

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90012

BEFORE

Torruella, Boudin and Howard, Circuit Judges,
Saris and Woodcock, District Judges

ORDER

ENTERED: APRIL 13, 2010

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 originally alleged that the judge engaged in misconduct while presiding over his criminal case and subsequently filed petition under 28 U.S.C. § 2255.

The petitioner charged that, in his criminal proceeding, the judge wrongfully prevented the petitioner from being indicted, arraigned, offered the opportunity to enter a plea, or found guilty by the jury. The petitioner asserted that the judge instead "deliberated in open court with the Jury foreman in order to manufacture a 'Guilty' [sic] verdict." The petitioner added that the judge also ordered restitution that he knew "to be in error," and improperly sentenced the petitioner to consecutive terms of incarceration .

The petitioner next alleged that the judge mishandled his § 2255 proceeding by wrongfully denying his motion for recusal and his request for a certificate of appealability.

The petitioner further stated that the judge directed the clerk not "to accept [his] filings," and denied the petition without giving the petitioner a hearing or providing adequate grounds for the court's decision. In subsequent correspondence, the petitioner added that, in the order denying the § 2255 petition, the judge factually misrepresented the holding of a Supreme Court case and intentionally "buried his perjurious [sic] statement by placing it directly connected to a correct authority"

Finally, the petitioner charged that the judge "pretended to be 'afraid' of [him and] threaten[ed him] by having the U.S. Marshal service bring pressure to bear through [his] former attorney." The petitioner concluded that the judge's handling of both the criminal and civil proceedings evidenced the judge's "unparalleled departure from the U.S. Constitution and Rule of Law [sic]," possibly due to a "mental illness or defect brought on by a combination of age and organic illness."

Chief Judge Lynch dismissed the complaint. The Chief Judge determined that the complaint, subsequent correspondence, and the dockets, as well as the relevant pleadings, court orders, and transcripts, provided no evidence that the judge was disabled, biased, or engaged in any other wrongdoing in connection with either of the petitioner's cases.

In reference to the criminal case, Chief Judge Lynch observed that, at the arraignment, the petitioner was charged and plead not guilty but consented to transfer of the case pursuant to Fed.R.Crim.P. 20. The case was subsequently returned with the indictment.¹ As there was no evidence of bias or other judicial impropriety in connection with the judge's handling of the

¹Fed.R.Crim.P. 20(c) provides that "[i]f the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket."

indictment, arraignment, or the petitioner's submission of a plea, the claims to that effect were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 11(c)(1)(C).

With regard to the jury's verdict, Chief Judge Lynch reviewed the trial transcript. The Chief Judge observed that, after closing arguments, the judge delivered jury instructions, accepted counsels' objections to the jury charge, and clarified several of his earlier instructions. The jury returned after about two hours of deliberations at which point the clerk asked the foreperson whether the jury had reached a verdict and she answered affirmatively. The judge then asked the foreperson for confirmation of the jury's guilty verdict on each of the four pending counts and dismissed the jury. As there was no evidence that the judge "deliberated with the jury" or otherwise undermined the independence of the jury's verdict, any such charge was also dismissed as frivolous pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Chief Judge Lynch then addressed the claim pertaining to the petitioner's sentence -- that the judge ordered restitution that he "knew to be in error," and improperly sentenced the petitioner to consecutive terms of incarceration. The Chief Judge noted that, shortly after trial, the court granted a motion filed by the government for the forfeiture of the petitioner's property. Thereafter, the court sentenced the petitioner to "60 months on each count, to be served concurrently" followed by "supervised release for a period of 3 yrs on each count, all such terms to run concurrently," and ordered restitution.

The Chief Judge determined that there was no information in the complaint or in the reviewed record supporting the claim that the judge intentionally miscalculated the amount of

restitution, or improperly sentenced the petitioner to consecutive terms. The record stated that the terms were to run concurrently. These allegations were, therefore, dismissed as baseless pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C). As there was no evidence of bias, any error in the amount of restitution ordered or in the substance of any other court order did not constitute grounds for a cognizable claim of misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

Turning to the petitioner's collateral proceeding, Chief Judge Lynch determined that there was no support for the charges that the judge improperly denied the petitioner the right to a hearing, improperly denied his motion for recusal and his request for a certificate of appealability, directed the clerk not to accept his filings, provided insufficient grounds for the dismissal of the petition, or intentionally misrepresented governing case law. The Chief Judge first noted that, while a hearing is not automatically required, the judge held a hearing on the petition. Thus, the claim that he was improperly denied the right to a hearing was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Chief Judge Lynch further observed that the petitioner correctly indicated that the court restricted him from submitting filings pro se after it allowed his motion for appointed counsel. The Chief Judge explained that this limitation was not remotely indicative of judicial wrongdoing. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

Chief Judge Lynch next noted that the judge issued a 20-page memorandum and order denying the § 2255 petition that recounted in detail each of the petitioner's claims, as well as the

government's responses, before dismissing the case for the reasons stated in the government's opposition. Accordingly, the claim that the judge committed misconduct by failing to provide sufficient grounds for denying the petition was dismissed as baseless. See 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

Moreover, the Chief Judge determined that the record was utterly devoid of any facts indicating that the judge harbored bias, malice or any other improper motive in connection with the case, including any evidence that he intentionally misrepresented Supreme Court case law in his decision. As to the motions for recusal and request for certificate of appealability, Chief Judge Lynch observed that, after the court denied the petition, it authorized the withdrawal of petitioner's counsel, and the petitioner filed multiple motions for recusal pro se. The judge issued a five-page order in which he denied the petitioner's request for a certificate of appealability (as requested by his former counsel), denied the motions for recusal as "unfounded," and explained that the court lacked jurisdiction to entertain other matters because the case was pending on appeal. Because these charges -- regarding the case law, the motion for recusal and the request for a certificate of appealability -- arose exclusively from the petitioner's disagreement with rulings issued by the court, they were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B), and Rule 3(h)(3)(A) ("Cognizable misconduct" does not include "an allegation that is directly related to the merits of a decision or procedural ruling, including a failure to recuse . . .").

In the petition for review, the petitioner essentially restates the original allegations. As to his criminal prosecution, he admits that, while a "document entitled as an 'Information' was indeed filed with the court," it was not properly "filed in open court after the accused ha[d] been

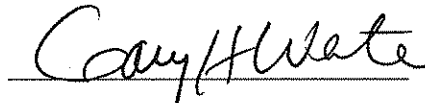
informed of the nature of the charges and ha[d] agreed to waive his right to an indictment by a grand jury." Thus, the petitioner asserts that this document and the court's procedure did not confer "authority upon the court to compel the attendance of the [petitioner]." With regard to the jury's verdict, the petitioner contends that the jury instructions improperly "forbade the Jury from deliberating the issue of Guilt [sic]," but that the foreperson, "acting in concert with the [j]udge arrived at a verdict dissimilar from that rendered by the [j]ury."

The petitioner admits that the judge held a hearing in his collateral proceeding but contends that it was deficient because it was non-evidentiary. The petitioner further asserts that the court's order of dismissal relied exclusively on the government's submissions and ignored "17 grounds covered in the original petition." The petitioner adds that the judge engaged in fraud when he "cited a [Supreme Court] holding that does not exist," and asks the Council to find that the judge has "engaged in conduct unsuitable for a [f]ederal judge" and recommend he be removed.

The petition for review is without merit. The matter is mooted by the recent death of the judge. See 28 U.S.C. § 352(b)(2), and Boudin, C.C.J., Order, In Re: Complaint No. 387, October 7, 2004, and cases cited (Resignation or retirement of judge moots a misconduct complaint unless there are "special circumstances in which the public interest justifie[s] proceeding with the complaint."). Not only are there no "special circumstances" that would justify the continuation of this proceeding, but the petitioner raises no issues beyond those thoroughly addressed by the Chief Judge. The petitioner essentially alleges nothing more than judicial decisions with which he disagrees. In the criminal matter, these include the orders addressing his indictment and transfer, the jury verdict and the sentence. In the civil matter, they include, in part, the judge's handling of

the hearing, the order dismissing the petition, and the orders denying the judge's recusal and certificate of appealability. As observed by Chief Judge Lynch, the petitioner supplies no facts indicating that any of the court's rulings were motivated by bias or a product of a disability. Accordingly, the complaint was also appropriately dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rules 11(c)(1)(B) and 11(c)(1)(C).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-09-90012 is affirmed. See Rules of Judicial Misconduct, Rule 19(b)(1).

A handwritten signature in cursive script, appearing to read "Gary H. Went", written over a horizontal line.

Gary H. Went, Secretary