

**JUDICIAL COUNCIL  
FOR THE FIFTH CIRCUIT**

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Complaint Number: 05-20-90023

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U. S. COURT OF APPEALS  
**FILED**

JAN 07 2020

FIFTH CIRCUIT  
LYLE W. GAYCE, CLERK

M E M O R A N D U M

Complainant, a state prisoner, has filed a judicial misconduct complaint against the subject United States District Judge regarding a criminal proceeding, two revocation proceedings, and two 28 U.S.C. § 2255 proceedings.

Criminal Proceeding

Complainant complains that the judge failed to rule on his motion to withdraw counsel, docketed in March 2016, before the new trial commenced in May 2016.

According to the docket, the motion was denied in March 2016 by another district judge to whom the case was assigned at the time. The allegation is therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant further complains that after “a brief pretrial conversation,” the judge denied his renewed motion to remove counsel (made in a letter to the court), thereby “forc[ing] [me] to proceed with . . . [my] attorney,” and the judge also “refused to reschedule the trial.” He also asserts that the judge’s “demeanor” during the discussions of the motions “was not impartial at all.”

To the extent that the allegations relate directly to the merits of a decision or procedural ruling, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, a review of the audio-recording

demonstrates the judge was respectful towards complainant and counsel throughout the discussions of the motions, and the conclusory assertion of biased demeanor is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) as lacking sufficient evidence to raise an inference that misconduct has occurred.

In addition, complainant claims that when the judge read the verdict of acquittal, he “rolled his eyes towards the ceiling, and stated how he did not agree with the jury’s verdict.” He further proposes that if the judge’s remark is not on the audio-recording of the proceeding, this constitutes evidence that “critical portions of the hearing were deleted.”

There is no video-recording of the proceeding, but nothing in audio-recording of the judge’s tone of voice in reading out the verdict, or in his remarks thereafter, support complainant’s allegation that the judge conveyed any opinion, let alone a negative opinion, of the verdict.

Regardless, even if the judge “rolled his eyes” upon reading the jury’s verdict, the Supreme Court of the United States has held that “[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant . . . . But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . . .” *Liteky v. United States*, 510 U.S. 540, 551 (1994). The allegation is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

A comparison of the audio-recording with the time-stamped transcript demonstrates that the record is accurate, and the conclusory allegation of record-tampering is therefore also subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

### Revocation Proceedings

Complainant contends that the judge and the court reporter conspired to tamper with the transcript of the revocation hearing, in support of which claim he offers the following evidence:

- The transcript “[was] not an accurate account of the hearing” because it “only encompassed [Case 2], and [Case 1] was completely missing.” A comparison of the transcript and the audio-recording shows that the transcript accurately records that the judge advised the parties that the hearing would address both Case 1 and Case 2, and complainant explicitly confirmed that he understood. Thereafter, the judge and counsel discussed whether the court should impose concurrent or consecutive sentences, and the judge imposed a separate sentence and term of supervised release in each matter. The allegation is clearly contradicted by the record and is therefore subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).
- The transcript does not include “any of [the judge’s] verbal blunders.” A comparison of the audio-recording and the transcript indicates that “filler words” (e.g., uh, um, er, ah, okay) and linguistic repetitions uttered by the judge, prosecutor, defense counsel, and complainant were omitted from the transcript. However, the omissions do not appear to have diminished the substance of the record, and the allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).
- The omission of “[i]mportant facts may point to abuse of discretion, misconduct, or any dubious acts.” In support of this allegation, complainant claims that defense counsel made an oral Rule 29 motion for which he was “rebuked” by an

“infuriated” the judge who denied the motion “without explanation.” An inquiry conducted pursuant to 28 U.S.C. § 352(a)(2) reveals that these allegations lack any factual foundation and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(B).

Complainant further protests that during the hearing, the judge “t[ook] over the prosecutor’s role-invoking [sic] judicial notice, and in essence nullifie[d] the 12 jurors’ not guilty verdict, and f[ound] “overwhelming evidence” that I [was] guilty of the supervised release violation” without stating “one scintilla of evidence” to support that finding.

To the extent that these allegations relate directly to the merits of a decision or procedural ruling, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the conclusory assertion of prejudicial conduct lacks sufficient evidence to raise and inference that misconduct has occurred, and the allegation is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also proposes that the judge deliberately appointed a particular attorney to represent complainant on appeal “because [the attorney] formerly worked under [the judge] . . . as a law clerk. There is a lot of corrupt stuff going on in this case.”

According to the attorney’s resumé, he was a law clerk for 12 months in another division of the district court several years before the subject judge was appointed to the federal bench. Complainant presents no evidence of any other personal relationship that would support the claim the judge deliberately appointed the attorney to undermine complainant’s chance of success on appeal, and the conclusory allegation is therefore also subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

28 U.S.C. § 2255 Proceedings

Complainant complains that the judge's nine-month delay in ruling on the recusal motions "supports a showing of prejudice" and "deni[al] [of my] due process rights for lack of review by the court."

The conclusory assertion that the judge intentionally delayed ruling on the recusal motions is insufficient to support a finding of judicial misconduct and is 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.



Priscilla R. Owen  
Chief United States Circuit Judge

January 3, <sup>2020</sup>2019