

JUL 14 2009

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

**JUDICIAL COUNCIL  
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF  
JUDICIAL MISCONDUCT**

No. 08-90195

**ORDER**

**KOZINSKI**, Chief Judge:

A misconduct complaint has been filed against a circuit judge. Complainant, a pro se prisoner, appealed the district court's dismissal of his habeas petition. The subject judge did not participate in the consideration of complainant's appeal, but complainant alleges that the judge improperly influenced the assignment of circuit judges to the panel that considered his appeal. According to his complaint, the judge did so as a favor to the district judge below and/or to a government attorney.

Complainant's appeal was first considered by a certificate of appealability (COA) panel, which granted his request for a certificate of appealability. His case was then assigned to a merits panel consisting of three other judges, which dismissed his appeal for lack of jurisdiction. It is understandable that complainant, who is probably unfamiliar with our procedure, would be suspicious that a different panel considered the merits of his case, and reached a seemingly different result than the COA panel. But it is standard procedure for cases to be presented initially to a COA panel to determine appealability and then, if the COA is granted, a

different panel for further review. The COA panel only makes a preliminary determination as to whether the appeal might have merit; it does not, by filing the COA, conclusively determine jurisdiction on that issue. There is thus no inconsistency between the rulings of the two panels.

Both COA panels and merits panels are selected randomly. An independent investigation discloses that this procedure was followed in complainant's case, without any input from the subject judge. Because no misconduct occurred, these charges must be dismissed. See 28 U.S.C. § 352(b)(1)(B); Judicial-Conduct Rule 11(c)(1)(D).

Complainant also alleges that his appeal was improperly dismissed and his petition for rehearing en banc was improperly denied. But the subject judge did not participate in the consideration of his appeal. In any event, these charges relate directly to the merits of the 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 adverse rulings. See In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Council 1982).

Complainant requests that we return the documents he enclosed in the appendix to his complaint. The clerk shall return these documents to him.

**DISMISSED.**