

FILED

AUG 2 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

Nos. 16-90028 and 16-90029

ORDER

THOMAS, Chief Judge:

Complainant, a pro se prisoner, alleges that a district judge and a magistrate judge made improper rulings in his civil case. These claims relate directly to the merits of the judges' rulings, and must be dismissed. See 28 U.S.C. § 352(b)(1)(A)(ii); In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. 1982); Judicial-Conduct Rule 11(c)(1)(B).

Complainant's case was transferred to the subject district judge after the judge was newly appointed to the bench as part of the district court's redistribution of cases. Complainant alleges that the district judge "hijacked" his case and requests that the case be transferred back to the judge originally assigned. Our circuit has held that an individual "has no right to any particular procedure for the selection of [a] judge" and is only "entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings." Cruz v.

Abbate, 812 F.2d 571, 574 (9th Cir. 1987). Complainant offers no evidence that the underlying case was assigned with an improper motive or purpose, or that the subject judge was even involved in the case assignment. Accordingly, this charge must be dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(A)(iii); In re Complaint of Judicial Misconduct, 650 F.3d 1370, 1371 (9th Cir. Jud. Council 2011); Judicial-Conduct Rule (c)(1)(D). Complainant's request that his case be transferred is denied because he seeks relief that is not available in judicial misconduct proceedings. 28 U.S.C. § 354(a)(2); Judicial-Conduct Rule 11(a).

Complainant also alleges that his case was referred to the magistrate judge without his consent. However, a litigant's consent is not generally a prerequisite for referring many pretrial matters to a magistrate judge. See 28 U.S.C. § 636(b)(1). This charge must be dismissed because the charged behavior does not amount to "conduct prejudicial to the effective and expeditious administration of the business of the courts." See 28 U.S.C. § 351(a); Judicial-Conduct Rule 11(c)(2)(A). Complainant further claims that the magistrate judge ruled on motions that must be decided by an Article III judge. This charge, which amounts to a jurisdictional objection, relates directly to the merits of the judge's rulings and must therefore be dismissed. See 28 U.S.C. § 352(b)(1)(A)(ii); Judicial-Conduct Rule 11(c)(1)(B); In re Charge of Judicial Misconduct, 685 F.2d

1226, 1227 (9th Cir. Jud. Council 1982). It is also incorrect. The docket reveals that the magistrate judge did not rule any dispositive motions.

Complainant alleges that the district judge engaged in ex parte communications with opposing counsel, conspiring to undermine his case. An allegation “that a judge conspired with a prosecutor in order to reach a particular ruling” may present a viable claim of judicial misconduct. Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice 145-46 (2006). But, to state such claim, a complainant would have to provide convincing proof that the judge did in fact conspire to rule against him. See id. Complainant states that the district judge’s courtroom deputy advised complainant that the judge had private discussions with opposing counsel, but the courtroom deputy denied that allegation during a limited inquiry. Because complainant has presented no proof of ex parte communications or that the judge conspired against him, these charges must be dismissed as entirely unfounded. See 28 U.S.C. § 352 (b)(1)(A)(iii); Judicial-Conduct Rule 11(c)(1)(D).

Complainant further alleges that the magistrate judge cannot be impartial in the underlying case because he is a former prosecutor. It is well established that a judge need not recuse from a case simply because he or she served as a prosecutor in previous, related cases. See e.g., United States v. Silver, 245 F.3d 1075,

1079-80 (9th Cir. 2001) (“Silver urges this court to . . . require a judge to recuse himself whenever he has served as United States Attorney in any other matter relating to the defendant presently before the judge. We decline to adopt such a broad interpretation of our [precedent]”); United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999) (the judge “was [previously] an Assistant United States Attorney . . . [but did not have supervisory power over the section of the office that investigated Scholl . . . [the judge] did not abuse her discretion in refusing to recuse herself”); Gravenmier v. United States, 469 F.2d 66 (9th Cir. 1972) (holding that judge, who as United States Attorney was of counsel when defendant was tried and convicted of one charge, is not disqualified from presiding over prosecution of same defendant for unrelated offense). Because there is no evidence that misconduct has occurred, this charge is dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); Judicial-Conduct Rule 11(c)(1)(D).

Further, complainant alleges, without any evidence to support the claim, that the magistrate judge “works with” the defendants in the case “to this very day.” This allegation is dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(A)(iii); Judicial-Conduct Rule 11(c)(1)(D).

DISMISSED.