JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-23-90069

In re Complaint of John Doe[1]

This is a judicial complaint filed by an criminal defendant ("complainant") against the United States magistrate judge assigned to the complainant's criminal case.

The judicial complaint alleges that the magistrate judge (1) induced and condoned a violation of state law by appointing defense counsel "who was given a directive in ensuring [the complainant's] conviction"; (2) knowingly appointed defense counsel who "attempt[ed] to induce the [d]efendant to plead to frivolous charges, with no basis of probable cause" in violation of the complainant's Sixth Amendment right to counsel; (3) engaged in "ex parte discussions with both government and counsel regarding [the complainant's] case"; (4) "[a]ssist[ed] the government by biding [it] time, under false pretenses, to build a case after KNOWINGLY indicting the [complainant] on frivolous charges . . . and assisting the government in [a] violation [of state rules of professional conduct]"; (5) treated the complainant "in a demonstrably loathsome [and] egregious manner"; (6) "conspired with the government in subtle ways and encouraged [the complainant's] own counsel to do so as well"; and (7) "became increasingly angry" in response to the complainant's recusal request and retaliated by "shorten[ing] all deadlines for

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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.

motions." Attached to the judicial complaint is 284 pages of exhibits, including e-mails and transcripts, in support of the allegations.

I have reviewed the record in the complainant's criminal case and the exhibits attached to 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). In summary, the record and exhibits show that the magistrate judge held two ex parte hearings on the complainant's two requests for appointment of new counsel[2] and also held a hearing on the complainant's recusal request. At the first ex parte hearing, the magistrate judge explained that after reading a letter the complainant had written to the state bar about court-appointed defense counsel, the magistrate judge had concluded that counsel and the complainant were in a "irreconcilable position" and that the complainant did not want counsel to continue representing the complainant. The magistrate judge noted that counsel was "attorney number five" for the complainant. The magistrate judge presented the complainant with four options. First, the magistrate judge advised that the complainant could choose self-representation, explaining that was the complainant's "constitutional right under the Sixth Amendment." The magistrate judge cautioned the complainant, however, that "[s]he who represents herself has a fool for a client." The magistrate judge explained that if the complainant chose self-representation, then standby counsel would be appointed "to assist" and "provide some guidance." Second, the magistrate judge stated that the complainant could "retain [the complainant's] own lawyer to represent [the complainant]." Third, the magistrate judge noted that the complainant could keep current court-appointed counsel. Finally, the magistrate judge advised that the magistrate judge could grant the complainant's request and appoint a sixth lawyer. But the magistrate judge was "not inclined to do that." The magistrate judge pointed out that the complainant had "some rather novel defenses" and that a new lawyer would have "to start from square one."

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[2]The record indicates that another ex parte hearing was held prior to the two ex parte hearings at issue in this judicial complaint.

The complainaint indicated continued dissatisfaction with current counsel, and the magistrate judge again explained that the complainant had the right to self representation. The magistrate judge assumed that the complainant had "pitched [suggested] defenses" to all five lawyers, who did not agree with them. When the complainant replied that the lawyers failed to look at the discovery, the magistrate judge responded that current counsel had "clearly gone through it." The complainant then alleged that current counsel "manipulated and deleted videos" provided to the complainant by a prior attorney. The magistrate judge then permitted current counsel to speak. Counsel denied the accusations and indicated the desire to withdraw as counsel. After hearing from counsel, the magistrate judge stated to the complainant, "I'm not in a position to decide [whether counsel destroyed evidence], nor will I." But the magistrate judge did note the "scandalous" nature of the accusations that defense counsel destroyed exculpatory evidence.

The magistrate judge then "candid[ly]" informed the complainaint, "[W]hen a lawyer hears that you have had five lawyers before, I think those lawyers are going to hide under the table and say—or just flat-out say 'No, I'm not going to take it.'" The magistrate judge asked the complainant, "[D]o you want to represent yourself?" The complainant replied, "No, I do not." Ultimately, the magistrate judge decided to take the matter under advisement and discuss the matter with the district judge assigned to the case. The record reflects that the fifth defense counsel was terminated from the case, and the magistrate judge appointed a sixth lawyer to defend the complainaint.

At the second ex parte hearing, the magistrate judge once again informed the complainaint of the options available if the complainaint was not satisfied with the sixth court-appointed counsel. The magistrate judge reminded the complainaint that the magistrate judge had "made it very clear to [the complainant], after lawyer number five, that lawyer number six was the last [court-appointed] counsel." At that time, the magistrate judge had "detailed reasons why lawyer six was going to be the

last one." The magistrate judge was "reluctant to give [the complainant] another lawyer" because of the "expenditure of funds . . . to pay for court-appointed lawyers," the time new counsel would need to review all of the case materials, and the fact that the case was a drug case that typically involves a lot of material to review.

The magistrate judge gave defense counsel the opportunity to speak. After defense counsel spoke, the magistrate judge afforded the complainant the same opportunity. The complainant replied, "Your Honor, if you couldn't tell, a whole lot of what he just said is lies to cover up the things that were done." The complainant expressed the belief that defense counsel was "working against" the complainant. The magistrate judge inquired what the complainant would do if the magistrate judge did not appoint new counsel: hire a lawyer, self-representation, or stay with current counsel. The complainant replied, "I'm not sticking with [current counsel]. [Current counsel] is trying to get me." The complainant indicated that the complainant's choice was self-representation.

The magistrate judge then asked the complainant a series of questions to determine whether self-representation was appropriate. One of the questions asked was, "Do you understand that you are charged with possession of a controlled substance . . . with the intent to distribute it?" The complainant replied, "I didn't know my charges. I was asking what they were, and I thought they were conspiracy." The complainant inquired what the charges were, to which the magistrate judge responded, "You are charged with conspiracy to distribute a controlled substance. The Court was wrong. Conspiracy to distribute a controlled substance . . . . Do you understand that?" The magistrate judge indicated that the magistrate judge "misspoke" and again stated the charge and asked if the complainant understood. The complainant answered yes. At the conclusion of the inquiry, the magistrate judge advised the complainant that "in [the court's] opinion, a trained lawyer would defend [the complainant] far better" and that it was "unwise" for the complainant to engage in self-representation. The magistrate judge then asked if the complainant still chose self-representation. The complainant answered yes and indicated that the decision

was made voluntarily. The magistrate judge concluded that the complainant "knowingly, voluntarily, and intelligently waived [the] right to counsel."

The magistrate judge found "it advisable to appoint standby counsel who [could] assist [the complainant] or who [could] replace [the complainant] in the event the district court determine[d] during trial that [the complainant] [could] no longer [engage in self-representation] and proceed on a pro se basis." The magistrate judge appointed current counsel as standby counsel because of counsel's familiarity with the case. The purpose of standby counsel was to help the complainant, if needed, or "step in and provide representation" in the event that the district court determined that the complainant was not competent to engage in self-representation. The magistrate judge reminded the complainant of the prior warning that "lawyer number six was going to be [the complainant's] last [court-appointed] lawyer" and expressed "frustrat[ion] that six lawyers haven't worked out." The magistrate judge lacked "confidence that things [would] work out with a seventh lawyer."

The complainant then inquired whether the private investigator would continue working for the defense, and counsel interjected that the private investigator was not interested in moving forward if the complainant proceeded pro se. The magistrate judge advised that "that doesn't mean that [the complainant] [couldn't] get another one to assist" and directed the complainant to include that in a letter to the district judge. The complainant inquired how to file documents, and the magistrate responded that the complainant could use regular mail or talk to the clerk about getting E-filing privileges. When the complainant inquired how to obtain discovery, the magistrate judge replied that the complainant would have to coordinate with the U.S. Attorney's Office. Finally, the magistrate judge reminded the complainant that the complainant could contact standby counsel for assistance but it was ultimately the complainant's decision; the magistrate judge was "not going to give [the complainant] advice."

Thereafter, the magistrate judge held a status hearing at which the magistrate judge addressed the complainant's recusal request. The transcript of the status hearing

is not available, but the complainant represents that the magistrate judge responded "well maybe you should have listened" after the complainant identified the magistrate judge as the "common denominator to every appointed counsel attempting to force [the complainant] to take a plea." The minute entry reflects that the magistrate judge advised the parties that the magistrate judge would not recuse and offered marks in support of that decision.

Having thoroughly reviewed the record and exhibits, to the extent the judicial complaint challenges the orders and decisions of the magistrate 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* J.C.U.S. Rules 4(b)(1), 11(c)(1)(B). To the extent the judicial complaint alleges that the magistrate judge conspired with defense counsel and the government, engaged in ex parte communications with the defense counsel and the government, treated the complainant in a hostile manner, or retaliated against the complainant, such allegations are mere speculation and "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