

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-15-90096

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: January 13, 2016)

PRESENT: McKEE, Chief Judge.

This is a complaint filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States Magistrate 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). 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 (U.S. Jud. Conf. 2008).

Complainant, a state prisoner, filed a petition for a writ of habeas corpus. In it, he raised numerous claims, including a claim that the bills of information underlying his conviction were invalid. The presiding District Judge referred the petition to the Subject Judge. Counsel for the Respondent filed a lengthy response accompanied by copies of numerous documents from the state court record. Complainant filed a reply to the response and a motion for the production of the state court record. The Subject Judge denied the motion for production of the state court record but directed Respondent's counsel to send Petitioner copies of all state court documents filed in the case. Respondent's counsel filed a letter indicating he had complied. In addition, shortly before issuing a report and recommendation on the habeas petition, the Subject Judge directed the District Court Clerk's Office to docket portions of the state court record.

The Subject Judge issued a lengthy and detailed report and recommendation in which he recommended denying the habeas petition. Among other things, the Subject Judge recommended denying the claims concerning the invalid bills of information as both procedurally defaulted and meritless. The Subject Judge observed that Complainant's claim had relied upon incomplete bills of information, and that the complete bills of information (which the Subject Judge had previously directed the Clerk

to docket) gave Complainant fair notice of the charges and did not violate his constitutional rights.

Complainant sought additional time in which to file objections to the report and recommendation and renewed his motion for production of the state court record. The Subject Judge granted the renewed motion and directed the Clerk of the District Court to send copies of the portions of the state court record that previously had been docketed. Complainant filed a lengthy set of objections. After considering the objections, the District Judge approved and adopted the report and recommendation, denied the habeas petition, and declined to issue a certificate of appealability.

In this complaint of judicial misconduct, Complainant alleges that he “believe[s]” the Subject Judge must have engaged in improper *ex parte* communications with an unidentified individual. Complainant states that, long after he initially raised claims concerning the allegedly invalid bills of information underlying his conviction, “an anonymous individual filed what are purported to be bills of information.” Complainant argues he was not properly served copies of the documents and that the Subject Judge inappropriately relied upon the documents in rendering his report and recommendation. Complainant surmises that “these documents were anonymously, and suddenly, filed when they were as a result of improper discussions between the [Subject Judge] and whoever this unidentified person may be.” Complainant contends that these alleged discussions constitute conduct prejudicial to the effective and expeditious administration of the business of the courts.

Complainant's allegations of improper *ex parte* communications are baseless. The docket shows that the copies of portions of the state court record, including the bills of information with which Complainant takes issue, were added to the docket in Complainant's habeas proceeding because the Subject Judge provided written instruction to the District Court Clerk's Office to docket them. Contact between judges and Clerk's Office personnel is authorized and proper; because the Clerk's Office is intended to assist judges in their adjudicative responsibilities, such contact does not constitute improper *ex parte* communication. See Commentary to Canon 3A(4) ("A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.").¹ Moreover, not long after those documents were added to the docket, the Subject Judge issued a written order directing the Clerk's Office to provide copies of those documents to Complainant

¹ The Code of Conduct for United States Judges is designed to provide guidance to judges, but is not a set of disciplinary rules. "Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules." Commentary on Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The record undermines Complainant's claim that the Subject Judge engaged in improper *ex parte* communications. Accordingly, the complaint is dismissed 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.

s/ Theodore A. McKee
Chief Judge

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ORDER

(Filed: January 13, 2016)

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)(i), (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 Circuit Executive within **42 days** after the date of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, 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 Office of the Circuit Executive and on the Court of Appeals’ internet site, www.ca3.uscourts.gov.

s/ Theodore A. McKee
Chief Judge

Dated: January 13, 2016