UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

KENT E. HOVIND, *et al.*,

Plaintiffs,

v. Case No. 3:20-cv-5708-RV/MJF

HOPE THAI CANNON,

Defendant.
_____/

ORDER

Now pending is the plaintiffs' civil rights complaint filed pursuant to 42 U.S.C. § 1983 against United States Magistrate Judge Hope Thai Cannon.[1] For the reasons stated below, this action is dismissed because the plaintiffs' claims are frivolous and amendment would not cure this deficiency.

I. Background

On May 22, 2020, the plaintiffs commenced a civil rights action pursuant to 42 U.S.C. § 1983 in the Northern District of Florida. *Hovind v. United States*, No.

[1] Because Plaintiffs assert a claim against a federal judge and not a state actor, their claim is more properly brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), not section 1983. *See Corbitt v. Wood*, 677 F. App'x 596, 598 (11th Cir. 2017) (citing *Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996)).

3:20-cv-05484-TKW-MJF (N.D. Fla. May 22, 2020) (ECF No. 1).[2] The plaintiffs subsequently filed an amended complaint. (ECF No. 7). Judge Cannon was the magistrate judge randomly assigned to the case, as our rules require.

On July 23, 2020, Judge Cannon ordered the plaintiffs to file a second amended complaint because their amended complaint violated the Local Rules for the United States District Court for the Northern District of Florida. (ECF No. 8 at 1 (citing N.D. Fla. Loc. R. 5.7(B)). The plaintiffs' amended complaint was fifty-six pages in length, and the plaintiffs did not seek leave to exceed the twenty-five-page limit imposed by the Local Rules. Additionally, Judge Cannon advised the plaintiffs to consider three potential issues with their amended complaint: (1) whether their claims could be barred by judicial and prosecutorial immunity; (2) whether their claims could be barred by the applicable statute of limitations; and (3) whether any claim relating to Hovind's 2006 conviction might be barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). (ECF No. 8 at 1-3). Judge Cannon provided the plaintiffs fourteen days to amend their complaint. (*Id.* at 4).

[2] Under Federal Rule of Evidence 201(b), a court may "take judicial notice of facts that are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999). This court will refer to documents filed in *Hovind v. United States*, 3:20-cv-05484-TKW-MJF as "ECF No." and documents in this case as "Doc."

Fourteen days after Judge Cannon entered her order instructing the plaintiffs to amend their complaint, the plaintiffs initiated the instant action against Judge Cannon. (Doc. 1). The plaintiffs argue that Judge Cannon's order directing the plaintiffs to amend their complaint in *Hovind v. United States*, No. 3:20-cv-05484-TKW-MJF constitutes a deprivation of their civil rights. (*Id.* at 7). For relief, the plaintiffs seek an order enjoining Judge Cannon from "any further exercise of authority, rights privilege or amenities [sic] of the office of Magistrate or Judge," an impeachment hearing, a grand jury to be convened on alleged violations of 18 U.S.C. §§ 241 and 242, and any other relief available at law and in equity. (*Id.* at 12).

II. Applicable Law

Courts must hold complaints drafted by *pro se* litigants to "less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam). Nevertheless, district courts possess the inherent authority to dismiss claims *sua sponte* when they are patently frivolous. *See Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011); *Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526 (11th Cir. 1983). Indisputably, frivolous claims may be dismissed without giving notice to a party and even prior to service of process. *Davis v. Kvalheim*, 261 F. App'x 231, 234 (11th Cir. 2008); *Vanderberg v. Donaldson*, 259 F.3d 1321, 1323 (11th Cir. 2001). A claim is

frivolous when "it lacks an arguable basis either in law or in fact." *Denton v. Hernandez*, 504 U.S. 25, 31 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001). One example of a claim subject to dismissal because it is "based on an indisputably meritless legal theory" is a claim against a defendant who is immune from suit. *Neitzke*, 490 U.S. at 327; *Perdomo v. Osah*, 805 F. App'x 1012, 1014 (11th Cir. 2020); *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993).

III. Discussion

A. Plaintiffs' Claims are Patently Frivolous

1. Allegation of Criminal Wrongdoing and Request for Impeachment Hearing

The plaintiffs seek to have a grand jury consider criminal charges for alleged violations of Sections 241 and 242 of Title 18 of the United States Code. (Doc. 1 at 12).

A grand jury "is an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). Although a grand jury normally operates "in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length." *United States v. Williams*, 504 U.S. 36, 47 (1992). True, the authority to convene a grand jury is

vested in a district court. *Petition of A & H Transp., Inc.*, 319 F.2d 69, 71 (4th Cir. 1963) (per curiam); Fed. R. Crim. P. 6. Nevertheless, the "grand jury is by design an institution independent from the Judicial Branch." *Pitch v. United States*, 953 F.3d 1226, 1237 (11th Cir. 2020) (en banc).

A district court judge "neither presides over the grand jury nor monitors its proceedings." *Id.*; *United States v. Calandra*, 414 U.S. 338, 343 (1974). In fact, under Rule 6(d) of the Federal Rules of Criminal Procedure, a district court judge is not permitted to be present in the grand jury room at all. *Pitch*, 953 F.3d at 1237. "Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office." *Williams*, 504 U.S. at 47.

No statute authorizes courts to command grand juries to investigate particular individuals or topics, and the Supreme Court has repeatedly refused "many requests to exercise supervision over the grand jury's evidence-taking process." *Id.* at 50. Accordingly, "in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge." *Id.* at 48. A grand jury, therefore, is "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973).

The decision whether to seek to have a grand jury investigate and indict someone belongs to the executive branch, not the judicial branch. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc); *Logan v. Hall*, 604 F. App'x 838, 841 (11th Cir. 1987). Federal courts do not possess the authority to initiate prosecutions or to order the Justice Department to prosecute someone. "Under the authority of Art. II, s 2, Congress has vested in the Attorney General"—not the federal courts—"the power to conduct the criminal litigation of the United States Government." *United States v. Nixon*, 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516). Accordingly, it is officials in the executive branch of government who decide whether a prosecution should be commenced. *United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000) (noting that the decision as to which crimes and criminals to prosecute is entrusted by the Constitution to the executive branch); *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989) (noting that "[o]nly the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241-242"); *United States v. Ballard*, 779 F.2d 287, 295 (5th Cir. 1986) ("A decision to prosecute is within the United States Attorney's substantial discretion . . . ."). Thus, to the extent the plaintiffs seek to have this court convene a grand jury, order

it to consider the plaintiffs' accusations, seek an indictment or otherwise initiate a prosecution, the plaintiffs' claims are frivolous.

To the extent the plaintiffs seek to assert a cause of action under sections 241 and 242, these provisions "are criminal in nature and provide no civil remedies." *Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960). They do not provide a plaintiff with a private right of action. *O'Berry v. State Att'ys Office*, 241 F. App'x 654, 657 (11th Cir. 2007) (holding that there is no private right of action under 18 U.S.C. §§ 241 and 242); *Hill v. Didio*, 191 F. App'x 13, 14-15 (2d Cir. 2006) (holding that there is no private right of action under 18 U.S.C. §§ 241 and 242); *Newcomb v. Ingle*, 827 F.2d 675, 676 n.1 (10th Cir. 1987) (holding that 18 U.S.C. § 241 is a criminal statute and does not provide for a private cause of action); *Cok*, 876 F.2d at 2 (noting that 18 U.S.C. §§ 241-242 "do not give rise to a civil action for damages"). Accordingly, any claim under sections 241 and 242 also would be frivolous.

To the extent the plaintiffs request that this court order a hearing to "impeach" Judge Cannon, this complaint was not properly filed in this court. *See* 28 U.S.C. §§ 351-363. Furthermore, issuing an order to amend a complaint to make it compliant with the Local Rules is not improper conduct that would warrant censure, much less "impeachment." Accordingly, regardless of how the plaintiffs' claims are construed, they are patently frivolous.

2. Judicial Immunity

Additionally, the plaintiffs' claim that Judge Cannon's order violated their civil rights is patently frivolous insofar as such claims are barred by judicial immunity. *Carroll*, 984 F.2d at 393 (noting that dismissal of a complaint as frivolous is justified when a defendant is entitled to absolute immunity); *Clark v. State of Ga. Pardons and Paroles Bd.*, 915 F.2d 636, 640 n.2 (11th Cir. 1990) ("The absolute immunity of the defendant would justify the dismissal of a claim as frivolous.").

"Judicial immunity is an absolute immunity . . . ." *Harris v. Deveaux*, 780 F.2d 911, 914 (11th Cir.1986). "Judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Judges are entitled to absolute judicial immunity from damages for those acts taken while they are acting in their judicial capacity unless they acted in the 'clear absence of all jurisdiction.'" *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (citations omitted). Judges are also generally immune from claims for injunctive and declaratory relief unless (1) a declaratory decree was violated or (2) declaratory relief is unavailable. *Id.* at 1242. "A judge enjoys immunity for judicial acts regardless of whether he made a mistake, acted maliciously, or exceeded his authority." *McCullough v. Finley*, 907 F.3d 1324, 1331 (11th Cir. 2018); *Stevens v. Osuna*, 877 F.3d 1293, 1301 (11th Cir. 2017); *see Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

A judge acts in the "clear absence of all jurisdiction" when the matter on which he acts is clearly outside of the subject matter jurisdiction of the court over which he presides. *See Dykes v. Hosemann*, 776 F.2d 942, 948 (11th Cir. 1985). "Whether a judge's actions were made while acting in his judicial capacity depends on whether: (1) the act complained of constituted a normal judicial function; (2) the events occurred in the judge's chambers or in open court; (3) the controversy involved a case pending before the judge; and (4) the confrontation arose immediately out of a visit to the judge in his judicial capacity." *Sibley v. Lando*, 437 F.3d 1067, 1070 (11th Cir. 2005) (*citing Scott v. Hayes*, 719 F.2d 1562, 1565 (11th Cir. 1983)).

Here, the plaintiffs' allegations show that Judge Cannon was clearly acting within her judicial capacity when she reviewed the plaintiffs' complaint and directed the plaintiffs to comply with the Local Rules for the Northern District of Florida.[3] Thus, to the extent the plaintiffs seek damages or equitable remedies, these claims are barred by absolute immunity. *Corbitt*, 677 F. App'x at 599; *Simmons v. Edmondson*, 225 F. App'x 787, 788 (11th Cir. 2007).

[3] District courts have the inherent power to control their dockets. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). Additionally, "[a] district court has discretion to adopt local rules." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010); *Frazier v. Heebe*, 482 U.S. 641, 645 (1987); *see* 28 U.S.C. § 2071; Fed. R. Civ. P. 83.

Additionally, the plaintiffs failed to demonstrate that they are entitled to declaratory or injunctive relief. To show entitlement to declaratory or injunctive relief, plaintiffs must allege with specificity: (a) a constitutional violation; (b) a serious risk of continuing irreparable injury if the relief is not granted; and (c) the absence of an adequate remedy at law. *Bolin*, 225 F.3d at 1242 (citing *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982)). Here, the plaintiffs did not and cannot state such a claim insofar as there was an adequate remedy at law for the alleged violations. Specifically, the plaintiffs could have raised an objection to Judge Cannon's order with the presiding district judge. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636 ("A judge of the court may reconsider any pretrial matter under . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."). Additionally, if the plaintiffs preserved an error, upon entry of a final judgment, the plaintiffs could raise any claimed error on appeal to the Court of Appeals for the Eleventh Circuit. *See also Bolin*, 225 F.3d at 1243 (noting that there is an adequate remedy insofar as the plaintiffs could appeal any rulings or actions taken in their cases to the Eleventh Circuit and Supreme Court). For these reasons, as well, the plaintiffs' claims are patently frivolous.

B. Amendment Would Be Futile

Pursuant to Rule 15(a)(1)(A) of the Federal Rules of Civil Procedure, a party may as a matter of course amend his or her complaint within 21 days after serving

it. Additionally, the Eleventh Circuit requires a district court to grant a *pro se* plaintiff "at least once chance to amend the complaint before the district court dismisses the action with prejudice—at least, that is, where a more carefully drafted complaint might state a claim." *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1132 (11th Cir. 2019) (quotation omitted). A district court, however, is not required to grant leave to amend when any amendment would be futile. *Id.*; *Woldeab v. Dekalb Cty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018) (citing *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991) *overruled in part by Wagnes v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541 (11th Cir. 2002)). "Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed." *Silberman*, 927 F.3d at 1132 (quoting *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007)).

Based on the allegations contained in the plaintiffs' complaint and the nature of their asserted grievances, it is obvious that there are no factual allegations that plaintiffs could allege to state a claim. Therefore, dismissal is appropriate.

IV. Conclusion

For these reasons, the plaintiffs' complaint is due to be dismissed as frivolous. The Clerk is directed to enter judgment in accordance with this Order.

DONE and **ORDERED** this 24th day of August, 2020.

s/ Roger Vinson
ROGER VINSON
Senior United States District Judge