

**FILED**

March 12, 2021

Lyle W. Cayce  
Clerk

# Judicial Council for the Fifth Circuit

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Complaint Number: 05-21-90079

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## MEMORANDUM

Complainant, a federal prisoner, has filed a complaint alleging misconduct by the subject United States District Judge who presided over his criminal trial.

Complainant alleges that the judge “had already predetermined my guilt and punishment before I was even indicted.” In support of this assertion, complainant recounts that when defense counsel first visited him in prison, defense counsel had either already prepared, or wrote during the visit, a note which included the following notation: “Courts will depart upward from my [sic] Guidelines.” Complainant proposes that this notation “clearly prove[s] that [the judge] engaged in improper ex parte communications with parties or counsel for one side in my case because how could [the judge] already come to the conclusion that I would be sentenced outside of my Guidelines before I had pled guilty, presented evidence, or established a defense that may or may not have proved my innocence[?]”

Complainant provided a copy of defense counsel’s handwritten note which was captioned “[illegible] guideline issues – 07-19-17 [illegible] visit” followed by a list of statutory provisions and guidelines, including: the criminal statute under which complainant was charged; applicable and inapplicable sections of the United States Sentencing Commission Guidelines Manual; the applicable Criminal History category; the applicable penalties; and, “Analysis of § 3553 -- court will depart upward from guideline

sentence” (i.e., referring to 18 U.S.C. § 3553 which sets out the factors a court may consider in imposing a sentence).

Complainant’s conclusory assertion that the final handwritten notation in a list of applicable criminal statutes and sentencing guidelines constitutes evidence of prejudgment by the judge and improper ex parte communication between the judge and defense counsel is insufficient to raise an inference that misconduct has occurred, and the allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further alleges that during the sentencing proceedings, the judge “was biased, impatient, intimidating,” spoke in an “antidefendant tone,” and “displayed abusive behavior towards me and my attorney with his egregious and hostile attitude.” Working his way through the 61-page transcript, complainant cites twelve examples of the judge’s allegedly biased conduct and remarks, e.g., interrupting defense counsel’s questioning of witnesses, instructing defense counsel to focus on questions that would assist the court in considering complainant’s objections to the Presentence Investigation Report, and admonishing defense counsel that his questions were eliciting responses that were not helpful to his client or were irrelevant.

A review of the transcript and audio-recording of the hearing clearly shows that the remarks at issue were attempts by the judge to discern defense counsel’s strategy in asking witnesses certain questions, and to move the proceedings along after the judge had heard sufficient testimony to reach a decision on a particular issue. The judge’s tone of voice was occasionally stern, but he did not display “aggression” or “hostility” towards complainant or defense counsel.

To the extent, if any, that the judge conveyed impatience or annoyance during the hearing, the Supreme Court of the United States has held that judicial bias is not established by a judge’s “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed

as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.” *Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994). The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also claims that the judge’s “personal bias” and prejudice were evident in erroneous findings about the extent of complainant’s involvement in the underlying crimes and/or his involvement in other crimes; “[The judge was] anxious and eager to punish me for . . . anything he could find.”

To the extent that this allegation relates directly to the merits of rulings or procedural decisions, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the Supreme Court of the United States has held that “[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant . . . But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . . .” *Liteky*, 510 U.S. at 551. The assertion of personal bias and prejudice is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

In addition, complainant claims that the judge denied every 28 U.S.C. § 2255 matter assigned to him between 2012 and 2020 and did so “based on the government’s response. He contends that these “favorable rulings for the prosecutors” constitute proof of the judge’s “history of personal bias and prejudice towards [criminal] defendants” and proof that the judge “can[not] be fair, neutral, or impartial” in his pending § 2255 proceeding.

To the extent that the allegation relates directly to the merits of decisions or procedural rulings, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, complainant’s speculation that the judge cannot be impartial in his pending § 2255 proceeding is insufficient to

support a finding of judicial misconduct and is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.



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Priscilla R. Owen  
Chief United States Circuit Judge

March 11, 2021