

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-09-90012

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BEFORE  
Lynch, Chief Circuit Judge

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ORDER

ENTERED: SEPTEMBER 22, 2009

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Complainant, a litigant, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. The complainant alleges that the judge engaged in misconduct while presiding over the complainant's criminal case and his subsequently filed petition under 28 U.S.C. § 2255.

The complainant charges that, in his criminal proceeding, he was not indicted, arraigned, offered the opportunity to enter a plea, or found guilty by the jury. The complainant states that the judge wrongfully prevented the jury from deliberating the complainant's "guilt or innocence," instead "deliberat[ing] in open court with the Jury foreman in order to manufacture a 'Guilty' [sic] verdict." The complainant adds that the judge also unfairly ordered restitution that he knew "to be in error," and improperly sentenced the complainant to consecutive terms of incarceration that "has left an ambiguity unresolved."

The complainant next alleges that the judge denied the complainant a fair opportunity to challenge his criminal conviction and sentence by mishandling the complainant's § 2255 proceeding.

The complainant contends that the judge wrongfully denied the complainant's motion for recusal (necessitated by the judge's mishandling of the underlying criminal case), and the complainant's request for a certificate of appealability (COA). The complainant further states that the judge directed the clerk not "to accept [his] filings," and unfairly denied the petition without giving the complainant a hearing and without providing sufficient grounds for his decision (relying only the government's deficient response as grounds for his ruling).

The complainant has since submitted additional correspondence stating that, in the order denying the § 2255 petition, the judge factually misrepresented the holding of a Supreme Court case.<sup>1</sup> The complainant contends that the judge intentionally "buried his perjurious [sic] statement by placing it directly connected to a correct authority . . . ." The complainant adds that the judge commented to the complainant's counsel that he was "tired of this case," although it is unclear to which of the complainant's cases the judge was allegedly referring. Other miscellaneous allegations are not cognizable as misconduct matters.

The complainant's allegations of misconduct are baseless. The complaint, subsequent correspondence, and the dockets, as well as the relevant pleadings, court orders, and transcripts, provide no evidence that the judge was biased against the complainant or engaged in any other wrongdoing in connection with either of the complainant's cases.

In reference first to the allegations arising from the criminal case, the record indicates that the information was filed with the court, and that the complainant was arraigned before the judge the following week. At the arraignment, the complainant plead not guilty but consented to transfer of

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<sup>1</sup>The complainant states that the judge cited the case for the proposition that "except for plain error, a defendant forfeits his right to challenge the lack of a grand jury indictment on direct appeal when he failed to timely raise such objection in the underlying case" but that, upon investigation, the complainant determined that the case contained no such holding.

the case pursuant to Fed.R.Crim.P. 20.<sup>2</sup> The case was subsequently returned to the judge charged in the present matter, with the indictment.<sup>3</sup> There is no evidence in this material, or elsewhere in the complaint, of bias or other judicial impropriety in connection with the judge's handling of the indictment, arraignment, or the complainant's submission of a plea. Accordingly, the claims to that effect are 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).

The complainant next alleges that the judge wrongfully prevented the jury from deliberating the complainant's "guilt or innocence," instead "deliberat[ing] in open court with the Jury foreman in order to manufacture a 'Guilty' [sic] verdict." The transcript of the last day of the complainant's jury trial indicates that, after closing arguments, the judge delivered jury instructions on each of the four counts with which the complainant was charged. The judge then accepted and preserved objections by counsel to the jury charge, and clarified several of his earlier instructions. The jury retired at just before noon and returned with a verdict approximately two hours later, at which point the clerk asked the foreperson whether the jury had reached a verdict and she answered affirmatively. The judge then read the verdict and asked "Am I correct?" The foreperson again answered affirmatively and the judge asked defense counsel if he wished to poll the jury, which he declined, and the jury was dismissed. There is no evidence that the judge "deliberated with the jury" or otherwise undermined the independence of the jury's verdict. Any such charge is dismissed as

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<sup>2</sup>The consent, signed by the complainant and his counsel, stated that he "wish[ed] to plead guilty to the offenses charged in that [sic] Information, to consent to the disposition of the case in [another district court] . . . and to waive Indictment in the [present district]."

<sup>3</sup>Fed.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."

frivolous pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

The complainant's final claim pertaining to his criminal case concerns his sentence -- that the judge ordered restitution that he "knew to be in error," and improperly or unclearly sentenced the complainant to consecutive terms of incarceration. The docket indicates that, shortly after trial, the government filed a motion for the forfeiture of the complainant's property, and complainant's counsel moved to withdraw. The court appointed replacement counsel, authorized the withdrawal of the complainant's original counsel, and granted the motion for forfeiture over the complainant's multiple objections. After the complainant's counsel unsuccessfully sought to challenge the factual accuracy of a pre-trial stipulation, the complainant was sentenced 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." The judge further ordered restitution and informed the complainant of his right to appeal.

There is 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 complainant to consecutive terms. The record states that the complainant's terms were to run concurrently "with the sentence imposed in the [the other district court]." <sup>4</sup> These allegations are, likewise, 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). Absent evidence of bias or wrongdoing -- of which there is none -- judicial error in the amount of restitution ordered or in the substance of any other court order is

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<sup>4</sup>In its memorandum and order dismissing the complainant's § 2255 case, the court adopted the government's argument that, because the complainant had already completed his sentence in the other jurisdiction by the time he was sentenced in the First Circuit district court, the latter "cannot be served concurrently with a sentence that has already expired."

directly related to the merits and, as such, is not 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 now to the charges emanating from the complainant's collateral proceeding, the complainant contends that the judge mishandled the case by: denying him the right to a hearing; denying his motion for recusal and his request for a certificate of appealability (COA); directing the clerk not to accept his filings; providing insufficient grounds for the dismissal of the petition; and misrepresenting governing case law. A review of the complaint, the docket, as well as relevant pleadings and court orders lend no support to these contentions. First, while a hearing is not automatically required, the judge held a hearing on the complainant's § 2255 motion. Although the complainant was not present, he was represented by counsel appointed at his request. Thus, the claim that he was improperly denied the right to a hearing is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

The complainant correctly points out that the court restricted him from submitting filings pro se. The record indicates that, although the complainant initially filed the case on his own behalf, the judge allowed his motion for appointed counsel, after which the judge prohibited the complainant "from filing any pleadings unless he first consults with appointed counsel and provides certification of same, or unless he notifies this Court that he elects to proceed without appointed counsel and to represent himself pro se in this action." This limitation is 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).

After the hearing noted above, the judge issued a 20-page memorandum and order denying the complainant's § 2255 petition. The order recounts in detail each of the complainant's claims, as well as the government's responses, before dismissing the case for the reasons stated in the

government's opposition. The claim that the judge committed misconduct by failing to provide sufficient grounds for denying the petition is 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 record is 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 (COA), the docket indicates that, after the court denied the petition, it authorized the withdrawal of complainant's counsel, and the complainant filed multiple motions pro se for the judge's recusal. The judge subsequently issued a five-page order in which he denied the complainant's request for a COA (as requested by the complainant's former counsel), denied the motions for recusal as "unfounded," and explained that the court lacks jurisdiction to entertain other matters because the case is pending on appeal. These charges -- regarding the case law, the motion for recusal and the request for a COA -- arise exclusively from the complainant's disagreement with rulings issued by the court. As such, they are 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 . . .").

For the reasons stated, Judicial Misconduct Complaint No. 01-09-90012 is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

9/22/09  
Date

Chief Judge Lynch  
Chief Judge Lynch