

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-08-90011

BEFORE

Selya and Lipez, Circuit Judges
Smith, Woodcock, and Delgado-Colón, District Judges

ORDER

ENTERED: JANUARY 29, 2009

Petitioner, a litigant, has filed a petition for review of Chief Judge Lynch's order dismissing his complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. The petitioner's allegations of misconduct centered primarily on his criminal prosecution and a related petition for habeas corpus.

The petitioner originally alleged that, in retaliation for "extremely insulting statements" that the petitioner had made to the judge in a memorandum filed in 2003, the judge issued an injunction, in May of 2006, prohibiting the petitioner from filing further pleadings without leave of court. The petitioner next charged that the judge improperly ignored two motions, filed in September 2007 and January 2008, and that, by doing so, the judge failed to recognize the petitioner's "irrefutable independent corroboration" that he has been "unconstitutionally incarcerated"

The petitioner further asserted that his unlawful imprisonment resulted from the judge's erroneous decision allowing the reintroduction of a dismissed count of the indictment "disguised"

as another charge. The petitioner contended that, at the beginning of his trial, the judge allowed the government's motion to dismiss this count but then wrongfully allowed the reintroduction of the same charge as part of another count in violation of the Double Jeopardy Clause of the Fifth Amendment. The petitioner concluded that, as a result, he was sentenced to an "extra 30 years . . . in prison."

Finally, the petitioner alleged that the judge improperly failed to declare a mistrial when he learned of "derogatory statements" made by a juror. The petitioner provided documentation from his criminal case, as well as miscellaneous documentation from two petitions for habeas corpus that the petitioner filed last year in a different circuit (eventually transferred to the First Circuit).

Chief Judge Lynch dismissed the complaint. The Chief Judge first summarized the relevant chronology, as follows. The petitioner was one of numerous defendants charged in 1997 with multiple drug, firearms, and conspiracy counts. As alleged, the government moved to dismiss one count and the court allowed this motion. After a lengthy trial, the jury returned a partial verdict, in early 1999, acquitting the petitioner on two counts. The judge declared a mistrial on the remaining counts.

After further discovery and the filing of additional motions, the court held another jury trial later the same year. The jury found the petitioner guilty. The petitioner was sentenced and the court of appeals affirmed the judgment.

Beginning in January of 2003, the petitioner started to file multiple motions pro se, including a motion for a new trial, a motion to recuse the judge, and a motion to vacate under 28 U.S.C. § 2255. The motion to vacate was the habeas matter to which the petitioner referred in

his misconduct complaint. In January 2007, the judge denied all of the petitioner's 20 outstanding motions.

As indicated in the complaint, the petitioner filed a motion for relief from judgment in September 2007, together with a related motion in January 2008. Chief Judge Lynch noted that, contrary to the petitioner's charges, these motions were not "ignored," but were decided in January 2008.

Meanwhile, in the habeas matter, the judge ordered the submission of a responsive pleading. The petitioner thereafter filed numerous motions resulting in the issuance of the district court's May 2006 order, to which the petitioner objected. Chief Judge Lynch observed that, in this 20-page order, the judge summarized the petitioner's criminal proceeding, defined the applicable legal standard(s), and analyzed the petitioner's claims before determining that the petitioner's charges were inadequate and that the remainder of the petitioner's claims had been addressed on appeal. Because the petitioner had included numerous arguments that the court deemed to be frivolous "attacks upon the legitimacy of [the petitioner's] conviction" and had filed multiple motions that the judge found to be "duplicative, incoherent and wholly devoid of meritorious argument," the judge enjoined the petitioner from filing additional pleadings without first obtaining written approval of the court. The court of appeals affirmed the district court's subsequent denial of the petitioner's motion for a certificate of appealability in this matter.

Chief Judge Lynch determined that the lengthy record of the petitioner's prosecution and the related habeas petition provided no facts indicating that the judge harbored any bias or improper motive in presiding over the petitioner's cases. Nor, the Chief Judge noted, did the petitioner provide any grounds for his conclusion that the May 2006 order (limiting the

petitioner's right to file further pleadings) was issued "in retaliation" for alleged insults the petitioner vented against the judge.

Chief Judge Lynch further explained that the petitioner's related charge that the judge improperly ignored motions filed by the petitioner, in September of 2007 and January of 2008, was equally unsupported. Nor, the Chief Judge noted, would the failure to resolve all pending motions be suggestive of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i); Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 11(c)(1)(A). Accordingly, the claims of bias, retaliation, and neglect were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Lastly, Chief Judge Lynch ascertained that the petitioner's remaining allegations derived exclusively from the petitioner's dissatisfaction with orders issued by the court. Accordingly, the complaint was also dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rules of Judicial Misconduct, Rule 11(c)(1)(B).

The petition for review (and supplementary materials that the petitioner filed) first reiterate the charge that the judge wrongfully reintroduced the dismissed count of the indictment under the guise of another charge for racketeering, although the latter contained "the very same elements" as the dismissed count. The petitioner includes an apparent excerpt from the trial transcript in which an unidentified speaker, presumably a judge, describes the charges and states that the only difference between the dismissed count and the added racketeering charge is the addition of another party.

The petitioner next restates the claim that the judge improperly failed to declare a mistrial when he learned of "derogatory statements" made by a juror and that both the prosecutor and the

judge engaged in fraud and misrepresentation in connection with the petitioner's case. In apparent reference to this claim, the petitioner includes another segment from the transcript of the jury trial in which the court addresses the request of the jury foreperson to speak with the judge. This request precipitated an inquiry into whether another juror had independent knowledge about facts relating to the case. After several conversations with the juror and with counsel, the judge dismisses the juror with the agreement of both parties.

The petitioner goes on to cite another case in which the Assistant United States Attorney responsible for the petitioner's prosecution was allegedly found to have engaged in misconduct and argues that the prosecutor similarly withheld exculpatory evidence from the petitioner and his counsel that would have allowed him to "mount . . . a ferocious attack on the government's case" The petitioner contends that Chief Judge Lynch should have been recused from considering the misconduct complaint because she affirmed the district court's judgment in the case on direct appeal and that, despite Chief Judge Lynch's statement to the contrary, the judge did not respond to the petitioner's motions, filed in September 2007 and January 2008, as well as to another motion that the petitioner allegedly filed in June 2008.

The petition for review is without merit. As an initial matter, neither the judicial misconduct statute, 28 U.S.C. § 351 et. seq., nor the Rules of Judicial Misconduct provide a mechanism for asserting prosecutorial misconduct. Nor do they require the recusal of the chief judge from the misconduct proceeding merely because she was directly involved in the appeals of the underlying case. See Rules of Judicial Misconduct, Rule 25.

Moreover, the petition for review, like the original complaint, contains no evidence that the judge harbored any animus or illicit motivation in connection with the petitioner's

proceedings. As observed by Chief Judge Lynch, the lengthy record of the cases provides no facts indicating that the judge exhibited any bias or retaliatory motive. The transcript excerpts included with the petition support this conclusion; they contain no information whatever suggesting that the judge sought to undermine the petitioner's access to a fair trial. As the reviewed record is devoid of any facts suggesting that the judge was biased or otherwise sought to "retaliate" against the petitioner, the complaint was appropriately dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).

As for allegation arising from the judge's alleged failure to decide all of the petitioner's motions, the record reflects that, in January of 2007, the court denied approximately 20 outstanding motions that the petitioner had filed since January of 2003. As stated by the Chief Judge, the docket further indicates that the motion filed in September 2007 was denied by the court in January 2008. Similarly, the only motion that the petitioner filed on the specified day of January 2008 was for leave to file an appendix and was allowed by the court two days after it was filed. The motion filed in June of 2008 and another motion filed in August of 2008 remain pending. As indicated by the Chief Judge Lynch, on the present facts--including but not limited to the fact that the petitioner had been enjoined from submitting further filings-- the pendency of one or more motions is not remotely suggestive of judicial wrongdoing. See id. § 352(b)(1)(A)(i).

As there was no evidence of judicial bias or animus, the charges arising from the petitioner's disagreement with the court's orders--including the substitution of one count of the indictment with another, the petitioner's convictions and sentence, the denial of post-trial motions, and the dismissal of the habeas petition--were appropriately dismissed pursuant to id. §

352(b)(1)(A)(ii).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-08-90011 is affirmed. See Rules of Judicial Misconduct, Rule 19(b)(1).

A handwritten signature in cursive script, reading "Gary H. Wente", is written over a horizontal line.

Gary H. Wente, Secretary