



conflict and recuse himself from complainant's 2002 criminal proceedings. Complainant maintains that the subject judge acquired extrajudicial information, bias, and prejudice due to his involvement, while an Assistant United States Attorney (AUSA), in the investigation and prosecution of complainant as a dangerous special offender and bank robber.<sup>1</sup> Complainant further alleges that this bias manifested itself in comments made by the subject judge at complainant's 2002 sentencing.

Complainant was charged in 1974 with possession of a firearm by a convicted felon and convicted following a jury trial. At his 1976 sentencing on that charge, he was determined to be a dangerous special offender. Complainant alleges that the subject judge, then an AUSA, provided evidence to the prosecutor that was presented in support of the dangerous special offender determination. In 1976, complainant was charged with bank robbery, pled guilty, and was sentenced in 1977. Complainant alleges that the subject judge also participated as an AUSA in the investigation and prosecution of the bank robbery and that the bank robbery conviction was one of three convictions used to enhance his 2002 sentence under 18 U.S.C. § 3559(c)(1) and 18 U.S.C. § 924(c).

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<sup>1</sup> Complainant does not allege that the subject judge prosecuted any charges against him as an AUSA but that he investigated and provided evidence to the prosecuting attorneys.

Complainant alleges that the bias acquired by the judge as an AUSA manifested itself at complainant's 2002 sentencing when, according to complainant, the judge slammed his hand on the bench and yelled: "You will die in prison this time, and me and my family will feel safe with you off the streets." (Complaint at 2). The transcript of complainant's sentencing reflects that the judge, in imposing a sentence of life imprisonment, made the following statement:

You have been in and out of jail all your life. You have been committing serious crimes all your life. If you commit another crime, it's going to be a crime that you commit while you're in prison because you'll never see the light of day. You'll be in prison the rest of your life. That's just punishment and it is also just protection for the rest of us from people like you.

(Sentencing transcript at 23). Complainant alleges that the transcript is inaccurate but that he has been unable to obtain an audio-tape of his sentencing to prove what was actually said.

Misconduct under the Judicial Conduct and Disability Act includes judicial treatment of litigants in a "demonstrably egregious and hostile manner" and violation of "specific, mandatory standards of judicial conduct." Rule 3(h)(1)(D) & (I), Rules for Judicial-Conduct and Judicial-Disability Proceedings. Misconduct under the Act does not include claims that are "directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 352(b)(1)(A)(ii). Language used by the

judge that is relevant to the case at hand is presumptively merits-related and excluded from misconduct review. See Commentary on Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 6; Petition of Lauer, 788 F.2d 135, 138 (8th Cir. 1985) ("A trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge feels are related to the proceeding before the court, he or she ultimately may be subject to a disciplinary sanction by the Judicial Council.").

The merits-related bar does not, however, prevent review of a claim that the judge's decision was the result of improper motive, bias, or conduct. Such a claim must be supported by sufficient evidence to raise an inference that misconduct has occurred. See 28 U.S.C. § 352(b)(1)(A)(iii); Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The Code of Conduct for United States Judges and 28 U.S.C. § 455(b)(3) require a judge to disqualify himself if "the judge has served in governmental employment and in that capacity participated as . . . counsel . . . concerning the proceeding." Canon 3(C)(1)(e). Disqualification is required "only when the case before [the judge] is the same as or is related to the case which was within his jurisdiction as prosecuting attorney." United States v. Silver, 245 F.3d 1075, 1079 (9th Cir. 2001)

(quoting Jenkins v. Bordenkircher, 611 F.2d 162, 165 (6th Cir. 1979)).

The criminal proceedings presided over by the subject judge 26 years after his service as AUSA were unrelated to complainant's sentencing as a dangerous special offender or plea of guilty to bank robbery. Although it is true that complainant's bank robbery conviction was one of three convictions used to enhance complainant's sentence, the subject judge was not called upon to resolve any issue related to that conviction. As the court of appeals noted in affirming complainant's 2002 conviction and sentence:

[Complainant] made arguments through counsel, but he never testified that the information in the presentence report was inaccurate, and he refused to be placed under oath. In addition, we find that the information in the report was sufficiently reliable. The Government filed certified copies of [complainant's] convictions, and it is undisputed that, in 1989, at a previous sentencing hearing, [complainant] did not dispute the convictions at issue. Accordingly, the trial court did not err by accepting [complainant's] prior convictions as stated in the presentence report.

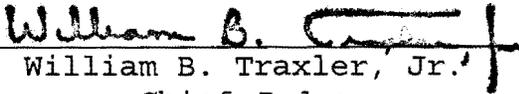
(Slip opinion at 3). Since the subject judge was not required to determine any disputed issue with respect to complainant's conviction for bank robbery, his alleged participation as an AUSA in the investigation of the bank robbery charge did not require that he recuse himself from complainant's 2002 case.

See United States v. Silver, 245 F.3d at 1080; Murphy v. Beto, 416 F.2d 98, 100 (5th Cir. 1969).

Complainant's allegation that the judge demonstrated his hostility and bias against him at sentencing also fails to establish a claim of misconduct. The language used by the judge, whether it was as alleged by complainant or as reflected in the transcript, was relevant to the sentence imposed and directly related to the judge's ruling. The comments do not establish that the judge was motivated by improper bias in sentencing complainant or constitute egregious or hostile treatment of complainant.<sup>2</sup>

Accordingly, this judicial complaint is dismissed as directly related to the merits of the judge's rulings and as lacking factual support for a claim of misconduct. 28 U.S.C. § 352(b)(1)(A)(ii) & (iii).

IT IS SO ORDERED.

  
William B. Traxler, Jr.  
Chief Judge

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<sup>2</sup> Complainant also alleges that he was told by an FBI agent in 1976 that the agent and the subject judge (as AUSA) were going to go after complainant for other bank robberies. This allegation also fails to support an inference that the subject judge was biased against complainant when he presided over his trial on unrelated charges in 2002.