

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCT 08 2019

FIFTH CIRCUIT
LYLE W. CAWCE, CLERK

Complaint Number: 05-19-90134

M E M O R A N D U M

Complainant, a federal prisoner, has filed a judicial misconduct against the subject United States Magistrate Judge regarding two motions hearings and related rulings in complainant's criminal proceeding.

Allegations regarding pre-trial motions hearing

Complainant claims that the magistrate judge was aware that complainant "often talks to himself and harmlessly waves his hands" due to brain damage. Complainant alleges that in response to his uncontrolled movements and utterances during the motions hearing, the magistrate judge "engaged with great contempt for several minutes verbally assaulting [me] even going so far as threat[e]ning [me] with law and procedure and even called [me] guilty before [my] trial which caused people in the courtroom to gasp and disapprove ..." He further alleges that the "violent tone" of the "unprovoked" and "malicious tirade" caused him to experience "great fear and psychological trauma." He also asserts that the magistrate judge said, "What you did to those kids and their mother," thereby demonstrating "prejudice and malicious intent rendering any relief to motions unobtainable."

It does not appear from the record that the magistrate judge was advised of complainant's inability to control his movements and utterances. Regardless, a review of the audio-recording and transcript of the hearing confirms that the magistrate judge found complainant's gesticulations and utterances distracting and sternly rebuked him, however the comment, while stern, lasted eleven seconds and did not constitute a "verbal assault". The U.S. Supreme Court has held that judicial bias is not established by a judge's

“expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.” Liteky v. U.S., 510 U.S. 540, 555-556 (1994). These allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Contrary to complainant’s recollection, a review of the audio-recording of the hearing indicates the magistrate judge did not say, “What you did to those kids and their mother” or anything similar. It appears that complainant might be referring to an exchange between the magistrate judge and defense counsel regarding a request for access to the minor victims’ therapeutic records. The magistrate judge expressed concern that if the government’s version of events was true, allowing defense counsel to view the therapeutic records might afford the defendant “access to” the minor victims. In response, defense counsel expressed dismay at any suggestion that he would violate the protective order and allow complainant to access the minors’ therapeutic records. The magistrate judge clarified that he was simply trying to weigh the patient-psychotherapist privilege against the defendant’s due process rights and was not insinuating that defense counsel would violate the protective order.

The assertions that the magistrate judge expressed malice and contempt for complainant, stated he was guilty, abused and threatened him, and demonstrated bias and prejudice in comments made directly to complainant or during discussion with defense counsel are belied by the record. The allegation that the magistrate judge’s comments, actual or purported, “render[ed] any relief to motions unobtainable” seems nonsensical given that the magistrate judge ultimately granted access to any therapeutic records established to be pertinent to defense strategy. These allegations are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Allegations regarding post-trial hearing

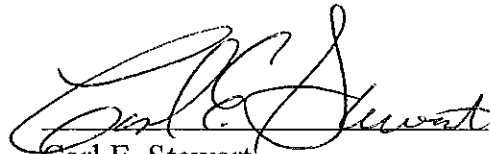
Complainant also complains that the magistrate judge's denial of his post-trial motion "to recuse counsel" was erroneous, "violated [my] rights to fair representation and trial," and constitutes evidence of a judge-attorney "buddy system".

To the extent that these allegations relate directly to the merits of the magistrate judge's decisions or procedural rulings, they are subject to dismissal as merits-related and conclusory under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, any assertion of bias appears entirely derivative of the merits-related charge, but to the extent the allegation is separate, it is wholly unsupported, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.

September 30, 2019


Carl E. Stewart
Chief Judge