

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

In the Matter of a

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Judicial Complaint

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No. 04-19-90144

Under 28 U.S.C. § 351

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MEMORANDUM AND ORDER

Complainant brings this judicial complaint against a district judge pursuant to the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, which provides an administrative remedy for judicial conduct that is “prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a).

The complainant alleges the judge committed misconduct in two criminal cases. In the first criminal case, the complainant moved for a new trial based on newly-discovered evidence. He contended additional witnesses would verify his version of the pertinent events. At a hearing on the matter, the judge took the case under advisement, noting:

And [government attorney] what I’d like you to do is to advise the court, with a copy to [defense counsel], of the, a list of inmates who were identified by the Bureau of Prisons to the defense at any time during the prosecution of this case. In other words, I’d like to know whether any of these persons have been previously identified or interviewed by, by the Bureau or, or by the case agent, and that information supplied earlier to the defense.

...I understand you haven’t known this information until just a few minutes ago, and that’s why I’m going to give you this opportunity, and anything else you want to advise the court about these persons, I’ll allow you to do that.

The judge also advised complainant's counsel that "I haven't determined whether or not I'm going to give you the opportunity to interview these folks, or not."

The judge then issued an order regarding the matter, which provided:

[T]he government must respond to these allegations, including advising the court whether or not any of the persons named were interviewed on behalf of the government or otherwise brought to its attention as witnesses to any of the events in the case and whether or not such information was disclosed to the defense prior to trial.

The government filed a response, indicating that three of the twelve persons the complainant identified had been interviewed.<sup>1</sup> The response also indicated the prosecuting attorney, together with a paralegal and a special investigative agent, spoke with, or attempted to speak with, the remaining nine persons, plus one of the persons originally interviewed. The government summarized the results of the interviews, or attempted interviews.

The judge then denied the motion for new trial, holding:

Even assuming that the evidence submitted by [the complainant] was in fact newly discovered with diligence and is material, I find that it is only cumulative and is not of such a nature that it would probably produce an acquittal of the charge.... The declarations by the new witnesses, like his witnesses at trial, deny that [complainant] was a participant.... However, I found [a government witness] to be credible on the crucial details and [complainant] not to be credible, based upon my opportunity to observe the witnesses and judge the

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<sup>1</sup> In the response, the government also advised that an interview form for one of the three witnesses had been provided to defense counsel; 449 Mass Interview Forms were "provided as part of the discovery in this case;" and "the discovery documents made available to defense counsel identified 21 inmates believed to be involved in the disturbance."

consistency of their testimony, both internally and with the balance of the evidence.

In the judicial complaint, the complainant alleges the judge:

- “does not have the authority to tell defense counsel whether or not she can interview her own witnesses;”<sup>2</sup> and
- that decision “allowed the prosecutor to try to interview defense witnesses before the defense – where the prosecutor intimidated witnesses and interfered with defense counsel’s investigation, instead of preparing a list as ordered.”

Secondly, the complainant contends the judge “entered a verdict without the presence of the complainant.” The judge addressed this contention during the motion hearing that principally involved the motion for new trial:

The [complainant] ... filed, pro se, two motions. And one of them was a motion for, entitled Motion for Reconsideration.

...[T]he Motion for Reconsideration, I think, was based on the fact the [complainant] was not present at the announcement of the verdict. But since this was not a jury trial, I find that it was not necessary for him to be present, and that the court’s written verdict was sufficient.

In the second criminal case, the complainant alleges the judge “wrongly ordered complainant shackled during trial while he was representing himself, where he had no history of outburst in the courtroom, posed no threat to civilian nor courtroom personnel, nor made any threats to anyone during the prosecution and had no history of violence

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<sup>2</sup> At the hearing on the motion for new trial, counsel for the complainant indicated she “would have to have permission from the court to interview each of these witnesses.”

during transporting to and from court nor while in the courtroom.” The complainant also contends the judge “ordered the prosecutor to remain seated during trial, but that the prosecutor continuously moved around the room as the complainant remained seated.”

In addition, the complainant contends he informed the judge after voir dire that he desired to be represented by counsel, but the judge denied his request, “forcing him to represent himself, denying him his constitutional right to counsel.” The case record indicates that the complainant moved to represent himself at trial. The judge granted the complainant’s motion and indicated the complainant’s attorneys would serve as standby counsel.

Thereafter, on the morning of trial, standby counsel stated she conferred with the complainant, who “indicated it would be okay if I could be counsel during the Government’s case, and the information was provided to the court and to the U.S. Attorney.” Counsel then went on to state that as “I understand the court’s position, it’s all or nothing, that either he has standby counsel throughout the trial or he represents himself throughout the trial.” In response, the judge noted:

Yes, ma’am. The so-called hybrid representation is discouraged. It’s in the discretion of the court. [Complainant] has an absolute right to represent himself so long as certain conditions are met, and I have granted that right. But it is confusing for [complainant] to, in effect, serve as co-counsel in the case, and so I’m not going to permit that in this case. So, [complainant] will, he will be representing himself through the entire trial.

Following that discussion, the complainant asked to be represented by counsel. The judge asked standby counsel if she was prepared to “take over the defense in this case” and

counsel expressed reticence in doing so. The judge then denied the complainant's request, noting:

And in any event, [counsel] says she's not prepared to go forward to represent you, and ... we cannot continue this case. It's been continued several times, and so I'm going to deny your request. So, you'll need to represent yourself as you originally wished.

The Judicial Conduct and Disability Act addresses judicial conduct, not judicial decisions. Under 28 U.S.C. § 352(b)(1)(A)(ii), claims that are “directly related to the merits of a decision or procedural ruling” are not subject to review through a complaint of judicial misconduct.<sup>3</sup> The procedure that has been established to consider misconduct complaints “is not designed as a substitute for, or supplement to, appeals or motions for reconsideration.” *In re Memorandum of Decision*, 517 F. 3d 558, 561 (U.S. Jud. Conf. 2008). It would be “entirely contrary” to the purpose of the Judicial Conduct and Disability Act “to use a misconduct proceeding to obtain redress for---or even criticism of---the merits of a decision with which a litigant or misconduct complainant disagrees.” *Id.* To allow “judicial decisions to be questioned in misconduct proceedings would inevitably begin to affect the nature of those decisions and would raise serious constitutional issues regarding judicial independence under Article III of the Constitution.” *Id.* Accordingly, to avoid the merits-related bar, a misconduct claim must contain “clear and convincing evidence of an

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<sup>3</sup> Similarly, Rule 4(b)(1) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings provides that “[c]ognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling.”

arbitrary and intentional departure from, or willful indifference to prevailing law.” *Id.* at 562.

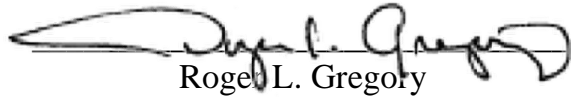
In determining what action to take on a judicial complaint, the chief judge may conduct a limited inquiry, including obtaining and reviewing transcripts and other relevant documents. *See* Rule 11(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings.

A review of the complainant’s allegations, in light of the case records, indicates the allegations are merits-related and, as a result, are not subject to review in a judicial misconduct proceeding. In the first case, the judge’s decisions to defer deciding whether to allow defense counsel to interview witnesses; to accept the response to the judge’s order offered by the government; to deny the complainant’s motion for a new trial; and to inform the complainant in writing of the verdict, are not reviewable in a judicial misconduct proceeding. Disagreements with these decisions must be pursued through the litigation, and not through a judicial complaint alleging misconduct.

Similarly, the complainant’s allegations concerning the second case are also merits-related and are not subject to review in a judicial misconduct proceeding. The judge’s decisions and rulings to have the complainant shackled for security reasons; to allow or not allow the prosecuting attorney to move from his/her seat during the course of trial; and to deny the complainant’s request for representation made on the day of trial, after the complainant had previously asked to represent himself, are not reviewable in a judicial misconduct proceeding. Disagreements with these decisions and rulings must be pursued through the litigation, and not through a judicial complaint alleging misconduct.

Accordingly, this judicial complaint is dismissed as merits-related. 28 U.S.C.  
§ 352(b)(1)(A)(ii).

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Roger L. Gregory", is written over a horizontal line.

Roger L. Gregory  
Chief Judge