

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NOS. 01-19-90028 -- 01-19-90029

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BEFORE  
Lynch and Kayatta, Circuit Judges  
Laplante, Walker, and McElroy, District Judges

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ORDER

ENTERED: APRIL 7, 2021

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Petitioner has filed a petition for review of Chief Judge Howard's order dismissing his complaint, under 28 U.S.C. § 351(a), against a magistrate judge and a district judge in the First Circuit. Petitioner alleged judicial misconduct in connection with his criminal case, over which the judges presided. Chief Judge Howard dismissed the complaint as baseless and as not cognizable.

Petitioner alleged that the judges were "negligent" and "concealed" the illegality of the indictment on which petitioner was charged. Petitioner contended that the original indictment was deficient because it lacked the signature of the Assistant U.S. Attorney (AUSA) who was present during the grand jury proceedings, although it was signed by the U.S. Attorney.

Petitioner contended that the U.S. Attorney was politically motivated to "orchestrate[ ]" a conspiracy to prosecute petitioner based on this illegal indictment. Petitioner further maintained that the U.S. Attorney improperly designated another AUSA (who had not attended petitioner's grand jury proceedings) to appear at the first status conference before the district judge. Petitioner surmised that the district judge's failure to dismiss the unlawful indictment and to proceed with the case in the absence of the original AUSA who participated in the grand jury proceedings evidenced the judge's "complicity" with the U.S. Attorney.

Petitioner further asserted that the district judge and magistrate judge improperly "validated" a superseding indictment containing additional charges proffered by the second AUSA and, thereby, improperly "legalized the participation" of the second AUSA in the proceeding. Based on the court's acceptance of the superseding indictment, petitioner inferred that the magistrate judge was an "accomplice" of the U.S. Attorney in his effort to try petitioner on the basis of the faulty indictment. Arguing that only the AUSAs who "attend the probable cause determination for arrest can attend the judicial proceedings prior to the trial and the criminal trial that is held," petitioner concluded that his arrest, trial, and conviction were unlawful and could not have proceeded without the "collaboration" of the judges with the U.S. Attorney.<sup>1</sup>

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<sup>1</sup>Although not named as subjects of the complaint, petitioner included similar allegations against two retired judicial officers, both of whom were also involved in petitioner's case. Chief Judge Howard appropriately declined to address these claims, and those against the United States Attorney and petitioner's defense attorney, as the judicial misconduct complaint procedure applies only to current federal judges. See 28 U.S.C. § 351, et seq., and Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 1(b).

Chief Judge Howard determined that the record, including the misconduct complaint, the dockets of the district court and appellate proceedings, and the courts' orders, provided no evidence for petitioner's allegations of judicial misconduct. In reviewing the record of the case, the Chief Judge observed that petitioner provided a certified copy of the original indictment on multiple charges, signed by the U.S. Attorney and the foreperson of the grand jury, but not by the AUSA who appeared with the U.S. Attorney at the grand jury proceeding. Subsequently, another AUSA appeared on the government's behalf at a status hearing before the district judge.

The Chief Judge further explained that the grand jury subsequently returned a superseding indictment, adding several additional charges to those included in the original indictment. The magistrate judge presided over petitioner's arraignment on these charges. After a lengthy jury trial before another judge, who was not a subject of the misconduct complaint, see supra note 1, the jury found petitioner guilty of all but two of the charges, and the court sentenced petitioner accordingly. The Court of Appeals affirmed petitioner's convictions and ultimately affirmed the sentence.

Chief Judge Howard determined that petitioner's allegations that the judges participated in a conspiracy to prosecute petitioner illegally based on faulty indictments or engaged in any other wrongdoing were wholly unsubstantiated. The Chief Judge found that, while petitioner presented no basis for the claim that the indictments were defective

based on their signatures or for any other reason, even if true, that fact alone would not suggest cognizable misconduct absent evidence of improper judicial motivation.<sup>2</sup>

Chief Judge Howard further determined that the appearance of a second AUSA on behalf of the government did not demonstrate judicial wrongdoing. As the Chief Judge found no facts in support of petitioner's claim that either of the judges was "complicit" in "concealing" an allegedly unlawful indictment, in order to improperly charge and try petitioner, and that this claim amounted to nothing more than a challenge to the court's acceptance of the indictments, the Chief Judge dismissed the misconduct complaint as baseless, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii), and as not cognizable, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(D), Rule 11(c)(1)(B), and Rule 4(b)(1) ("If [a] decision or ruling is alleged to be the result of an improper motive, . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision.").

Alleging that Chief Judge Howard erroneously dismissed the misconduct complaint, petitioner repeats the claim that the U.S. Attorney was politically motivated to prosecute petitioner unlawfully. Contending that the U.S. Attorney knew that the initial indictment was invalid because it lacked the signature of the attending AUSA, petitioner

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<sup>2</sup> The Chief Judge made note of Fed. R. Crim. P. 7(c) ("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government."), and observed that, although not necessary to the resolution of the complaint, it did not appear that petitioner challenged the legality of either indictment in his criminal case in the district court or on appeal, although he has since done so unsuccessfully in collateral proceedings. See infra note 3.

reiterates that the U.S. Attorney was "forced to integrate" another AUSA in order to proceed with the case. Petitioner further reiterates that, by allowing the prosecution to proceed based on the superseding indictment containing only the signature of an AUSA who had not participated in the grand jury's original probable cause determination, the judges knowingly violated the Federal Rules of Criminal Procedure and thus engaged in misconduct. Petitioner adds that the district judge withdrew from the case after the first status conference in order to "disassociate[ ]" from this impropriety.

Petitioner provides no information that undermines Chief Judge Howard's disposition of the misconduct complaint. The petition, like the underlying complaint, offers no facts supporting the claim that either of the judges was improperly motivated in presiding over petitioner's prosecution. The thoroughly reviewed case record, the complaint, and the petition for review contain no evidence that the judges sought to prosecute petitioner based on a knowingly unlawful indictment. Petitioner seeks to use the judicial misconduct complaint process exclusively to challenge the sufficiency of his indictment, a legal question not subject to a misconduct complaint.<sup>3</sup>

Further, while there is no indication that the court violated the governing rules of procedure, failure to comply with procedural rules would not alone support a claim of judicial misconduct where, as here, there is no evidence of improper judicial motivation.

See Howard, C.C.J., Order, [In Re: Judicial Misconduct Complaint No. 01-18-90016](#)

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<sup>3</sup> The question of the legality of the signatures on an indictment is a legal issue. Although not necessary to the resolution of the misconduct complaint, petitioner has thus far been unsuccessful in challenging the legality of the indictment against him.

(February 19, 2019) (explaining that a violation of a procedural rule would not, absent evidence of improper judicial motive, suggest cognizable misconduct). The same is true for petitioner's apparent challenge to the transfer of his case from the subject district judge to another district judge.<sup>4</sup> Therefore, Chief Judge Howard properly dismissed the misconduct complaint as baseless, and, as it derived exclusively from petitioner's challenge to the legality of the indictments underlying his prosecution and conviction, as not cognizable. See 28 U.S.C. §§ 352(b)(1)(A)(iii) and 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rules 11(c)(1)(D) and 11(c)(1)(B).

For the reasons stated, the order of dismissal issued in Judicial Misconduct Complaint Nos. 01-19-90028 - 01-19-90029 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

April 7, 2021

Date

  
Susan Goldberg, Secretary

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<sup>4</sup> Contrary to petitioner's allegation, the district judge did not "disassociate[ ]" from petitioner's case, as the docket indicates that the case was transferred to another district judge pursuant to the applicable local rule at the time. Regardless, absent improper motive, a challenge to a judge's recusal decision is not cognizable. See Rules of Judicial-Conduct, 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. If [a] decision or ruling is alleged to be the result of an improper motive, . . . the complaint is not cognizable to the extent that it calls into question the merits of the decision.").