

MAY 20 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 08-90085

ORDER

KOZINSKI, Chief Judge:

A misconduct complaint and three supplements have been filed against a district judge. Complainant, a pro se prisoner, was the defendant in a criminal case over which the subject judge presided.

Complainant first alleges that the judge unduly delayed in holding an evidentiary hearing and resolving his motion for relief from judgment based on actual innocence. Delay is not cognizable “unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.” Judicial-Conduct Rule 3(h)(3)(B). Complainant claims that the delay here was improperly motivated, but he provides no evidence to support this allegation.

Complainant also alleges that the judge’s eventual denial of his motion was incorrect and that it was improper for the judge to rule on the motion without holding an evidentiary hearing. These charges relate directly to the merits of the

judge's decisions and must therefore be dismissed. See 28 U.S.C.

§ 352(b)(1)(A)(ii); Judicial-Conduct Rule 11(c)(1)(B). A misconduct complaint is not a proper vehicle for challenging the merits of a judge's rulings. See In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Council 1982).

Complainant further alleges that the judge's decisions were motivated by bias against him and a desire to protect the prosecutor. But complainant hasn't provided any objectively verifiable proof to support these allegations.

Complainant speculates that the judge took a dislike to him because of certain evidence that was presented at his trial. It's not uncommon for adverse evidence concerning a party to come out during a trial, especially in a criminal case, and such facts may well affect the presiding judge's view of the party to whom they pertain. But opinions formed on the basis of evidence presented during the course of ordinary proceedings generally do not require a judge to recuse himself. See Liteky v. United States, 510 U.S. 540, 554–55 (1994). Failure to do so certainly does not amount to judicial misconduct. And opinions allegedly expressed by third parties to the effect that the judge disliked complainant or favored the prosecution do not constitute proof of misconduct. Because complainant has presented no evidence that misconduct occurred, these charges must be dismissed. See 28 U.S.C. § 352(b)(1)(A)(iii); Judicial-Conduct Rule 11(c)(1)(D).

To the extent that complainant raises allegations against the prosecutor or court staff, the charges are dismissed because this misconduct complaint procedure applies only to federal judges. See Judicial-Conduct Rule 4.

DISMISSED.