

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-21-90026

In re Complaint of John Doe¹

This is a judicial complaint filed by a criminal defendant (“complainant”) against the United States district judge (“subject judge”) assigned to the complainant’s case.

First, the complainant alleges that based on the subject judge’s “first hand knowledge” of a judicial complaint that the complainant had filed against *another* district judge that the subject district judge has “an established friendship” and “lengthy tenure” with, the subject judge engaged in a “premeditated plot to create an avenue for an erroneous conviction because of personal bias.” Relatedly, the complainant asserts that “prejudice is attached” because the district judge “of [the] previous [judicial] complaint is now the appointed catalyst of this current [j]udicial [c]omplaint” against the subject judge.

Second, the complainant also alleges that the subject judge conspired with a government attorney as a “revenge attack” for the complainant’s allegation of “prosecutorial misconduct” against that attorney in a separate criminal action in which the complainant was acquitted. The judicial complaint alleges that the complainant filed a motion in limine to exclude evidence of the acquitted conduct and the subject judge “entered a ‘Docket Text Order’” granting the motion, but this order

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.

was “abruptly, without notice to the . . . [c]omplainant[,] . . . deleted” from the docket. The subject judge granted the government’s motion for an extension of time to respond to the motion in limine and ultimately denied the motion in limine. Based on this conduct, the complainant “infer[s] . . . that there are premeditated and secret ex parte communications between” the government and the subject judge.

Third, the complainant alleges that “at the conclusion of [the subject judge’s] memorandum and order [denying the motion in limine],” the subject judge makes “an indirect threat” by “stating, something like, ‘He don’t take to[o] kindly of.’”

Fourth, the complainant alleges that at the conclusion of a *Frye* hearing,² the subject judge “accosted the complainant, stating: . . . [D]id you file a motion for me to recuse myself?” When the complainant responded that he filed a recusal motion “in the United States Court of Appeals,” the complainant’s attorney notified the subject judge that the attorney “was unaware of this and . . . immediately advised the [c]omplainant not to respond.” According to the complainant, the importance of this exchange is that “the names of the [c]omplainant and the [j]udicial [o]fficer complained against are to remain confidential, except in special circumstances.”

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 that the complainant previously filed a judicial complaint against another district judge who presided over a separate criminal matter for which the complainant was ultimately acquitted. A copy of that judicial complaint was forwarded to the subject judge as “the next senior active judge.” *See* Judicial Council

²“In *Missouri v. Frye*, the Supreme Court held that ‘defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.’” *United States v. Albarran*, 943 F.3d 106, 113 (2d Cir. 2019) (quoting *Missouri v. Frye*, 566 U.S. 134, 145 (2012)). During a *Frye* hearing, the district court’s goal is “to ensure that a full and accurate communication on the subject has occurred.” *Id.*

of the Eighth Circuit: Rules Governing Complaints of Judicial Misconduct and Disability (“Eighth Circuit Misconduct Rules”), Rule 3(a)(2).³ At that time, the subject judge was also presiding over the complainant’s other criminal case. The judicial complaint against the other district judge was ultimately dismissed, and the Judicial Council voted to deny the petition for review.

In the criminal case before the subject judge, the complainant, through his attorney, moved to dismiss the indictment based on prosecutorial misconduct. A magistrate judge recommended that the subject judge deny the motion. After “conduct[ing] *de novo* review of the motion[,],” “read[ing] the transcript of the hearings, . . . fully consider[ing] the briefs filed . . . as well as the objections, and . . . independently research[ing] the controlling law,” the subject judge adopted the magistrate judge’s recommendation and denied the motion. “In particular, the [subject judge] note[d] that the government ha[d] consistently represented to the [subject judge] that there has been no intentional withholding of exculpatory evidence,” despite “mistakenly represent[ing] that the FBI did not obtain [certain] information.”⁴

³Rule 3(a)(2) provides:

If the complaint concerns the conduct of a district judge or magistrate judge, the clerk will also send a copy of the complaint to the chief judge of the district court in which the district judge or magistrate judge holds his or her appointment. . . . If the complaint concerns the conduct of a chief district judge . . . , the clerk will send a copy of the complaint to the judge of such court in regular active service who is most senior in date of commission among those who are not subjects of the complaint.

⁴While the complainant filed the dismissal motion *before* filing the judicial complaint against the other district judge, the subject judge denied the dismissal motion *after* the complainant filed the judicial complaint against the other district judge.

Several months after the Judicial Council denied the petition for review in the other district judge's case, the government provided its notice of intent to offer evidence pursuant to Federal Rule of Evidence 404(b) in the case before the subject judge. The complainant, through counsel, then filed a motion in limine to exclude evidence relating to prior conduct for which the complainant was ultimately acquitted. The day after the complainant filed the motion in limine, a docket text order was entered that "granted" the motion. This docket entry, however, was subsequently removed. The government moved for an extension of time to respond to the motion in limine, which the subject judge granted the next day. In response, the complainant, through counsel, moved for reconsideration of the subject judge's grant of the government's motion for an extension of time. The motion for reconsideration stated that "[a]t no time did [the subject judge] set a briefing schedule pertaining to . . . [the] Motion *in Limine*" and attached as an exhibit the deleted docket text order showing that the subject judge had already granted the motion in limine. The subject judge denied the motion for reconsideration in a docket text order, explaining that the prior docket text order "was entered in error as the motion was filed the day before." Ultimately, the subject judge denied the motion in limine. In the conclusion section, the district judge stated, "Based upon the foregoing analysis, Defendant's Motion in Limine is not *well taken*." (Emphasis added.) Contrary to the complainant's allegation, at no time did the district judge conclude, "He don't take to[o] kindly of."

Subsequently, the complainant, through counsel, moved to allow the complainant to review completed jury questionnaires with the complainant's counsel. The subject judge entered a docket text order denying the motion, explaining that the "examination of the jury questionnaires does not require the presence of [the] defendant and [the] defendant will [not] thereby be prejudiced." The district judge also concluded that a *Frye* hearing would "be accomplished through video consistent with the order of the chief judge and the letter and spirit of the Cares Act." There is no transcript of the *Frye* hearing on the docket. Instead, an electronic minute entry for the proceedings provides, in relevant part, "Case status discussed between the Court, both sides and defendant."

Having reviewed the record, I conclude that the judicial complaint must be dismissed. The complainant's allegation that the subject judge conspired with the previously complained-of district judge to secure the complainant's erroneous conviction is pure speculation that "lack[s] sufficient evidence" from which to "infer[] that misconduct has occurred." J.C.U.S. Rule 11(c)(1)(D). The judicial-misconduct rules *mandated* that the subject judge receive notice of the complaint filed against both the other judge *and* the subject judge. And, contrary to the complainant's allegation, the judicial-misconduct rules did not designate the other complained-of district judge as the "appointed catalyst" over the current judicial complaint against the subject judge; instead, that district judge merely received notice pursuant to the rules.

Furthermore, the record does not support a conclusion that the subject judge was biased against the complainant by asking during the *Frye* hearing whether the complainant had a pending recusal motion against the subject judge. Had the complainant filed a recusal motion with the district court, the subject judge would necessarily have had to rule on it. And the subject judge was entitled to notice that the complainant filed a judicial complaint against the subject judge. *See* Eighth Circuit Misconduct Rule 3(a)(1).⁵

Additionally, the complainant's allegation that the subject judge also conspired with the government attorney on the complainant's motion in limine as revenge for the complainant's allegation of prosecutorial misconduct lacks sufficient evidence. *See* J.C.U.S. Rule 11(c)(1)(D). The subject judge explained on the record why the docket text order granting the motion in limine was deleted: it "was entered

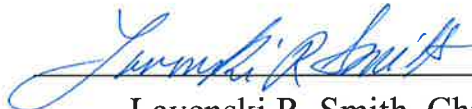
⁵Rule 3(a)(1) provides, in relevant part: "Upon receipt of a complaint against a judge filed in proper form under these rules, the clerk of the court of appeals . . . will promptly send copies of the complaint to the chief judge of the circuit . . . and to each judge whose conduct is the subject of the complaint."

in error as the motion was filed the day before.” Nothing in the record undermines this explanation or supports an inference that collusion was the actual motivator.

Finally, there is no evidence that the district judge ever threatened the complainant in the order denying the motion in limine. *See* J.C.U.S. Rule 11(c)(1)(D). Indeed, that order does not say what the complainant alleges that it says.

The judicial complaint is dismissed.

8/24/2021, 2021



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