

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-22-90006

BEFORE  
Barron, Chief Circuit Judge

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ORDER

ENTERED: APRIL 3, 2023

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Complainant, an incarcerated criminal defendant, has filed a complaint under 28 U.S.C. § 351(a) against a district judge in the First Circuit. Complainant alleges judicial misconduct in connection with an ex parte conference held in complainant's criminal proceeding over which the district judge presided. The misconduct complaint is not indicative of misconduct, is baseless, and is not cognizable.

Complainant alleges that, at the beginning of complainant's jury trial, the district judge held an improper ex parte lobby conference with counsel for the government, from which the judge "purposely" excluded complainant's counsel. Complainant asserts that the district judge "engaged in personal bias" against him by giving the prosecution the opportunity to "convince" the judge to make a ruling in its favor without complainant's attorneys present. Complainant further asserts that the judge treated complainant's counsel in an egregious manner by excluding them from the discussion with the prosecution, which resulted in a successful ruling for the government. Complainant

surmises that, by holding the ex parte conference, the district judge engaged in "perjury" and conspired with the government to withhold exculpatory evidence. Complainant concludes that the judge's actions violated complainant's due process right to a fair trial and the Code of Conduct for United States Judges (Code of Conduct), undermined the public's confidence in the judiciary, and require the immediate vacation of his sentence.

As an initial matter, the judicial misconduct procedure does not provide an avenue for obtaining relief in a case, including vacating a sentence. See 28 U.S.C. § 351, et seq., and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rules 11, 19(b), and 20(b).

The reviewed record, including the misconduct complaint, the docket of the proceedings, and the relevant transcripts, provides no basis for complainant's allegations of judicial misconduct. The record indicates that complainant was charged with a crime, to which he pled not guilty and proceeded to trial. Prior to trial, complainant filed a motion for the district court to order the production of certain records, and the government filed an opposition. The district judge ordered the production of and the government to review the records. After reviewing the records, the government filed an ex parte, sealed report, concluding that the records contain no exculpatory information and that they are privileged or reflect hearsay, but sharing with the court, out of an abundance of caution, a single statement included in the records.

Before the parties made their opening statements at trial, the district judge held an ex parte lobby conference for the government to explain further whether the statement

identified in the ex parte, sealed report was privileged, exculpatory, and/or hearsay. The following morning, the district judge held another ex parte lobby conference with the government, at which the judge indicated that the government had the obligation to disclose to complainant's counsel the statement from the records, as it appeared to be exculpatory information, unless the government could convince the court otherwise. Ultimately, over the government's objection, the court ordered the disclosure of the statement to complainant's counsel.

Thereafter, complainant's counsel entered the judge's chambers, and the judge explained that the government had provided to the court a statement from the specified records which, on first impression, did not appear to require disclosure; however, after further consideration, the court had determined that its disclosure to complainant was necessary. The government read the statement, and complainant's counsel requested a copy of the statement and permission to question the relevant witness about the statement at trial, both of which the court allowed.

The misconduct complaint is meritless. The record demonstrates that the ex parte communication to which complainant objects and which forms the basis of his misconduct complaint was neither unethical nor otherwise improper; the court's communication with the prosecution about whether the statement included in the records was exculpatory information requiring disclosure to complainant's counsel was authorized by law. See supra pp. 2-3; Rules of Judicial-Conduct, Rule 4(a)(1)(C) ("Cognizable misconduct includes . . . engaging in *improper* ex parte communication

with parties or counsel for one side in a case (emphasis added)); Code of Conduct, Canon 3(A)(4)(a) ("A judge may[ ] initiate, permit, or consider ex parte communications as authorized by law.")<sup>1</sup>; and United States v. Tsarnaev, 968 F.3d 24, 94 (1st Cir. 2020) (explaining that "a judge may act in camera and with the benefit of only the prosecution's views . . . when there is a need to stop disclosure of sensitive information – for example (and without limitation), material that . . . fall[s] outside the rule of Brady"). Accordingly, the complaint is dismissed as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

Complainant's related allegations – that, by holding the ex parte lobby conference, the judge exhibited bias against complainant, treated complainant's counsel in an egregious manner, committed perjury, violated complainant's due process rights, or engaged in any other judicial wrongdoing – are baseless. To the contrary, the record indicates that the lobby conference was held in order to determine the information to which complainant was constitutionally entitled and resulted in a court ruling in complainant's favor with the disclosure to complainant of the statement at issue. See supra p. 3. See also Tsarnaev, 968 F.3d at 95 (quoting United States v. Innamorati, 996 F.2d 456, 488 (1st Cir. 1993) ("[T]he interests of justice are better served by encouraging the government to let the district court resolve' concerns about sensitive information 'in

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<sup>1</sup> A violation of the Code of Conduct may inform consideration of a judicial misconduct complaint but does not necessarily constitute judicial misconduct under the statute. See Code of Conduct, Canon 1 Commentary (While the Code of Conduct may "provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364), [n]ot every violation of the Code should lead to disciplinary action."); and Rules of Judicial-Conduct, Commentary to Rule 4 ("While the Code [of Conduct's] Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act [28 U.S.C. § 351, et seq.] and these Rules . . .").

close cases'; and a '[d]efendant[ ] in general would not gain from a regime that encouraged the government to decide the matter itself.")). Accordingly, the complaint is dismissed as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

Where, as here, there is no evidence of bias or improper motive, to the extent that the complaint is based on complainant's disagreement with the judge's rulings, including, but not limited to, the orders regarding the production and disclosure of exculpatory information and complainant's sentence, it is not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii), and Rules of Judicial-Conduct, Rule 11(c)(1)(B); see also Rules of Judicial-Conduct, Rule 4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling . . . . If the decision or ruling is alleged to be the result of an improper motive . . . or improper conduct . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision.") and Commentary to Rule 4 ("Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related."). Accordingly, the complaint is dismissed as not cognizable, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

For the reasons stated, Complaint No. 01-22-90006 is dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(A), (B), and (D).

April 3, 2023

Date

  
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Chief Judge Barron