JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-23-90060

In re Complaint of John Doe[1]

This is a judicial complaint filed by a criminal defendant ("complainant") against the United States district judge who presided over the complainant's criminal case.

First, the judicial complaint alleges that the district judge "enable[d]" an "egregious practice of law" in rejecting the complainant's argument that the government was unable to prove that the complainant knowingly distributed fentanyl, a controlled substance under the Controlled Substance Act, because, at most, the government could only prove that the complainant knowingly distributed 4-FA, an amphetamine that may be considered an analogue drug. According to the complainant, the district judge "constructively amend[ed] the indictment" and violated the complainant's "constitutional right to a grand jury indictment." Second, the judicial complaint alleges that the complainant "strategically adopted the complainant's lawsuit . . . against the government in response to [the complainant's] motion to disqualify the US Attorney's Office and quash [its] associated indictment." Third, the judicial complaint alleges that the district judge exhibited hostile behavior toward the complainant when the complainant's "newly appointed lawyer . . . requested time to consult with expert witnesses before beginning trial." Fourth, the judicial complaint alleges that the district judge demonstrated "provocative

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[1]Under 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.

tendencies toward the complainant" in denying the motion for substitute counsel. Finally, the judicial complaint alleges that the district judge "present[ed] a . . . darker version of the circumstances to support" the complainant's sentence.

I have reviewed the record in the complainant's criminal case, including the transcripts identified in the judicial complaint. *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 that the complainant moved to dismiss the indictment, arguing that because 4-FA, an analogue, is not a controlled substance under the CSA, the complainant's intent to distribute an analogue was insufficient to sustain a conviction under the CSA. The district judge adopted the magistrate judge's report and recommendation to deny the dismissal motion, stating, "As the magistrate judge observed, the [g]overnment will have to prove at trial the required degree of intent required . . . , and also that 4-FA is, in fact, an analogue. But at this stage, the [c]ourt reviews whether the allegations in the [i]ndictment, if proven, constitute the crimes alleged."

Thereafter, the complainant filed a pro se motion to disqualify the U.S. Attorney's Office because of a pending civil lawsuit that the complainant filed against certain employees in that office. The complainant alleged that a conflict of interest resulted because of the civil lawsuit. At the pretrial status conference, the complainant stated, "I would like [standby counsel] to represent me, but after we determine your decision on the rest of the pretrial motions that I filed." The district judge denied the motion to disqualify, explaining, "I have dismissed the claims in the civil case against the prosecutors because they have prosecutorial immunity under the law. And the remaining claims, however, have been stayed pending the completion of this trial. And so in light of that fact, there is no conflict of interest and the motion to disqualify and quash is denied."

At another pretrial status conference held the following day, the district judge addressed "a last-minute expert disclosure on the eve of trial." The complainant's

counsel explained that although counsel disclosed two expert witnesses to the government, only one could potentially be called as a witness. However, "[i]n all candor to the [c]ourt," defense counsel did not know whether counsel would call the expert as a witness because of the "cost benefit analysis" of what the expert could "potentially say." Defense counsel explained that while the complainant "never disagreed" with counsel's decision to obtain the expert, "[i]t was not something that [the complainant] was . . . passionate about." Defense counsel "push[ed]" the complainant on the issue because of counsel's belief that it "was something that was needed . . . to properly defend." Defense counsel was "unclear that a report would be something that would be helpful for [the complainant's] defense." According to defense counsel, the defense expert indicated that the report would be ready that day or the following day. Defense counsel urged the district judge not to exclude the defense expert "given the unusual circumstances of the case" and defense counsel's transition "from standby to full counsel" the day prior. After hearing argument from the government, the district judge did not bar the defense expert. The district judge did, however, express "concern[] . . . that months and months and months ago [the complainant, proceeding pro se,] came to the [c]ourt and said, I need a delay because I need experts. I'm having trouble getting experts, and apparently had no intention whatsoever to get experts and failed to do so." The district judge noted that the complainant had "ignored the guidance and strong advice of . . . talented standby counsel to take some steps to get experts." The district judge expressed "frustration over the manipulation . . . , coupled with the premature habeas case and the premature appeal and the civil lawsuit against the prosecutors and all the other antics. The judicial complaint and on and on." The district judge declined to exclude the defense expert because of standby counsel becoming full counsel the day prior.

At trial, the complainant was found guilty and proceeded to sentencing. Following the conviction, the complainant moved to proceed pro se. Following a hearing, the district judge granted the motion. At sentencing, the district judge first addressed the complainant's motion for substitute standby counsel and declined to address other motions that were "repetitive or inappropriate for sentencing." The

district judge explained that there is no "right to substitute standby counsel. You either exercise your right to counsel or you waive your right to counsel and choose to exercise your right to represent yourself. Then, the [c]ourt has the option of appointing standby counsel and [the court did] so, but [standby counsel] is not your lawyer." When the complainant continued to request substitution of standby counsel, the district judge repeatedly stated that standby counsel was not the complainant's counsel. When the complainant interrupted the district judge, the district judge reminded the complainant to "demonstrate respect" and not to "interrupt." The district judge then stated that the complainant's understanding of the role of standby counsel was "incorrect." The district judge explained that standby counsel does not represent the complainant, "has no obligation to do anything to further [the complainant's] defense," and "is not obligated to get . . . experts, to get . . . discovery, [or] to help . . . with arguments." The district judge again inquired whether the complainant was waiving a constitutional right to counsel, and the complainant answered, "Yes, I am. And I never said [standby] counsel was obligated to do anything. . . . I'm asking why was [standby counsel]—[standby counsel is] here to potentially assist me with doing things that I cannot do because I am in jail." The complainant further stated that standby counsel's failure to "do anything" violated the complainant's "constitutional right." After the complainant again interrupted the district judge, the district judge again explained that standby counsel has "no obligation to do anything for your defense. [Standby counsel] is not your lawyer. Please hear me. . . . Today at sentencing, do you wish to proceed . . . on your won behalf?" The complainant responded, "Yes, I do. But why was [standby counsel] appointed to me as standby counsel if [counsel] does absolutely nothing." Once again, the district judge explained that standby counsel "has no obligation to do anything." The complainant again requested substitution of standby counsel. The district judge denied the motion.

After the district judge denied the motion to substitute standby counsel, the complainant indicated that the complainant had other motions to file with the court. The district judge replied, "It is too late . . . to file any motions. Today is the day of the sentencing." After the complainant interrupted the district judge, the district judge

continued, "No more motions. It's too late for motions. You've filed many, many motions. You had plenty of opportunity to file motions. . . . We are done with motions today."

The district judge then sentenced the complainant. In doing so, the district judge set forth the reasons for the sentence, including the nature and circumstances of the offense, the complainant's lack of remorse, and the complainant's likelihood to reoffend.

Having reviewed the record, to the extent the judicial complaint challenges the orders and decisions of the district judge, it 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* Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (J.C.U.S.) Rules 4(b)(1), 11(c)(1)(B). To the extent the judicial complaint alleges that the district judge violated the law or engaged in hostile behavior toward the complainant, the record reveals that such allegations are "frivolous, 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).

The judicial complaint is dismissed.

July 17, 2023

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