

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

In re:
Complaint of Judicial Misconduct

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* Nos. 06-14-90076/77
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M E M O R A N D U M

This complaint of judicial misconduct was filed by the petitioner in a habeas corpus proceeding against the district judge and magistrate judge assigned to his case. The complainant alleges that the magistrate judge had ex parte communications with the complainant's appointed counsel, in which counsel revealed "information" that caused the magistrate judge to become biased against the complainant and to deny him relief. The complainant further alleges that the district judge "knew the difficulties" between the complainant and appointed counsel but "took no action," did not allow complainant to file a motion for replacement of counsel, denied his motions for appointment of additional counsel, and instructed the clerk of court not to accept his notice of appeal from that ruling. According to the complainant, neither subject judge took any action to remedy the incompetent representation allegedly provided by appointed counsel. Complainant requests that his habeas proceeding be stayed pending (1) investigation of his complaint, (2) appointment of new counsel, and (3) assignment of new district and magistrate judges.

After conducting an initial review, the chief judge may dismiss a complaint as to which he concludes: (A) that the claimed conduct, even if it occurred, "is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office"; (B) that the complaint "is directly related to the merits of a decision or procedural ruling"; (C) that the complaint "is frivolous," a term that applies to charges that are wholly unsupported; or (D) that the complaint "is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred." Rule 11(c)(1)(A)-(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Review of the district-court record reveals that the district judge appointed two attorneys to represent the complainant in his habeas proceeding. The complainant filed pro se motions for appointment of a third attorney, and the district judge denied those motions. In due course, the magistrate judge issued a report and recommendation that the complainant's habeas petition be denied. The magistrate judge also denied the

complainant's pro se motion to stay the proceeding in light of alleged ex parte communications between the complainant's counsel and the magistrate judge, and the district court ordered the clerk not to accept further pro se pleadings from the complainant. To the extent that this judicial-misconduct complaint is based on these or other rulings of the subject judges, it is subject to dismissal under Rule 11(c)(1)(B). See *a/so* 28 U.S.C. § 352(b)(1)(A)(ii). The Judicial Council is not a court and has no jurisdiction to review any rulings by a judge or to grant relief, such as a stay, in an underlying civil action. See *In re Complaint of Judicial Misconduct*, 858 F.2d 331 (6th Cir. 1988).

To the extent that it alleges ex parte communications and resulting bias on the part of the magistrate judge, the complaint is subject to dismissal under Rule 11(c)(1)(C) & (D). See *a/so* 28 U.S.C. § 352(b)(1)(A)(iii). The complainant does not specify when or how the alleged communications occurred, does not identify the substance of the "information" allegedly communicated, and does not explain how he came to be aware of such communications. The magistrate judge has, in an order denying a motion to stay, denied ex parte communication with the complainant's counsel. The allegation to the contrary is wholly lacking in evidentiary support.

Finally, to the extent that it alleges a failure to remedy ineffective assistance of counsel, the complaint is subject to dismissal under Rule 11(c)(1)(A). The subject judges' duty is to adjudicate the matters placed properly before them, not to monitor appointed counsel's performance and to act sua sponte to remedy perceived deficiencies. The alleged judicial inaction does not constitute misconduct.

For these reasons, this complaint will be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) & (iii) and Rule 11(c)(1)(A)-(D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

/s/ R. Guy Cole, Jr.
Chief Judge

Date: October 30, 2014