKEE, Chief Judge.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, Rules for Judicial-Conduct and Judicial-Disability Proceedings, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

Rule 18(b) Time. A petition for review must be filed in the office of the clerk of the court of appeals within **35 days** of the date on the clerk's letter informing the parties of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the clerk of the court of appeals, and in an envelope marked “Misconduct Petition” or “Disability Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the Rules for Judicial-Conduct and Judicial-Disability Proceedings is available from the Clerk’s Office of the Court of Appeals for the Third Circuit and on the Court of Appeals’ internet site, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

s/ Theodore A. McKee  
Chief Judge

Dated: December 4, 2014