JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-23-90119

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 case.

The judicial complaint alleges that the district judge's "actions, statements, and behavior . . . reflect bias, or the appearance of bias, reasonable questioning of [the judge's] impartiality, impropriety or the appearance of impropriety in violation of the Code of Conduct for United States Judges." The judicial complaint identifies the following actions as evidencing the judge's bias against the complainant: (1) the district "[j]udge expressed personal concerns that [the complainant's] testimony could cause jurors to see [the complainant] in a positive view"; (2) the district "[j]udge allowed the [g]overnment to remove a portion of the recording unfavorable to [its] witness" but then "allowed the witness to say the recording was in [its] entirety, when it had a portion removed"; (3) the district judge allowed the government to make a false statement and then "left it uncorrected"; (4) the district "[j]udge requested for [the complainant] to plead guilty, twice, the day of trial, even though it was established that [the complainant] desired to go to trial"; and (5) the district "[j]udge jokingly referred to . . . the noise Nazi in the presen[ce] of the jury."

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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.

The district judge ruled that "if [the complainant] testifies and if [the complainant] offers an explanation for [the] cooperation, the United States will be allowed to cross-examine [the complainant] about the event, all of the events that happened back in and after 2011."

Before trial began, the government also advised the district judge of its intention to play a video for the jury but "exclude from the . . . video . . . a part where [the complainant] says . . . may I have an attorney." During trial, the government's witness confirmed that there had been "no additions or deletions to the recording [the witness] made."

Prior to the venire panel being sworn in, defense counsel advised the district judge that counsel had spoken to the complainant "about the tenor of what [a proposed witness] would say" and that the complainant had decided not to call the individual as witness. Defense counsel acknowledged that "[t]he timing of that is not so great because the [g]overnment now has been speaking with [this individual]." The government responded that it had just received information from an FBI special agent that the complainant, according to the individual, had paid that individual to "help" the complainant. The government moved to revoke the complainant's bond on the basis of tampering with a witness and offered the testimony of the FBI special agent in support. The district judge asked, "Do you have wheels in motion to get a plea agreement ready?" Defense counsel replied, "Yes, Your Honor. Yes, that—I think I might already have done that, but I will—not regarding the obstruction, but I think already have a plea agreement done on that." After the FBI special agent's testimony concluded, the district judge inquired, "[W]here are we now with proceeding with a guilty plea?" The government and defense counsel advised the district judge that the complainant desired to go to trial.

During voir dire, the district judge stated, "The noise nazi over here says that someone's phone is buzzing. So if anyone has an activated phone, would you please turn it off."

I have reviewed the record, including transcripts referenced 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 government moved to preclude the complainant from offering into evidence the complainant's assistance to the government in an unrelated criminal investigation. The complainant's counsel responded that the activities underlying the charges occurred in 2011, but nothing occurred in the case until 2015; thus, "[t]he concern is trying to explain to the jury why nothing happened" in the intervening years. The complainant's counsel represented that the complainant would testify "that during that time period [the complainant] was assisting the police officers and it is for that reason that [the complainant] had not been charged." The government then proffered what was occurring in 2011, which was that the complainant "provided information to police that . . . he [was] a pimp and that he had a client who was interested in having sex with underage girls." The government's "concern [was] that that's improper 404(b) evidence" that it "wouldn't be able to bring out." The government argued that if the defense discussed the cooperation, then the government would "need to bring that out and tell the full story." The government intended to play a portion of an interview conducted with the complainant and omit the portion in which the complainant discusses being a pimp; however, if that information was going to come out, the government wanted to play the entire interview. The district judge inquired of defense counsel what would "prevent the [g]overnment from completely cross-examining [the complainant] about . . . the[se] . . . details." Defense counsel responded that "the specifics of what [the complainant] did" were not relevant. But the district judge's

> concern [was] that [the complainant] is going to be presented as this shining knight who is trying to help the [g]overnment and . . . the jury is going to be left with a whole lot of questions, well, what happened? Why—the [g]overnment must have believed him then so why are they bringing this case now and on and on. Once that gate is open, I don't see any practical way to close it unless the fully story is disclosed.

During trial, the government cross-examined the complainant. The government questioned the complainant about an email account that was "shut down immediately after [an] e-mail [was] sent with child pornography on it." The government asked, "And so once the e-mail with the account was sent, it was closed down. There's no way in the world you were able to send an e-mail on that account; isn't that correct? The complainant responded, "Well, aren't there dates and times that are after the e-mail was sent on there?" The government replied, "It was closed down at that point. So, no, there are not." The government then immediately stated, "I'm going to strike that because that's actually—I shouldn't have said that. Your Honor, you should probably instruct the jury to strike my last comment." The district judge responded, "I'm sorry?" The government replied, "You should probably have the jury disregard my last comment." The government then proceeded with questioning.

Having reviewed the record, I conclude that to the extent the judicial complaint challenges any of the aforementioned rulings, 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 district judge was biased against the complainant, 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).

Accordingly, the judicial complaint is dismissed.

January 18, 2024

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