

23-90051-jm
February 8, 2024
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 23-90051-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

In August 2023, the Complainant filed a complaint with the Clerk’s Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), charging a district judge (the “Judge”) of this Circuit with misconduct.

BACKGROUND

In May and June of 2020, a grand jury returned an indictment and superseding indictment charging the defendant with several federal crimes, including firearm-related murder. The Judge has presided over the matter since June 2020, and in December 2022 presided over a jury trial, which resulted in the Complainant’s conviction of several offenses.

As relevant to the pending complaint of judicial misconduct, in June 2020 the Complainant was assigned counsel pursuant to the Criminal Justice Act (“CJA”), and the next day the Judge appointed an additional CJA lawyer to represent the Complainant. In July, the Judge entered an order appointing a third CJA lawyer for the Complainant, and the first lawyer was relieved, leaving the Complainant with two court-appointed lawyers.

In August 2023, the Complainant—who at this point was proceeding pro se, after having been convicted—moved for the Judge’s recusal, arguing, in sum and substance, that the Judge should recuse because, among other reasons,¹ she had erroneously relieved the first attorney in favor of the second and third attorneys. The Judge denied that motion, explaining that the second attorney had been appointed because the Complainant had been charged with a death-penalty-eligible offense, and the second attorney had been identified by the Federal Defender’s Office as having expertise in such cases. The Judge had then

¹ The Complainant also alleged that the Judge should recuse because the Judge’s law clerk or courtroom deputy knew the victim from having shopped at the jewelry store in question, but he does not repeat this claim in the current misconduct complaint.

consulted with the second attorney about the appointment of an additional lawyer, because death-penalty-eligible defendants are entitled to two lawyers.²

The complaint of judicial misconduct is largely duplicative of the Complainant's recusal motion. The Complainant states that he learned, after he was convicted, that the first CJA lawyer was upset at having been relieved because he "had never been removed from advocating for a client" in "forty five years of practicing law," and he requests that "an independent investigation be commenced," "in accordance with the Canons of Judicial Ethic[s]," to determine why the Judge relieved the first attorney in favor of the second and third attorneys.

DISCUSSION

The complaint is dismissed.

The gravamen of the complaint is that the Judge erred by relieving the first CJA lawyer and appointing two additional CJA lawyers in accordance with 18 U.S.C. § 3005 and relevant regulations implementing the Criminal Justice Act.

² See 18 U.S.C. § 3005 (providing that, in capital cases, the district court shall, "upon the defendant's request," appoint two lawyers, "of whom at least 1 shall be learned in the law applicable to capital cases," and that the district court, in making such appointment, "shall consider the recommendation of the Federal Public Defender organization").

This is an allegation that the Judge got it wrong, not that the Judge engaged in misconduct. Accordingly, the allegation is dismissed as “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352(b)(1)(A)(ii); Rule 4(b)(1) (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling[.]”); 11(c)(1)(B). Likewise, to the extent the Complainant contends that the Judge should have recused, this allegation too is dismissed as merits-related. Rule 4(b)(1) (allegations arising from “a failure to recuse” should be dismissed as merits-related). Merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge’s decision or procedural ruling.” Rule 4 cmt. If the Complainant wishes to challenge the Judge’s decisions related to appointment of counsel, or the Judge’s decision not to recuse, he may do so, to the extent the law allows, only through normal appellate procedures.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.