

STATE OF MARYLAND

BEFORE THE COMMISSION ON JUDICIAL DISABILITIES

IN THE MATTER OF:

JUDGE DEVY PATTERSON RUSSELL

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CJD 2016-189

JUDGE RUSSELL'S RESPONSE TO COMMISSION'S CHARGES

The Honorable Devy Patterson Russell ("Judge Russell"), through undersigned counsel, responds as follows to the Commission on Judicial Disabilities' (the "Commission") direction that Investigative Counsel initiate formal proceedings in the above captioned case.

I.

Judge Russell has served as a judge of the District Court of Maryland for Baltimore City since February 10, 2006.

Unlike a person who is the subject of a grand jury investigation, which is controlled by prosecutors with almost no judicial supervision, a Maryland judge who is the subject of a Judicial Disabilities Commission investigation has important *due process* rights, including the right to present relevant information for consideration by the Inquiry Board and by the Commission – prior to the filing of any formal proceedings against the judge. Unfortunately, Judge Russell has been unfairly prejudiced by (1) the refusal of both former Investigative Counsel and the Commission to provide her with the information that she needed in order to respond to the recommendation of the Inquiry Board, and (2) the Commission's decision to initiate formal proceedings on a misleading and incomplete factual predicate.

II.

As to the Commission's assertion that "[b]ased upon information received, the Commission's [former] Investigative Counsel opened an investigation regarding Judge Russell's conduct...[,]" on November 29, 2017, undersigned counsel requested that former Investigative Counsel provide the following information prior to any further action by the Commission:

On the issue of whether the proceedings before the Inquiry Board were conducted in violation of Judge Russell's right under Md. Rule 18-404(e)(4)(C) to be notified "of the name or the person who filed the complaint and the contents of the complaint[,]" (1) identify every person who provided you with information pertaining to any charge against Judge Russell that has been recommended by the Inquiry Board, and (2) provide a concise statement of essential facts asserted by each of those persons.

Both former Investigative Counsel and the Commission refused to provide this information. From our review of the Commission Record, which was not provided to us prior to the Commission's decision to initiate formal proceedings, it is clear that the "information received" by former Investigative Counsel was provided by one or more of Judge Russell's judicial colleagues and/or by one or more judicial system employees. Under these circumstances, former Investigative Counsel's strategic decision to "open a file" on "information received" – rather than require the source of that information to file a "formal" complaint – deprived Judge Russell of her right to (1) notification of the source's identity and (2) a meaningful opportunity to present the Inquiry Board with relevant information about the source's motivation and/or conduct prior to the Board's recommendation. Therefore, no formal proceedings should be initiated in this case until undersigned counsel has been provided with (1) the above requested information, and (2) the opportunity to demonstrate that Judge Russell has been unfairly prejudiced by the way that the preliminary investigation was conducted.

As to whether the charges authorized by the Commission should be dismissed for former Investigative Counsel's failure to comply with the time requirements of Rule 18-404(e)(6), on November 29, 2017, undersigned counsel also requested the following information:

On the issue of whether the Commission should dismiss this matter pursuant to Md. Rule 18-404(e)(6), disclose (1) the date on which Case No. 2016-189 was assigned to this matter, (2) the first date on which you received information about the conduct for which you "opened an investigation," and (3) every other date prior to April 20, 2017, on which you received information about Judge Russell from a person other than herself.

Both former Investigative Counsel and the Commission refused to provide this information. While the Commission Record does not include any information about the date on which former Investigative Counsel "opened the file," it does include the summary of an oral statement taken from Judge Barbara Waxman during a meeting that occurred on December 21, 2016. In the spring of 2017, the Baltimore City Judicial Nominating Commission was notified by the Judicial Disabilities Commission that there was a "complaint" against Judge Russell that was "pending" at that point in time. Under these circumstances, no formal proceedings should be initiated in this case until undersigned counsel has been provided with (1) the above requested information, and (2) the opportunity to demonstrate that the charges against Judge Russell should be dismissed for failure to comply with the established time requirements.

III.

As former Investigative Counsel's investigation included an examination of search warrants – or copies of search warrants – issued by Judge Russell that had obviously been turned over to former Investigative Counsel by one or more District Court judges and/or employees, undersigned counsel also requested on November 29, 2017, to be provided with the following information:

On the issue of how Investigative Counsel came into possession of warrants issued by Judge Russell, identify (1) the person who provided Investigative Counsel with the warrants, (2) the location at which the warrants were seized, (3) the person who authorized the seizure of the warrants, and (4) each person in the “chain of custody” of the warrants from the time that they were seized until October 26, 2017.

Both former Investigative Counsel and the Commission refused to provide this information. Although a review of the Commission Record does not provide all of the requested information, it is clear that both Judges Scurti and Waxman participated in the scheme by which the warrants were turned over to former Investigative Counsel. Moreover, nothing in the Commission Record shows that the warrants were provided to former Investigative Counsel in conformity with the requirements of Md. Rule 4-601(j).

In *Sheetz v. Mayor and City Council of Baltimore*, 315 Md. 208 (1989), the Court of Appeals held that although the “exclusionary rule” is seldom applied in civil proceedings, “illegally seized evidence..., where properly challenged, is inadmissible upon a finding of bad faith[.]” *Id.* at 217. Under these circumstances, no formal proceedings should be initiated in this case until undersigned counsel has been provided with (1) the above requested information, and (2) the opportunity to demonstrate that the exclusionary rule should be applied to the search warrants and/or copies of search warrants that were turned over to former Investigative Counsel.

IV.

There are several reasons why Judge Russell should not be required to face charges that she (1) “openly displayed contempt for the reasonable directives of her supervisors,” (2) was “disrespectful, combative, and unprofessional” in her interactions with fellow judges and other courthouse staff and personnel, (3) failed to fully cooperate with former Investigative Counsel during the investigation, and (4) had misrepresented “facts in her written correspondence.” First,

these conclusory accusations utterly fail the “reasonable particularity” specificity requirement. Judge Russell’s due process rights include the right to be placed on notice of what she is alleged to have done that constitutes sanctionable conduct. Second, because Judge Russell never received any prior notification that she was being investigated for these accusations, she was deprived of any opportunity to present relevant information with respect to these issues.

Finally, there was absolutely no need for former Investigative Counsel to employ the services of a private process server in this case. It is clear from the record that on June 6, 2017, Judge Russell provided former Investigative Counsel with her work email and cell phone number. Former Investigative Counsel, however, did not have the courtesy to ever (1) mention to Judge Russell that she was being investigated, or (2) ask Judge Russell why she had not accepted delivery of the certified mail from the Commission. Judge Russell never refused to accept certified mail that she knew – or, with reasonable diligence, should have known – had been mailed to her by former Investigative Counsel. Under these circumstances, no formal proceedings should be initiated in this case until Judge Russell has been provided with (1) adequate notice of whatever specific facts that are alleged to have “revealed” sanctionable conduct, and (2) the opportunity to respond to each assertion of specific facts.

V.

Judge Russell denies that she violated any of the Rules listed in Paragraph 5 of the Charges.

VI.

In Paragraph 6 of the Charges, Judge Russell is accused of (1) having “failed to forward warrants, returns and inventories from executed warrants returned to [her] by the executing officer... for processing in accordance with the policies and procedures of the District

Court...[.]” and (2) at some point in 2016, instructed a law clerk to match up warrants, inventories, and returns for processing, and thereafter “instructed the law clerk to destroy... the remaining warrants, inventories , and returns.” The first accusation does not constitute a charge of sanctionable conduct, and the second accusation is false.

(1)

As to the first accusation, it is conclusively settled that the return of a warrant is a *ministerial* act and that evidence seized during the execution of a validly *issued* search warrant is not excluded for non-compliance with a ministerial provision. See *Fitez v. State*, 9 Md. App. 137, 141-42 (1970); *Mills v. State*, 12 Md. App. 449, 457-58 (1971); *Aiken v. State*, 101 Md. App. 557, 570-71 (1994).

Although both the Maryland Code and the Maryland Rules of Procedure contain “Search Warrant” provisions, the applicable statute (Section 1-203 of the Criminal Procedure Article) has not been amended since the applicable rule (Rule 4-601) was amended in 2015. Therefore, to the extent that there is a conflict between the statute and the rule, the more recently enacted rule states the applicable law. Rule 4-601(g), which contains provisions applicable to “executed” search warrants, does not establish (1) a deadline by which the judge to whom an executed search warrant is returned must “file” that return with the clerk of the court, or (2) procedures for situations in which that judge has not been provided with “all other papers” that are to be filed with the clerk. Moreover, there is no – oral or written – District Court procedure that pertains to search warrants that are not ready for “processing.”

In her August 3rd response to former Investigative Counsel, Judge Russell stated:

I was advised very early in my career in the event all four conditions are not present, I should hold onto the documents until such time as the package becomes complete. I am unaware of any written District Court policy or procedure that states to the

contrary. Indeed, the Maryland Rules provide no guidance on this circumstance. I am aware of other colleagues that engage in the same process as I described above. During my tenure as a judge, no one has ever informed me that my practice is contrary to any District Court policy or procedure and there have never been any complaints about my practice in handling warrants.

As indicated in my previous correspondence, moving forward I have implemented steps to process my warrants on timelier basis by reviewing them every 60 to 90 days.

A judge's failure to comply with a *ministerial* provision in a rule of procedure that is of no consequence whatsoever to the merits of a judicial proceeding does not – as a matter of law – constitute “sanctionable conduct” in the absence of circumstances that are not present in this case, in which it is uncontroverted that – during her 11 years of service on the District Court – not a single person has questioned and/or complained to Judge Russell about how she handled her search warrants, and not a single judicial colleague has suggested to her that she was not in compliance with her obligations.

A careful review of the 135 warrants turned over to former Investigative Counsel will conclusively establish that almost none of them satisfied the processing requirements set forth in Md. Rule 4-601. Even assuming that 135 of Judge Russell's warrants were ready for processing during the years 2007-2015, a statistical calculation shows that she failed to process 1.25 search warrants per month during that period of time. Under these circumstances, in light of Judge Russell's responses to Investigative Counsel, Judge Russell should not be charged in 2018 with sanctionable conduct based upon her alleged failure to “process” search warrants during a period of time that ended in 2015.

(2)

As to the false accusation that Judge Russell allegedly instructed a law clerk to “destroy” her warrants, etc., as Judge Russell stated in her August 3, 2017 supplemental response, “I will,

however, once again categorically deny that I ever instructed anyone to destroy my warrants.” Moreover, on the basis of what has been provided to undersigned counsel, it appears certain that – if the law clerk’s testimony is consistent with the statement she gave to former Investigative Counsel – the law clerk will testify that Judge Russell stated that “we might as well get rid of” the documents that the law clerk could not match up. Those words simply do not constitute an instruction to “destroy” anything. Finally, and most important, while it should be obvious that if Judge Russell wanted her warrants destroyed, she would have destroyed them herself, the fact is that **Judge Russell remains in possession of every piece of paper that the law clerk was unable to match up, and undersigned counsel will introduce those documents into evidence if it is necessary to do so.**

VII., VIII., & IX.

Although the reasons why Judge Russell should not be required to face charges as a result of the vague and conclusory assertions contained in Paragraphs 7, 8 and 9 of the Commission’s Charges have been addressed in Section IV of this Response, undersigned counsel wishes to add that judges have both a constitutional right and a duty to speak when it is in the interest of justice to do so. For that reason, no public charges should ever be initiated against a judge on the ground that he or she has been “disrespectful, combative, unprofessional,” etc. unless the date(s) and time(s) and location(s) and allegedly sanctionable conduct are identified with reasonable particularity.

REQUEST FOR HEARING

Judge Russell requests a hearing on the above stated objections, and an opportunity to demonstrate that she remains in possession of each piece of paper that she is falsely accused of having “instructed” a law clerk to “destroy.”

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2018, copy of this document was mailed and emailed to Kendra Randall Jolivet, Esq., Executive Secretary, Commission on Judicial Disabilities, and to Tanya C. Bernstein, Esq., Acting Investigative Counsel, Commission on Judicial Disabilities.

Steven D. Silverman, Esq.