

21-90031-jm  
January 8, 2024  
Chief Judge

**JUDICIAL COUNCIL OF THE  
SECOND CIRCUIT**

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In re  
CHARGE OF JUDICIAL MISCONDUCT                      Docket No. 21-90031-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

On July 26, 2021, 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 2017, a grand jury returned an indictment charging the Complainant with drug-related offenses and the case was assigned to the Judge. The Judge presided over a jury trial, which, together with pretrial oral arguments, spanned 9 days, and which resulted in the Complainant’s conviction in September 2020. Shortly after the jury verdict, the Complainant, through counsel, moved for a

new trial and to set aside the verdict, arguing the evidence was insufficient to support a conviction, and that a juror should have been excused because she had witnessed certain of the Complainant's interactions in the courthouse. The Judge denied the motions in September 2021. The Complainant also moved for release from custody pending sentencing, which the Judge denied.

The misconduct complaint largely challenges the Judge's pretrial rulings, the conduct of the trial, and the conviction. The Complainant alleges, for example, that his speedy trial rights were violated because more than 3 years passed from his indictment until his trial; there was insufficient evidence to sustain his conviction on a conspiracy charge; the Judge "allowed things to be used during [his] trial" that he had previously instructed the prosecutor not to use; and that the Judge dismissed a minority juror for being 5 minutes late.

The complaint also alleges undue delay. The Complainant notes that he moved for a new trial and to set aside the verdict in September 2020 and that the motions had not been decided as of when he filed this misconduct complaint in July 2021. As noted above, the Judge denied the motions in September 2021.

Finally, the complaint alleges that the Judge fell asleep "several times . . . during crucial points in my trial." The Complainant does not elaborate further

on when or how many times he claims the Judge fell asleep; the trial transcript is more than 800 pages.

## DISCUSSION

The complaint is dismissed.

To the extent the Complainant raises allegations related to his speedy trial rights, the Judge's pretrial rulings, the sufficiency of the evidence, the evidence the Judge allowed to be admitted, or the Judge's dismissal of a juror, the claim is that the Judge got it wrong, not that he engaged in misconduct. Accordingly, these allegations are 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, including a failure to recuse."); 11(c)(1)(B). Purely 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 rulings or the sufficiency of the evidence, he may do so, to the extent the law allows, only through normal appellate procedures.

The claim that the Judge unduly delayed deciding the post-trial motions is also dismissed because the rules and guidance implementing the Act make clear that allegations concerning delay are ordinarily not the proper subject of a judicial misconduct complaint, and should also be dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) as “directly related to the merits of a decision or procedural ruling.” See Rule 4(b)((2) (“Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.”); Rule 4 cmt. (“[A] complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, i.e., assigning a low priority to deciding the particular case.”). The Complainant provides no evidence that the Judge’s delay is habitual or that the Judge had an improper motive in delaying ruling on the Complainant’s motions.

The complaint alleges that the Judge fell asleep “several times” during the multi-day trial but does not provide further details. A review of the trial transcripts reflects that the Judge spoke with the attorneys, jurors, or other courtroom personnel many dozens of times on most trial days, and on some days

more than 100 times. Even assuming the truth of this allegation, the complaint is dismissed because the Complainant provides no evidence of a habitual problem; dozing off for brief intervals during a lengthy trial is not tantamount to “inability to stay awake during court proceedings,” Rule 4(c), and therefore does not rise to the level of disability under the Act.

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