

**JUDICIAL COUNCIL
FOR THE FIFTH CIRCUIT**

Complaint Number: 05-20-90031

U. S. COURT OF APPEALS
FILED

FEB 03 2020

FIFTH CIRCUIT
LYLE W. GAYCE, CLERK

M E M O R A N D U M

Complainant, a state prisoner, complains that after initially stating that the federal sentence would run concurrently with the undischarged term of complainant's state sentence, the subject United States District Judge changed the federal sentence to run consecutively to the state sentence. He alleges that the change "wasn't based on the [18 U.S.C. §] 3553 factors," rather the judge was improperly swayed by the prosecutor's visible and audible "outrage," i.e., "making weird faces, huffing and puffing."

It is not possible to discern from a review of the audio-recording of the sentencing hearing whether the prosecutor "made weird faces" or showed other signs of "anger," but no "huffing and puffing" are audible. Regardless, the record does show that shortly after pronouncing that the federal sentence would be served concurrently with the undischarged term of the state sentence, the judge stated that she might have "misspoke[n] about concurrent" and took a recess to confer off the record. Contrary to complainant's contention that the judge then changed the sentence "to satisfy the gover[n]ment" rather than based on consideration of 18 U.S.C. § 3553, in response to complainant's questions about the final sentence, the chief judge explained at length the multiple factors she considered in deciding to impose a consecutive sentence.

Complainant also reports that in November 2018 he asked Bureau of Prisons officials ["the BOP"] to enter "a Nunc Pro Tunc Designation in [my] attempt to have [my] yet-to-be imposed state sentence currently [sic] with [my] federal sentence." He has provided a copy of a letter from the BOP

advising that “[a]s required by policy, the federal sentencing court was contacted for its position on the concurrency of your federal sentence with your later-imposed state sentence. In responding, the Court stated that your federal sentence should run consecutive to any other sentence.”

Complainant protests that the advice the judge reportedly gave to the BOP improperly “altered” the terms of the federal sentence which was “to be consecutive to a specific [state] sentence.” However, even if the judge’s advice was incorrect, the conclusory assertions that the error constituted “favoritism” and violated the judge’s “oath of honesty and fairness” are insufficient to support a finding that judicial misconduct has occurred.

To the extent that these allegations relate directly to the merits of the chief judge’s decisions, they are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, the allegations of bias and “favoritism” appear entirely derivative of the merits-related charges, but to the extent the allegations are separate, they are wholly unsupported, and are 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.”

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 30, 2020

BEFORE THE JUDICIAL COUNCIL
OF THE FIFTH CIRCUIT

No. 05-20-90031
Petition for Review by [REDACTED]
of the Final Order Filed February 03, 2020,
Dismissing Judicial Misconduct Complaint
Against [REDACTED]
Under the Judicial Improvements Act of 2002.

United States Court of Appeals
Fifth Circuit

FILED

April 9, 2020

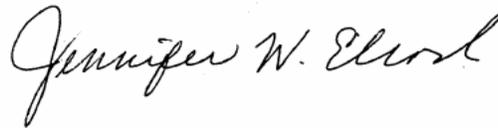
Lyle W. Cayce
Clerk

ORDER

An Appellate Review Panel of the Judicial Council for the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the order of Chief Judge Priscilla R. Owen, filed February 03, 2020, dismissing the Complaint of [REDACTED], against [REDACTED] under the Judicial Improvements Act of 2002. The Order is therefore **AFFIRMED**.

April 8, 2020

Date



Jennifer W. Elrod
United States Circuit Judge
For the Judicial Council of the Fifth Circuit