

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-22-90073

JCP No. 08-22-90074

In re Complaint of John Doe¹

This is a judicial complaint filed by an inmate (“complainant”) against the United States district judge and United States magistrate judge assigned to the complainant’s criminal case. The judicial complaint alleges that “[t]hese two judges have appointed all ineffective counsel[] to represent [the complainant] . . . who were all in favorable [sic] with the USA government . . . and [the judges] in order for all these [attorneys] to hinder [the complainant] of [a] ‘justification defense.’” The judicial complaint alleges that the judges’ appointment of ineffective counsel shows their “bias” against the complainant.

I have reviewed the record. *See* Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (J.C.U.S.) Rule 11(b). The record shows as follows. On September 12, 2016, the magistrate judge entered an order appointing a federal public defender as complainant’s counsel. On November 28, 2017, the magistrate judge granted that federal public defender’s motion to withdraw as counsel and appointed counsel under the Criminal Justice Act (“first CJA counsel”) to represent the complainant. On September 11, 2018, the first CJA counsel moved to withdraw. The next day a hearing was held; the minute entry reflects that the following occurred:

¹Under Rule 4(f)(1) of the Rules Governing Complaints of Judicial Misconduct and Disability of the Eighth Circuit, the names of the complainant and the judicial officer complained against are to remain confidential, except in special circumstances not here present.

The Court inquires of defense counsel whether she feels she can continue to represent the defendant. Defense counsel advises she does not feel she can continue as counsel for the defendant. The Court inquires of the defendant if he wishes another attorney be appointed for him. The defendant confirms he would like to have new counsel appointed to represent him. After hearing all statements, the Court grants the motion to withdraw The Court further advises the defendant that this matter is currently set for trial on the 10/29/18 trial docket and new counsel will most likely require more time to prepare and resolve this case. The defendant confirms he understands and will agree to a continuance of the trial setting if needed. *The Court advises the defendant he will need to cooperate with his new counsel and there will be no other attorneys appointed if he is unhappy with his new counsel.*

(Emphasis added.) On September 25, 2018, the magistrate judge entered an order appointing new CJA counsel (“second CJA counsel”). The next day, the magistrate judge granted the first CJA counsel’s motion to withdraw.

On August 27, 2019, a status conference was held. The minute entry reflects that the magistrate judge cleared the courtroom of all persons except defense counsel, the complainant, and court personnel. The magistrate judge held an in camera hearing. During that hearing, the magistrate judge advised the complainant that he would not be provided new counsel and that the second CJA counsel would continue to represent him.

On October 21, 2019, the complainant filed a pro se motion to substitute counsel. The next day, the complainant filed a motion for leave to proceed pro se. At a pretrial conference hearing on October 29, 2019, the district judge discussed with the complainant whether he wanted to proceed pro se. The complainant told the district judge that the second CJA counsel was “refus[ing] to file” certain motions, including a motion concerning a “legal justification” defense. The district judge then explained to the complainant, “The Government filed a motion in limine to limit that.

So in fairness, [the second CJA counsel] didn't need to file that because it was brought before the Court for the Court to consider, and I told you you're not even in the ballpark on that one. That's not even a close call. You don't get that one." The district judge reminded the complainant that appointed counsel was an "officer of the Court" and "not a secretary that just files everything [the complainant] tell[s] him to file."

After a lengthy discussion between the district judge and the complainant, the complainant was handed a waiver-of-counsel form. The complainant clarified that he *did* want counsel to represent him; he just *did not* want the second CJA counsel to do it. The district judge reviewed at length the form with the complainant. The complainant requested a continuance, but the district judge informed the complainant the trial would proceed as scheduled. Ultimately, the complainant stated, "You know what? I'm going to take [the second CJA counsel] for this trial. . . . I'm going to take him." The complainant expressed his "hope" that second CJA counsel was "not working with the Government." The district judge responded that second CJA counsel has "represent[ed] a lot of people" and was a "man of integrity and . . . does good work." The district judge noted that it was "unfortunate that [the complainant] [was] so suspicious of everybody who tries to help [him]."

On November 5, 2019, the district judge entered an order finding as moot the complainant's motion for leave to appear pro se and motion to substitute attorney based the complainant withdrawing the request at the October 29 hearing.

On November 6, 2019, the complainant was found guilty at trial. Post-trial, the complainant moved to proceed pro se. At the sentencing hearing on September 30, 2020, the district judge sustained the complainant's motion to proceed pro se and appointed the second CJA counsel as standby counsel.

On October 6, 2020, the second CJA counsel moved to withdraw as counsel, citing "an interaction [with the complainant] wherein [counsel] felt that [the

complainant] was threatening his safety.” The district judge granted the motion to withdraw and directed the magistrate judge to appoint new counsel. On October 16, 2020, the magistrate judge appointed new CJA counsel to represent the complainant.

Having reviewed the record, I conclude that to the extent that the judicial complaint challenges the judges’ rulings on the appointment of counsel, the allegations must be dismissed as “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352(b)(1)(A)(ii); *accord* J.C.U.S. Rules 4(b)(1), 11(c)(1)(B). To the extent the judicial complaint alleges that the judges showed bias or colluded with the government and the complainant’s counsel to deprive the complainant of a justification defense, the allegations are “frivolous” and “lacking sufficient evidence to raise an inference that misconduct has occurred.” 28 U.S.C. § 352(b)(1)(A)(iii); *accord* J.C.U.S. Rule 11(c)(1)(C), (D).

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Lavenski R. Smith, Chief Judge
United States Court of Appeals
for the Eighth Circuit