UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

FREDDIE D. HEARD,	)	
	)	
Plaintiff,	)	
	)	Case No: 2:21-CV-125-MHT-KFP
v.	)	
	)	
SANDRA J. STEWART,	)	
	)	
Defendant.	)	

MOTION REQUESTING LEAVE TO AMEND
F. R. CIV. P. 15

Comes the Plaintiff in the above captioned action, Freddie D. Heard, and moves this Court to allow him to amend his complaint.

Respectfully Submitted,

Freddie D. Heard
#272097
E.C.F.
#200 Wallace Dr.
Clio, Al. 36017

Certificate of Service

This certifies that I have on this 29th day of July, 2022 placed a true and exact copy of my:

MOTION REQUESTING LEAVE TO AMEND
F. R. CIV. P. 15

in the U.S. Mails, first-class postage prepaid, addressed to:

Sandra J. Stewart
United States Attorney's Office Middle District of Alabama
131 Clayton Street
Montgomery, Al. 36104

Freddie D. Heard

Certified Mail No. 7018 3090 0002 1032 8668

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

FREDDIE D. HEARD,	)	
	)	
Plaintiff,	)	
	)	Case No: 2:21-CV-125-MHT-KFP
v.	)	
	)	
SANDRA J. STEWART,	)	
	)	
Defendant.	)	

FIRST AMENDED COMPLAINT

STATEMENT OF THE CASE

Plaintiff attempted to determine via a FOIA request the existence (or non-existence) of instructions on how a citizen can access the federal grand jury. According to the U.S. Attorney for the Middle District of Alabama, no such records exist.

Plaintiff also requested an audience with the federal grand jury in Mobile, Alabama, which issue the Defendant adroitly side-stepped. It is to that issue that this Plaintiff submits his First Amended Complaint.

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 702 to 706, 28 U.S.C. § 1331, 1361,1651, and 2202.

PARTIES

2.Plaintiff Freddie D. Heard is a state prisoner with a current address of:

426 (1967). Inseparable from the guaranteed rights entrenched in the first amendment, the right to petition for redress of grievances occupies a "preferred place" in our system of representative government, and enjoys a "sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945). Indeed, "[i]t was not by accident or coincidence that that rights to freedom in speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances." *Id.* at 323.

United States v. Hylton, 710 F.2d 1106, 1111 (5th Cir. 1983)

DUBIOUS INTRUSIONS

10. The dubious intrusions that Congress and the Department of Justice have made into the federal grand jury are somewhat more complicated.

11. The judicial dishonesty in the United States Court of Appeals for the Second Circuit and the other federal courts that has gone uncorrected since the Second Circuit Court's ruling in *United States v. Hansel*, 70 F.3d 6 (2d Cir. 1995), in which it ruled the following:

> Hansel's objection to the presence of a government attorney during the grand jury proceedings fails, because Rule 6(d) of the Federal Rules of Criminal Procedure expressly states that government attorneys may "be present while the grand jury is in session."
>
> *Id.* at 8.

12. The judicial dishonesty in that statement is evident because the text of Rule 6(d) was *not* the issue Hansel raised, as will more fully appear, *infra.*

13. The problems the *Hansel* opinion (as precedent) created are as follows.

14. The issue Hansel raised and is addressed herein is whether Congress actually had the constitutional *authority to enact* Rule 6(d) and Title 28 U.S.C. §

515(a) *in the first place.*

15. Once upon a time this sort of trickery engaged in by the judges who authored the opinion in *United States v. Hansel*, was prohibited:

5 U.S.C. § 7301. Executive Order No. 11222 issued May 8, 1965. 30 F.R. 6469.

16. Any person in government should:

> Uphold the Constitution, laws and regulations of the United States and of all governments therein and never be a party to their evasion. [display in government building]
>
> Public Law 96-303, Sec. 3(3) II, 94 Stat. 855, 856, July 3, 1980.

17. The dishonesty of the Department of Justice and its minions fare no better. A typical response to these issues is quoted (with Defendant's objections) in a Seattle case, *U.S. v. Seleznev*, No. CR11-0070-RAJ, infra:

18. The Government's position on the prosecutor's relationship to the grand jury in its "Response to Defendant's Pro Se Motion to Dismiss for Violations of the Grand Jury Clause of the Fifth Amendment" is that tradition prevails over rights guaranteed by the U.S. Constitution.

19. Even if the Court were to consider the pleading, it is frivolous and should be denied. It is well established that the prosecutor has authority to attend grand jury sessions. By tradition and case law, the prosecutor is not merely an advocate, but also the grand jury's legal advisor. *See, e.g., United States v. Sears, Roebuck & Co.*,

719 F.2d 1386, 1393-94 (9th Cir. 1983). Courts have recognized that grand juries may need some assistance understanding criminal laws. Prosecutors are allowed to explain the law and interpret the legal significance of evidence while tempering this assistance in order to preserve the grand jury's independence. *See United States v. Sigma International*, 196 F.3d 1314, 1323 (11th Cir. 1999).

Response (to Entry # 177), p.2, lines 18-26 (Entry # 178, filed 8/27/2015).

20. There are a number of problems with the Government's position in this paragraph.

21. "Frivolous"? An earlier satire on the legal system describes the dishonest use of this word:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> Lewis Carroll, *The Annotated Alice: Alice's Adventures In Wonderland & Through The Looking Glass*, p. 269 (Martin Gardner 1960).

Alice-in-Wonderland was a world in which words had no meaning. *Welch v. United States*, 90 S.Ct. 1792, 1803 (1970).

22. "[W]ell established"? Standing alone, historical practice cannot justify contemporary violations of the Constitution. *Marsh v. Chambers*, 463

U.S. 783, 790, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

23. Our ancestors warned us:

> Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."
>
> *Boyd v. United States*, 116 U.S. 616, 635 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886).
>
> *Miranda v. Arizona*, 384 U.S. 436, 459, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

24. Dishonest use of "tradition" is nothing new.

> Then some Pharisees and teachers of the law came to Jesus from Jerusalem and asked, "Why do your disciples break the tradition of the elders? They don't wash their hands before they eat!" Jesus replied, "And why do you break the command of God for the sake of your tradition? For God said, 'Honor your father and mother' and 'Anyone who curses his father or mother must be put to death.' But you say that if a man says to his father or mother, 'Whatever help you might otherwise have received from me is a gift devoted to God,' he is not to 'honor his father' with it. Thus you nullify the word of God for the sake of your tradition.
>
> Matthew 15:1-6 (NIV).

25. As this Government has nullified the original intent of the Constitution for the sake of their "tradition." Strange how tradition always falls in their favor.

Case law fares no better.

> After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction.

Standard Oil Co. v. United States, 31 S.Ct. 502, 533 (1910) (Justice Harlan, concurring in part and dissenting in part).

26. Congress had no authority to change the mode of proceeding by grand jury from what our ancestors understood and was a right they guaranteed with the Fifth Amendment of the Constitution. As a consequence, Defendant Michael Anthony Barr was indicted by a grand jury suffering from a defect so fundamental that it is no longer a grand jury.

27. Case law tells us one thing. The reality is something else altogether. For example, it appears that Congress has no authority to bypass the "unrepealed" Fifth Amendment.

> Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.
>
> *Miranda v. Arizona*, 384 U.S. 436, 491, 86 S.Ct. 1602, 1636, 16 L.Ed.2d 694 (1966).
>
> It is not without significance, that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.
>
> *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Douglas, J., concurring).

Without an indictment or a presentment by a Grand Jury the District Court exceeds its jurisdiction.

Ex Parte Wilson, 114 U.S. 417, 422, 5 S. Ct. 935, 937, 29 L.Ed. 89 (1885).

Any person charged with a crime that is punishable by death or imprisonment in a penitentiary has a constitutional right to be indicted by a grand jury.

United States v. Wellington, 754 F.2d 1457, 1462 (9th Cir. 1985) (citations omitted).

[T]he accused ... [has] the Fifth Amendment *right* not to be prosecuted without indictment by grand jury.

United States v. Wydermyer, 51 F.3d 319, 324 (2nd Cir. 1995) (citations omitted).

If an indictment is found in willful disregard of the rights of the accused, the court should interfere and quash the indictment.

United States v. Farrington, 5 F. 343, 348(D.C.N.Y. 1881).

28. "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a grand jury." That does indeed confer a right not to be tried (in the pertinent sense) when there is no grand jury indictment. Undoubtedly, the *common-law protections* traditionally associated with the grand jury attach to the grand jury are required by this provision—including the requisite secrecy of grand jury proceedings.

Midland Asphalt Corp. v. United States, 489 U.S. 794, 802, 109 S.Ct. 1494, 1499-1500, 103 L.Ed.2d 879 (1989).

29. It is Defendant's contention that no one in any federal criminal case has been indicted by a grand jury since 1906 as the words "grand jury" were understood by the Fifth Amendment's authors, as Congress had no authority to change the *meaning* or the *intent* of the Fifth Amendment's authors, rendering all grand jury proceedings since then unconstitutional.

It is never to be forgotten that in the construction of the language of the

Constitution here relied on . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.

Ex Parte Bain, 121 U.S. 1, 12, 7 S.Ct. 781, 787, 30 L.Ed. 849 (1887).

30. [T]he court has no power to add to or subtract from the procedures setforth by the Founders. I realize that it is far easier to substitute individual judges' ideas of "fairness" for fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right. . . . As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.

In re Winship, 397 U.S. 358, 377-378, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Black, dissenting).

31. Since the Bill of Rights was enacted in 1791, that is exactly what has happened: we have come to rely on the shifting, day-to-day standards of "fairness" of individual judges.

No act of Congress can authorize a violation of the Constitution. *United States v. Brignoni-Ponce*, 422 U.S. 873, 877, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975).

32. The Constitution cannot be interpreted safely *except* by reference to common law and to British institutions as they were when the instrument was framed and adopted. *Ex Parte Grossman*, 267 U. S. 87, 108-109, 45 S. Ct. 332, 333, 69 L. Ed. 527 (1925). That this applies with equal force to federal grand juries is equally clear. *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed.

397 (1956); *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919), *In Re Grand Jury Proceedings*, 479 F.2d 458, 460-461 n. 2 (5th Cir. 1973) (collecting cases), *In Re Grand Jury January, 1969*, 315 F.Supp. 662, 675 (D. Md. 1970).

> 32. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents . . . .
>
> PUBLIUS (Alexander Hamilton), The Federalist No. 78 (May 28, 1788).

33. Other pronouncements on the Constitution are equally reassuring. A couple of examples:

> Courts are to guard against the small encroachments of rights as well as the more egregious; rather, the small encroachments are worse since they imperceptibly wear away the protections of the Constitution, permitting "'[a] close and literal construction [that] deprives them of half their efficacy, and lead[ing] to gradual depreciation of the right, as if it consisted more in sound than in substance.'"
>
> *United States v. Bradley*, 922 F.2d 1290, 1296 (6th Cir. 1991).

> Were we to do less, we would fail to protect an imposing tree in the forest of our liberties whose seeds were wrested from the hands of ancient monarchs, planted by legal giants, and nurtured by patriots for centuries. Then we would surely have to bow our heads when asked where we would hide when the Devil turned round on us. *See* Robert Bolt, *A Man for All Seasons* 66 (Vintage International Ed. 1990).
>
> *United States v. Becker*, 23 F.3d 1537, 1542 (9th Cir. 1994).

Unfortunately, as applied to the "indictment by grand jury" clause of the Fifth Amendment of the Constitution, all the foregoing high-blown rhetoric means

nothing unless the presiding judge *honors* the *original intent* of those who authored the Fifth Amendment.

34. Constitutional Violations—Indictment by Grand Jury as Opposed to Indictment by Public Prosecutor.

"Let justice be done, though the heavens fall." Lord Mansfield in *Rex v. Wilkes*, 4 Burrow's Reports 2527, 2562 (1768), from an English maxim popular prior to 1600.

See also United States v. Coggin, 1 F. 492 (E.D.Wisc. 1880) (it is the duty of the court to administer the law according to its best understanding, *regardless* of the consequences).

Constitutional restraints prohibit prosecutors from engaging in conduct that undercuts the *independence* of the grand jury. *United States v. Zielinski*, 740 F.2d 727, 730 (9th Cir. 1984).

35. Although that is the rhetoric, reality does not square with the Constitution.

> The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice.
>
> *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F.Supp. 519, 521 (E.D.N.Y. 1974).
>
> Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.
>
> *Delays in Criminal Cases*, Campbell, 55 F.R.D.229, 253 (1972).

In 1976, for example, federal grand juries returned 23,000 indictments and 123 "no bills." Hearings on H.R. 94, 95th Congress, 1st Session, Congressional Record, p. 739 (1977). *See United States v. Ciambrone*, 601 F.2d 616, 622 n. 5 (2d Cir. 1979).

36. Members of Congress recognized the problem decades ago: "Their [grand juries] historic purpose as a 'legal shield' is being *disregarded* by *prosecutors* who *totally dominate* the proceedings." Congressional Record, Extension of Remarks, Vol. 123, p. 7678, March 15, 1977, by the Honorable Raymond F. Lederer.

37. "H.R. 94 would insure independent and informed federal grand juries. Jurors, not the prosecutor, would determine and review all the evidence." *Id.*

38. Congressman Lederer's remarks concerned an article in the Philadelphia Evening Bulletin referring to a bill to reform the federal grand jury system authored by the Honorable Joshua Eilberg, H.R. 94. The Justice Department apparently retaliated against Representative Eilberg for his grand jury reform attempts. *See United States v. Eilberg*, 536 F.Supp. 514 (E.D. Pa. 1982). That bill failed, as did an earlier attempt in 1951. *See United States v. Cox*, 342 F.2d 167, 186 n. 4 (5th Cir. 1965).

> Law reform has never been given priority by any government, perhaps because the law always works a little better for government than for individuals.
>
> Blatcher, *The Court of King's Bench 1450-1550*, p. 90 (Univ. of London Athlone Press 1978).

39. The "no bills" referred to *supra* were not what one would first imagine:

> Those the grand jury refuses to indict are likely to be people the prosecutor does not *want* indicted. Many of the cases ending up with a "no true bill" are actually instances where a prosecutor feels the need for such backing to support his own view that further proceedings shall not be held.
>
> Congressional Record, Extension of Remarks, Vol. 123, p. 21637, June 9, 1977 by the Honorable Benjamin S. Rosenthal.

40. Special safeguards were incorporated in the whole concept of the grand jury: "A grand juror cannot carry on systematic persecution against a neighbor whom he hates, because he is not permanent in the office." 9 *The Writings of Thomas Jefferson* 83 (Library Edition 1904).

This is *not* true of today's prosecutors.

> [Prosecutors] have a personal interest in winning cases. Successful prosecutors often have the opportunity to move to lucrative positions at private law firms. Others, claiming to be "tough on crime," may run for office or judgeship. The interests of justice and the interests of the prosecutor thus are often in conflict; prosecutors are restricted only by their consciences, and some choose a career boosting path.
>
> John C. Anderson, *'Our' prosecutors tell lies?* The National Law Journal, May 10, 1999, Podium, p. A25.

41. The grand jury was designed as a safeguard to protect defendants against oppressive government practices. *Butterworth v. Smith*, 494 U.S. 624, 629, 110 S.Ct. 1376, 1380, 108 L.Ed.2d 572 (1990); *U.S. ex rel Toth v. Quarles*, 350 U.S. 11, 16, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

Under the common law it was understood that the grand jury was to *stand*

between the *prosecutor* and the accused. *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 373, 50 L.Ed. 652 (1905). It appears to some that the grand jury is obsolete. *Delays in Criminal Cases*, Campbell, *supra*.

> The purpose of the [Fifth] Amendment was to limit the powers of the legislature, as well as of the *prosecuting officers*, of the United States.
>
> *Ex Parte Wilson*, *supra*, 114 U.S. at 426, 5 S.Ct. at 939.

42. As history clearly proves, there is *no limit* to what a corrupt or overzealous prosecutor can do to an American citizen. Such conduct on the part of a prosecutor does not even follow the United States Attorney's Manual:

> The Fifth Amendment to the Constitution of the United States provides, in part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."
>
> While it is a very effective instrument of law enforcement, the grand jury is regarded primarily as a protection for the individual. It has been said that the grand jury stands between the accuser and the accused as "a primary security to the innocent against hasty, malicious, and oppressive persecution." *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). The grand jury functions to determine whether there is probable cause to believe that a certain person committed a certain offense and, thus, to protect individuals against the lodging of unfounded criminal charges. *See United States v. Calandra*, 414 U.S. 338 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 391 U.S. 935 (1965).
>
> *United States Attorneys' Manual*, Section 9-11.010 (Oct. 1, 1990).

43. Even with the changes in the *Manual* over the years, the grand jury's functions still include "the protection of the citizenry from unfounded criminal

charges." *Id.*, Section 9-11.010 (1997).

Ironically, it is often the practice of federal prosecutors to quote *In re District Attorney of United States*, Case No. 3,925 (C.Ct. W.D. Tenn. 1872), to *contradict* their *own Manual* when these issues are raised:

> This high officer cannot thus stand between the innocent and the guilty by the exercise of that sound discretion which is here accorded to him, if he is to be excluded from the grand jury room.
>
> *Id.*, 7 Fed. Case 745.
>
> The government may proceed in many cases if the district attorney elected so to do without your agency. It is only because the law officers prefer your intelligent and impartial investigation in all cases to the assumption of responsibility on their part that they do not proceed by information instead of indictment.
>
> *Id.*, 7 Fed. Case 746.

44. The nonsense in the second paragraph quoted in this case is contradicted by every Supreme Court case ever to address the subject of indictment by grand jury.

45. The problem is not that the machinery of the grand jury is obsolete. The problem is that Congress threw an insurmountable monkey wrench into the grand jury machinery in 1906. The federal courts then, by the misinformed application of "case law," completely destroyed indictment by grand jury as understood by the Fifth Amendment's authors

> 46. The Fifth Amendment had in view the rule of the *common law*, governing the mode of prosecuting those accused of crime. *Mackin v. United States*, 117 U.S. 348 (1886), *United States v. Deisch*, 20 F.3d 139, 145 n. 11 (5th Cir. 1994). The grand jury had common law origins.

In re April 1956 Term Grand Jury, 239 F.2d 263, 268 (7th Cir. 1956).

Under the common law the grand jury was instructed by a charge from the *judge* who sat upon the bench. Indictments were then preferred to them in the *name* of the king, but at the suit of any *private prosecutor*. Blackstone's Commentaries, Vol. 5, p. 302 (Tucker Edition 1803).

> 47. Of course, "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. . . . [U]ndoubtedly the framers of the Constitution were familiar with it." *Schick v. United States*, 195 U.S. 65, 69 (1904).
>
> *Bloom v. Illinois*, 391 U.S. 194, 199, 88 S.Ct. 1477, 20 L.Ed.2d 522 n. 2 (1968).

48. That this was the practice in United States courts for generations after the Fifth Amendment was enacted is also easily seen. The *court* is the *only* proper source from which a grand jury may obtain advice as to questions of law.

49. No other person has a right to give a grand jury an opinion on questions of law, which affect the rights of individuals or of society. *United States v. Kilpatrick*, 16 F. 765, 770 (D.C.W.D.N.C. 1883).

50. An early example of the judge instructing grand jurors in the law may be found in *Respublica v. Shaffer*, 1 U.S. (1 Dall.) 236 (O.T. Phila. 1788), quoted in *United States v. Williams*, 504 U.S. 36, 51-52, 112 S.Ct. 1735, 1744, 118 L.Ed.2d 352 (1992).

51. This fact of law is apparently unknown to today's Congress or federal courts:

> A variety of proposals would replace or supplement the prosecutor as a legal advisor to a grand jury. Instead, there would be an independent office of the grand jury counsel to instruct the grand jury on the law and pass on the admissibility of evidence and competency of witnesses.
>
> Congressional Record, Extension of Remarks, Vol. 123, p. 21637, June 9, 1977, by Hon. Benjamin S. Rosenthal.

I.e., our system already has a "grand jury counsel" to instruct the grand jury on the "law": he is called the *judge*.

> 52. The very fact of the presence of the prosecutor in the grand jury room *contradicts* the historically defined role of that body. How can the grand jury protect the accused from the accuser if the accuser is alone with the grand jury and can effectively *control* the course of its investigation?
>
> Schwartz, *Demythologizing The Grand Jury*, 10 American Criminal Law Review 701, 759 (1972); *see also* p. 758, n. 291.

> 53. In fact . . . the grand jury has become a tool of the prosecutor. By both establishing the grand jury's agenda and orchestrating the quality and quantity of the evidence presented, the prosecutor almost invariably determines who is and is not indicted.
>
> Congressional Record, Extension of Remarks, Vol. 123, p. 23394, July 15, 1977, Hon. Robert F. Drinan quoting the Boston Globe.

54. The grand jury was not meant to be the private tool of the prosecutor. *United States v. Fisher*, 455 F.2d 1101, 1105 (2nd Cir. 1972). This is *precisely* what it has become.

> Most grand jurors are pawns in the hands of many unscrupulous

prosecutors . . . grand juries are no more than rubber stamps placing the onus of guilt on the accused.

Congressional Record, Extension of Remarks, Vol. 123, pp. 28357 and 28358, Sept. 8, 1977, Hon. William (Bill) Clay quoting the Boston Globe of July 11, 1977.

55. It is odd that a grand jury foreperson can influence the grand jury's individual members, *see Ramseur v. Beyer*, 983 F.2d 1215, 1237 (3rd Cir. 1992) and today's lawyers are completely oblivious to the influence of a *government attorney*.

On November 3, 1806, Joseph Hamilton Daviess, United States Attorney for Kentucky, moved that a grand jury be convened to consider indicting Aaron Burr for attempting to involve the United States in a war with Spain. On December 3rd the grand jury was called. Daviess immediately moved "to be permitted to attend the grand jury in their room." This motion was considered "novel and unprecedented" and was denied. After hearing the evidence in secret the grand jury deliberated and, on December 5th, an ignoramus bill was returned.

Demythologizing The Grand Jury, *supra*, at 734.

See also United States v. Burr, Fed. Cas. No. 14,892 (C.Ct.D.Ky. 1806).

Nor was the practice of prohibiting prosecutors[1] from leading grand jury

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[1] Prosecutor and prosecuting officers were not, under the Fifth Amendment, the same thing. Until the Fifth Amendment was amended by judicial fiat in the 19th century and congressional enactment in the 20th, the "prosecutor" was a private individual, not a government employee. See, *e.g.*, *United States v. Rawlinson*, Fed. Cas. No. 16,213 (C.Ct.D.C. 1802). Note that a *female* prosecutor, called a *prosecutrix*, still means what the word meant when the Fifth Amendment was authored.

The Supreme Court of Missouri expanded the rule of *Welch* in *State v. Atkins*, 292 S.W. 422 (Mo. 1926), affirming the rape conviction of a physician who while examining a patient penetrated her by surprise and stopped when she protested. The Court explained:

investigations and degrading the grand jury into a rubber stamp an 1806 "anachronism" or "archaic practice," as pronounced by Schwartz in *Demythologizing The Grand Jury, supra.*

> A solicitor is *not* a judicial officer. He *cannot* administer an oath. He *cannot* declare law. He *cannot* instruct the grand jury in the law. That function belongs to the *Judge alone.* If the grand jury desire to be informed of the law or of their other duties, they *must* go into court and ask instructions from the bench.
>
> *Lewis v. Commissioners*, 74 N.C. 194, 197-199 (Superior Court of Wake County, 1876) (quoted with approval in *United States v. Virginia-Carolina Chemical Co.*, 163 F. 66, 75 (C.Ct. M.D. Tenn. 1908) and *United States v. Kilpatrick, supra*).

56. he results of the dangerous mode of inquisition alluded to in *Lewis* in 1876 is aptly described in former U.S. Senator Abourzek's article, *The Inquisition Revisited*, 7 Barrister 19 (1980):

> [A grand jury is] "a spear in the hands of ambitious prosecutors anxious to silence dissent or to climb to greater political heights over the backs of hapless defendants caught up in the system."

That it was up to the *judge*, under the practice known to the common law as understood by the framers of the Fifth Amendment, to instruct the grand jury as to its duties and responsibilities, was common knowledge in the federal courts of the

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> It is plain that, if appellant did penetrate prosecutrix sexually...no more physical force was employed by him than is necessarily incident to such an act when done with the consent of the woman...

Niederstadt v. Nixon, 505 F.3d 832, 838 (8th Cir. 2007).

nineteenth Century. *See, e.g., Charge To The Grand Jury* (several cases with the same title), Fed. Cas. No. 18,255 (Cir.Ct.D.Calif. 1872), 18,248 (C.Ct.D.W.Va. 1868), 18,251 (D.C.D. Oregon 1869), 18,257 (C.Ct.D. Maryland 1836), 18,258 (C.Ct.W.D.N.C. 1875) (Had Congress the authority to pass this Act?).

57. It was also well known that *additional* instructions to the grand jury *also* had to be given by the *judge*. *United States v. Watkins*, Fed. Cas. No. 16,649 (C.Ct.D.C. 1829).

58. This was also well known at the beginning of the twentieth Century. The grand jury is a body known to the common law . . . Blackstone says (Vol. 4, p. 303).

59. These grand juries are previously instructed in the articles of their inquiry, by a charge from the *judge* who presides upon the bench. *Beavers v. Henkel*, 24 S.Ct. 605, 607 (1904).

60. As a federal judge in the nineteenth century remarked, "The moment the executive is allowed to control the action of the courts in the administration of criminal justice, their independence is *gone*." *In re Miller*, Fed.Cas. No. 9,552 (C.Ct.D.Ind. 1878).

61. That government lawyers were not allowed in the grand jury room, under the indictment by grand jury clause of the Fifth Amendment, was well understood in this country for over 100 years. *See United States v. Rosenthal*, 121 Fed. 862, 874 (S.D.N.Y. 1903) and the cases cited therein.

67. In order to overcome the *Rosenthal* decision and the intention of the Framers of the Fifth Amendment, Congress then enacted, on June 30, 1906, the statute that has come down to us as 28 U.S.C. § 515(a) and the Rule that has come down to us as Federal Rule of Criminal Procedure 6(d), permitting the attorneys for the government to "attend the grand jury in their room." *See* Congressional Record for June 6, 1906, pp. 7913-7914, a portion of which reads as follows:

68. The Secretary read the report submitted by Mr. Knox, May 28, 1906, as follows:

> The Committee on the Judiciary, to whom was referred the bill (S. 2969) authorizing the Attorney-General and certain other officers of the Department of Justice to conduct legal proceedings in any court of the United States, having considered the same, report the bill favorably without amendment. It is frequently desirable and even necessary that the Attorney-General should detail an officer of his Department to assist some United States attorney in the investigation and prosecution of cases of unusual importance or interest, or to make an independent investigation and report the result to the Department, and, if necessary, to prosecute the same; or, where this latter is impracticable, to appoint a special assistant to the Attorney-General, particularly in criminal matters.
>
> In 1903 the Attorney-General appointed a special assistant to investigate and report in the Japanese silk fraud cases, and it was held (121 Fed. Rep. 826, *U. S. v. Rosenthal*) that a special assistant to the Attorney-General is not an officer of the Department of Justice under sections 359 and 367, Revised Statutes, or other provisions of the United States Statutes, and the indictment was quashed because of the presence of this attorney in the grand jury room. **That case further holds that neither the Attorney-General, the Solicitor-General, nor any officer of the Department has the power to conduct or aid in the conduct of proceedings before a grand jury.** It is clearly of great importance that they should have this power.

69. From 1787 to the present time, therefore, a federal grand jury has been a

body organized and functioning as by the common law at the date of the adoption of the amendment; and it seems reasonably clear that no power abides in the Congress to affect or modify the integrity and independence of the body as established. *United States v. Huston*, 28 F.2d 451, 452-453 (D.C. N.D. Ohio, W.D. 1928).

70. The question that has apparently been unanswered from that day to this is as follows: from what source or by what authority did Congress arrogate to itself the *right* to change the *meaning* and *mode* of *procedure* of the grand jury as it was understood in 1791 when the Fifth Amendment, U.S. Constitution, was enacted? By what Constitutional authority did Congress determine that members of the Department of Justice "should have this power?"

71. Defendant is well aware of the case law concerning prosecutorial misconduct in re the Grand Jury in the federal courts:

> This Circuit applies a strict standard for dismissal of an indictment because of alleged prosecutorial misconduct before the grand jury. The appellants must demonstrate that "prosecutorial misconduct is a long-standing or common problem in grand jury proceedings in [the] district." *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985).
>
> *United States v. Azad,* 809 F.2d 291, 294 (6th Cir. 1986).

72. One would think that a problem that has existed for over 110 years would be a longstanding problem.

73. Do citizens have a right to petition their government for the redress of their grievances?

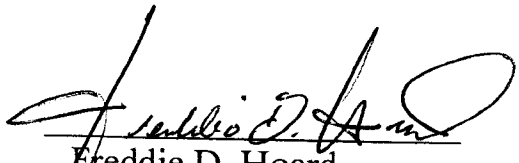
Does that right extend to all branches of government?

Is the federal grand a branch of that government?

Simple yes or no answers will suffice. If no, then Plaintiff submits that clause of the first Amendment is a 'dead letter'. If yes, this Court must schedule an interview with the federal grand jury for the Plaintiff.

WHEREFORE, Plaintiff moves this Court to grant him the relief he requests.

Respectfully Submitted,



Freddie D. Heard
#272097
E.C.F.
#200 Wallace Dr.
Clio, Al. 36017

Certificate of Service

This certifies that I have on this 29th day of July, 2022 placed a true and exact copy of my:

FIRST AMENDED COMPLAINT

in the U.S. Mails, first-class postage prepaid, addressed to:

Sandra J. Stewart
United States Attorney's Office Middle District of Alabama
131 Clayton Street
Montgomery, Al. 36104

Freddie D. Heard

Certified Mail No. 7018 3090 0002 1032 8668

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FREDDIE DEMOND HEARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:21-CV-125-MHT-KFP
	)	
DIRECTOR, OFFICE OF	)	
INFORMATION POLICY, and	)	
SANDRA J. STEWART,	)	
UNITED STATES ATTORNEY,	)	
	)	
Defendants.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Plaintiff Freddie Demond Heard, appearing pro se, initiated this action in February 2021. Heard seeks an order directing Defendants to schedule an opportunity for Heard to appear before the grand jury, provide Heard with materials for accessing the grand jury, or inform Heard they will not permit him to speak to the grand jury. Doc. 1 at 4. Defendants have moved to dismiss and for summary judgment. Doc. 13. Despite a show cause order and two extensions of time, Heard failed to respond to Defendants' motion. *See* Docs. 16, 18, 20. Instead, Heard has moved for leave to file an amended complaint, which he attached to his motion. Docs. 21, 21-1. Because Defendants are not proper parties and Heard's proposed First Amended Complaint would be subject to dismissal, the undersigned RECOMMENDS Defendants' motion to dismiss be GRANTED and Heard's motion to amend be DENIED.

D26

I. BACKGROUND

Heard, an inmate at Easterling Correctional Facility in Clio, Alabama, filed this action after the Executive Office for United States Attorneys ("EOUSA") denied, and the Director of the Office of Information Policy affirmed, his Freedom of Information Act ("FOIA") request. Heard first sought information about how he could present to the grand jury and, second, an opportunity to speak to the grand jury. Doc. 1-1. EOUSA rejected Heard's request because disclosure of grand jury information is exempted from disclosure under FOIA and is barred by Federal Rule of Criminal Procedure 6(e). Doc. 1-2. The Office of Information Policy affirmed because EOUSA does not maintain the records Heard sought. Doc. 13-1 at 30–31. Heard subsequently pursued relief in this Court.

Heard asserts the grand jury is open to all citizens to present their grievances for consideration. Doc. 1 at 3–4. Heard maintains he is entitled to information about how he can become a witness for the grand jury, as well as to make an appearance before the grand jury. Heard asks this Court to schedule his presentation to the grand jury, direct Defendants to provide him information about becoming a grand jury witness, or order Defendants to admit Heard will not be permitted to speak to the grand jury. *Id.* at 4.

In response, Defendants move to dismiss and for summary judgment.[1] Doc. 13. Defendants contend Heard, who relies on FOIA as the basis of his Complaint, erroneously sued individual government officials rather than a proper federal agency. Consequently, Defendants maintain Heard's Complaint fails to state a claim on which relief can be

[1] As discussed below, the Court does not reach Defendant's motion for summary judgement because the motion to dismiss is due to be granted.

D27

granted. Rather than respond to Defendants' motion, Heard seeks leave to amend his Complaint to name solely the United States Attorney for the Middle District of Alabama as Defendant and reduce his claim for relief only to scheduling his appearance before the grand jury.

II. LEGAL STANDARDS

A. Motion to Dismiss

Under the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While detailed factual allegations are not required, a plaintiff must present "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Generally, courts read complaints by pro se plaintiffs more liberally than those drafted by attorneys. *Osahar v. U.S. Postal Serv.*, 297 F. App'x 863, 864 (11th Cir. 2008). Yet, courts do not have "license to serve as *de facto* counsel . . . or to rewrite an otherwise deficient pleading in order to sustain an action." *GJR Invs., Inc. v. Cnty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) (citations omitted), *overruled on other grounds by Ashcroft*, 556 U.S. 662. All litigants, pro se or not, must comply with the Federal Rules of Civil Procedure. *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

D28

B. Motion for Leave to Amend

Federal Rule of Civil Procedure 15(a) permits a party to "amend its pleading once as a matter of course within: (A) 21 days after serving it; or (B) if the pleading [requires] a responsive pleading . . . 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f)[.]" Fed. R. Civ. P 15(a). Otherwise, a party seeking to amend must procure the court's leave or the opposing party's consent. Fed. R. Civ. P. 15(a)(2). When sought, courts should freely grant leave to amend. Fed. R. Civ. P. 15(a)(2).

However, if an amendment would be futile, a court should not grant leave. Fed. R. Civ. P. 15(a)(2); *Stringer v. Jackson*, 392 F. App'x 759, 760 (11th Cir. 2010) (citing *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir. 2004)). Amendment is futile if the amended complaint would still be dismissed. *Stringer*, 392 F. App'x at 760 (quoting *Hall*, 367 F.3d at 1263). When considering if an amendment would be futile, the court may consider whether the amended complaint would state a claim on which relief can be granted and any relevant affirmative defenses. *Wyatt v. BellSouth, Inc.*, 176 F.R.D. 627, 631 (M.D. Ala. 1998) (citing *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993)).

III. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants move to dismiss because Heard has improperly sued individual defendants rather than the appropriate federal agency under 5 U.S.C. § 552. The statute declares that litigants must bring their complaints against the appropriate federal agency, not an individual officer or position in the federal government. *See* 5 U.S.C. § 552(a)(4)(B);

see also 5 U.S.C. § 551(1) (defining agency). The United States District Court for the District of Columbia, a persuasive authority often tasked with interpreting FOIA, has stated, "[A] claim under FOIA can only proceed against a federal government agency." *Boyd v. Trump*, 478 F. Supp. 3d 1, 3–4 (D.D.C. 2020); *see Martinez v. Bureau of Prisons*, 444 F.3d 620, 624 (D.C. Cir. 2006).

Here, Heard has improperly brought his action against individual defendants in their official capacities rather than any appropriate federal government agencies.[2] This is inconsistent with the statute on which Heard bases his case. Accordingly, taking its allegations as true, Heard's Complaint fails to state a claim against the named Defendants, and Defendants' motion to dismiss is due to be granted. Because this matter should be dismissed based on Federal Rule of Civil Procedure 12(b)(6), the Court does not consider Defendants' assertions on summary judgment.

B. Heard's Motion for Leave to Amend

Heard seeks the Court's leave to amend his Complaint. Heard's proposed First Amended Complaint removes the Director of the Office of Information as a Defendant while continuing his action against the United States Attorney. Heard's First Amended Complaint is significantly lengthier than his original Complaint, though most of the new allegations express Heard's view of the history of the grand jury. Heard's amended claim

[2] While it is inconsequential to the issue presented on the motion to dismiss, the Court notes Defendants' assertion in its motion for summary judgment that the Department of Justice does not maintain the records Heard requests, in any event. Doc. 13-1 at 3.

D 30

for relief only asks this Court to schedule an appearance for Heard before the federal grand jury. Doc. 21-1.

Heard's proposed First Amended Complaint would be subject to dismissal for the same reasons Defendants' instant motion to dismiss is due to be granted. Heard impermissibly intends to sue a government agent under FOIA. Consequently, granting Heard's leave to amend his Complaint would be futile, and his motion should be denied.

IV. CONCLUSION

Accordingly, the undersigned Magistrate Judge RECOMMENDS:

1. Defendants' Motion to Dismiss (Doc. 13) be GRANTED.
2. Defendants' Motion for Summary Judgment (Doc. 13) be DENIED as MOOT.
3. Heard's Motion for Leave to Amend (Doc. 21) be DENIED.
4. This case be DISMISSED.

Further, it is ORDERED that by **October 4, 2022**, the parties may file objections to this Recommendation. The parties must specifically identify the factual findings and legal conclusions in the Recommendation to which objection is made. Frivolous, conclusive, or general objections will not be considered by the Court. This Recommendation is not a final order and, therefore, is not appealable.

Failure to file written objections to the proposed findings and recommendations in accordance with 28 U.S.C. § 636(b)(1) will bar a party from a de novo determination by the District Court of legal and factual issues covered in the Recommendation and waive the right of the party to challenge on appeal the District Court's order based on unobjected-

D31

to factual and legal conclusions accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); 11TH Cir. R. 3–1. *See Stein v. Reynolds Sec., Inc.*, 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

DONE this 20th day of September, 2022.

/s/ Kelly Fitzgerald Pate
KELLY FITZGERALD PATE
UNITED STATES MAGISTRATE JUDGE

D32

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

FREDDIE D. HEARD,	)	
	)	
Plaintiff,	)	
	)	Case No: 2:21-CV-125-MHT-KFP
v.	)	
	)	
SANDRA J. STEWART,	)	
	)	
Defendant.	)	

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S RECOMMENDATION OF THE MAGISTRATE JUDGE

Comes the Plaintiff, in the above entitled action, Freddie D. Heard, and objects to the Magistrate's Recommendation for the reasons that the Recommendation is so replete with legal error that it can only be addressed by page number, *seriatim*.

-1-

Defendants have apparently already issued a de facto denial of his request to testify in front of the grand jury via their motions to dismiss and for summary judgment.

An amended complaint cancels all previous pleadings.

It is settled in this Circuit that "[a]n amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading." *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994); see also *Eason v. Holt*, 73 F.3d

600, 603 (5th Cir. 1996) ("amended complaint itself superseded the original complaint under the well-settled law of this circuit").

Defendants are not proper parties? If the U.S. Attorney is not a proper party to litigate citizens access to the grand jury, who is?

-2-

Grand jury testimony is exempt from disclosure. Ministerial records are not.

Rule 6 (e) Protects only materials that "reveal some secret aspect of the inner workings of the grand jury." *Davies b. C. I. R.*, 68 F 3d (9th Cir. 1991) 1129, 1130.

What proper federal agency? The grand jury?

-3-

Notice 'name solely'. FOIA is no longer relevant to this case.

This page, for the most part, is mere boilerplate.

-4-

Notice that 5 U.S.C. § 552 is not mentioned *anywhere* in the First Amended Complaint.

-5-

Plaintiff has no claim under the FOIA in his First Amended Complaint.

Heard's view of the history of the grand jury? Apparently, case law, law journal articles, and the Congressional Record are mere irrelevancies.

-6-

Heard is not suing anyone or anything under FOIA in his First Amended Complaint. The issues herein are simple ones.

Do citizens have a right to petition their government for the redress of their grievances?

Does that right extend to all branches of government?

Is the federal grand a branch of that government?

Simple yes or no answers will suffice. If no, then Plaintiff submits that clause of the first Amendment is a 'dead letter'. If yes, this Court must schedule an interview with the federal grand jury for the Plaintiff.

-7-

CONCLUSION

Plaintiff is entitled to the relief he requests.

Respectfully Submitted,

Freddie D. Heard
#272097
E.C.F.
#200 Wallace Dr.
Clio, Al. 36017

Certificate of Service

This certifies that I have on this 4th day of October, 2022 placed a true and exact copy of my:

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S RECOMMENDATION OF THE MAGISTRATE JUDGE

in the U.S. Mails, first-class postage prepaid, addressed to:

Sandra J. Stewart
United States Attorney's Office Middle District of Alabama
131 Clayton Street
Montgomery, Al. 36104

Freddie D. Heard

Certified Mail No. 7021 1970 0000 7110 0318

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FREDDIE D. HEARD, Plaintiff, v. DIRECTOR, OFFICE OF INFORMATION POLICY, United States Dept. of Justice, and SANDRA J. STEWART, Defendants.	CIVIL ACTION NO. 2:21cv125-MHT (WO)

OPINION

Plaintiff, who is pro se, filed a somewhat confusingly drafted complaint against two federal officials, complaining about the denial of records he had requested from the United States Attorney's Office in Mobile, Alabama under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and discussing his First Amendment right to petition the government for redress of grievances. As relief, plaintiff seeks either to be scheduled for an appearance before the grand jury, provided the requested documents explaining how to

D37

arrange to meet with a grand jury, or for the government to make an admission that citizens cannot present grievances to the grand jury. Defendants moved to dismiss the case or, in the alternative, for summary judgment on the merits. In response to defendants' motion, plaintiff moved to amend the complaint to drop his FOIA claim and state a First Amendment claim that his right to petition the government means that he has a right to meet with the grand jury.

This case is before the court on the recommendation of the United States Magistrate Judge that (1) the motion to dismiss be granted because plaintiff has sued the wrong defendant under FOIA, (2) the motion for summary judgment on the merits of the FOIA claim be denied as moot, and (3) the motion for leave to amend be denied as futile. Also before the court are plaintiff's objections to the recommendation. Upon an independent and de novo review of the record, the court concludes that plaintiff's objections should be

overruled and the recommendation should be adopted, except as to the reason given for denying the motion to leave to amend the complaint as futile. The court finds the proposed amendment would be futile for different reasons.

In the recommendation, the magistrate judge states that allowing amendment of the complaint would be futile because plaintiff seeks to sue under FOIA and still names as a defendant only a federal official rather than a federal agency. *See* Report and Recommendation (Doc. 22) at 6. But, given that plaintiff no longer pleads a FOIA claim in the proposed amended complaint, plaintiff's choice of defendant is not determinative. In the proposed complaint, plaintiff appears to plead only a First Amendment claim, based on the right to petition the government for redress of grievances, asserting that he has a right to a meeting with a federal grand jury to present his grievances. He names as defendant only the Acting

D39

United States Attorney for the Middle District. While he does not state in which capacity he seeks to sue defendant, the court assumes plaintiff seeks to sue defendant in her official capacity because he seeks only injunctive relief. The court lacks jurisdiction over such a claim. "An action against an officer, operating in his or her official capacity as a United States agent, operates as a claim against the United States." *Solida v. McKelvey*, 820 F.3d 1090, 1095 (9th Cir. 2016). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Plaintiff does not allege that the federal government has waived sovereign immunity for constitutional claims against the United States as a general matter, and the court is unaware of any legal authority suggesting that the government has waived its immunity for constitutional claims such as the one presented here. As the government has not waived its sovereign

D40

immunity, the court lacks jurisdiction to hear plaintiff's proposed suit. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

Moreover, to the extent plaintiff seeks to sue defendant in her individual capacity under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), his case is not cognizable because, "[b]y definition, *Bivens* suits are individual capacity suits and thus cannot enjoin official government action." *Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016).

An appropriate judgment will be entered.

DONE, this the 4th day of January, 2023.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

D41

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FREDDIE D. HEARD, Plaintiff, v. DIRECTOR, OFFICE OF INFORMATION POLICY, United States Dept. of Justice, and SANDRA J. STEWART, Defendants.	)	CIVIL ACTION NO. 2:21cv125-MHT (WO)

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) Plaintiff's objections (Doc. 23) are overruled.

(2) The United States Magistrate Judge's recommendation (Doc. 22) is adopted to the extent set forth in the opinion entered today.

(3) Defendants' motion to dismiss (Doc. 13) plaintiff's FOIA claim is granted.

D42

(4) Defendants' motion for summary judgment (Doc. 13) is denied as moot.

(5) Plaintiff's motion for leave to file an amended complaint (Doc. 21) is denied as futile.

(6) To the extent plaintiff pleaded a claim in the original complaint (Doc. 1) based on the First Amendment right to petition the government, the claim is dismissed for the same reasons given in the opinion for denying the motion for leave to amend the complaint as futile, *i.e.*, lack of jurisdiction if it is an official-capacity claim and, if it is an individual-capacity claim, because the claim is not cognizable under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

(7) This case is dismissed with prejudice.

Costs are taxed against the plaintiff, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment

D43

pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is closed.

DONE, this the 4th day of January, 2023.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

D 44

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FREDDIE D. HEARD, Plaintiff, v. DIRECTOR, OFFICE OF INFORMATION POLICY, United States Dept. of Justice, and SANDRA J. STEWART, Defendants.	)	CIVIL ACTION NO: 2:2-cv-125-MHT (WO)

MOTION FOR RECONSIDERATION
F. R. Civ. P. 59(e), 60(b)

Comes the Plaintiff in the above-entitled action, Freddie D. Heard, and moves this Court to reconsider its ruling of 01/04/23 for any and several of the following reasons:

1. This Court had determined the outcome of this action well before the Court had actually read anything, let alone addressed the issues raised or applied the proper legal standards. See *United States v. Cross*, 128 F.3d 145, 148 n. 2 (3d Cir. 1997): [D]ue process cannot be satisfied when the state provides a "hearing" at which the judge is not really listening or before which the decision has already been made.

2. The issue as are simple ones.

A. Does an American citizen have a Constitutional right to petition his government for the redress of grievances?

B. Does that right extend to all departments of government? See *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609 (1972), which holds that the Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches.

C. Is the federal grand jury a department of the Government?

3. The Opinion of 01/04/23 contains mistakes on every page, addressed *seriatim*, by page number, to wit:

-1-

There was nothing confusing about the complaint. Such conduct on the part of the judge is, unfortunately, nothing new or out of the ordinary.

> "I don't want to know what the law is, I want to know who the judge is."
>
> Roy M. Cohn, quoted in *New York Times Book Review*, 3 Apr. 1988, at 24.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> *The Annotated Alice: Alice's Adventures In Wonderland & Through The_Looking Glass* by Lewis Carroll 269 (Martin Gardner 1960).

The bending of the meanings of words is symptomatic of a diseased

institution, with the angle of linguistic deflection indicating the seriousness of the cancer within. The Spanish Inquisition represented an advanced case.

Rawson's Dictionary of Euphemisms and Other Doubletalk, Revised Edition, page 35 (1995).

-2-

The complaint was "futile" for one elementary reason.

[U]ltimately, the guarantee of [our] rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

Bracy v. Gramley, 81 F.3d 684, 703 (7th Cir. 1996) (dissent), *reversed*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2nd 97 (1997).

-3-

I.e., the "different reasons" consisted were found by a judge intending to uphold the status quo.

A passive judiciary merely ratifies the status quo; instead of acting as a bulwark against undue political power, it becomes an actor in concert with the political branches against the individual.

Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 So. Cal. L. Rev. 289, 317 (Jan. 1995).

Does an American citizen have the right to petition the Federal grand jury? Or does he not?

-4-

"The Court lacks jurisdiction" is simply incorrect. That Plaintiff does not allege that the Federal government has not waived sovereign immunity for constitutional (or other) claims is contradicted by the pleadings, the statutes, and

case law as well, to wit:

> In Perry, the court rejected USMS's argument that judicial review of USMS's discretionary decision to remove CSOs was permitted under 5 U.S.C. § 702 only for statutory, not constitutional, claims. See 74 F. Supp. 2d at 832-34. It noted that "when Congress wishes to preclude judicial review of constitutional claims, it must express its intent to do so quite clearly," which it has not done. *Id.* at 834 (citing *Johnson v. Robinson*, 415 U.S. 361, 366 (1974)).
>
> *Hauschild v. U.S. Marshals Serv.* (S.D. N.Y. 2018)

> In contrast, the United States has waived sovereign immunity as to constitutional claims seeking equitable remedies. See 5 U.S.C. § 702 (authorizing actions seeking relief other than money damages for persons adversely affected by or suffering legal wrong because of "agency action"); *Jaffee*, 592 F.2d at 718-19; *Aladjem*, 1999 WL 718069, at *3.
>
> *Taggart v. GMAC Mortg., LLC* (E.D. Pa. 2012)

> Much of our prudential standing jurisprudence in this circuit has focused on whether a particular injurious act is within the "zone of interests" of a particular administrative statute. E.g., *Stockman v. Fed. Election Comm'n*, 138 F.3d 144 (5th Cir. 1998); *Asbestos Info. Ass'n/ N. Am. v. Reich*, 117 F.3d 891 (5th Cir. 1997). This is not an administrative law case, however, so standing is not governed by administrative law's "zone of interests" test. See *Clarke*, 479 U.S. at 400 n.16 (observing that the "zone of interest" test has been applied primarily in claims brought under the Administrative Procedure Act and "is most usefully understood as a gloss on the meaning of § 702 [of that Act] . . . . While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application."); *Bennett*, 520 U.S. 154, 163 (1997) ("The breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the [APA] may not do so for other purposes.") (citations omitted); see also William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 255-63 (1988) (criticizing use of "zone of interest" test outside of administrative context).

Procter & Gamble v. Amway, 242 F.3d 539 (5th Cir. 2001)

In its first amended complaint, the District alleged jurisdiction under the Fifth Amendment of the United States Constitution, the APA, 5 U.S.C. §§ 702-03, and FLSA, 29 U.S.C. § 201 et seq. None of these authorities confer jurisdiction. The District's failure to cite a specific jurisdictional grant in its complaint does not defeat jurisdiction. See *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 181 (5th Cir.1980). The District here asserts that this action arises under the Fifth Amendment and the APA, and that jurisdiction is conferred by 28 U.S.C. § 1331 which grants district courts jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States."...

Taylor-Callahan-Coleman Counties Dist. Adult Probation Dept. v. Dole, 948 F.2d 953 (5th Cir. 1991)

Plaintiff cited "all of the above" in his complaint.

The District must also establish a waiver of sovereign immunity before relief can be granted. In this case, a waiver must be found in the APA. That Act does not make every agency action subject to judicial review. *Heckler v. Chaney*, 470 U.S. 821, 828, 105 S.Ct. 1649 1654, 84 L.Ed.2d 714 (1985) (citing 5 U.S.C. §§ 701-706). Section 704 of that Act limits judicial review to "[a]gency action made reviewable by statute and [to] final agency action for which there is no adequate remedy in a court...." 5 U.S.C. § 704.

Taylor-Callahan-Coleman Counties Dist. Adult Probation Dept. v. Dole, 948 F.2d 953 (5th Cir. 1991)

No adequate remedy in a court is obvious, at least in *this* court.

-5-

5 U.S. Code § 702 - Right of review

A person suffering legal wrong because of agency action, **or** adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency **or** an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority **shall not be dismissed nor relief**

therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That **any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title)**, and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction.

Standard Oil Co. v. United States, 221 U.S. 1, 105, 31 S.Ct. 502, 533 (1911) (Justice Harlan, concurring in part and dissenting in part).

MOTION FOR RECONSIDERATION

Whether a motion for reconsideration should be analyzed under Rule 59(e) or Rule 60(b) depends on when it was filed. *Tex. A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 400 (5th Cir. 2003). Since Farquhar filed his Rule 59 motion within the 28-day time limit prescribed by that rule, the district court properly analyzed Farquhar's motion under Rule 59(e). See *id.* A district court's denial of a motion to alter or amend judgment "is reviewed for abuse of discretion and need only be reasonable." *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 231 (5th Cir. 2003). Relief under Rule 59(e) requires a showing of (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear legal error or to prevent manifest injustice. In re *Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002).

Farquhar v. Steen (5th Cir. 2015)

A constitutional right does not need enabling legislation to provide for its

enforcement. *B.A.P. Inc. v. McCulloch*, 170 F.3d 804, 809 (8th Cir. 1999).

[A] serious constitutional problem would arise if there were no judicial forum to hear "colorable" constitutional claims. *Flores-Miramuntes v. I.N.S.*, 212 F.3d 1133, 1135 n. 3 (9th Cir. 2000) (citation omitted).

It is a violation of a federal judge's oath of office to deny an individual's Constitutional rights. *Adamson v. C.I.R.*, 745 F.2d 541, 546 (9th Cir. 1984). *See also* 28 U.S.C. § 453, *U.S. Code Cong. & Admin. News*, p. 6896 (1990) (violation of oath of office grounds for impeachment).

WHEREFORE, Plaintiff moves this Court to mandate his access to the federal grand jury. See e.g., *Application of Wood*, 833 F. 2d 113 (8th Cir. 1987). See also *In the Matter of the Grand Jury Appearance Request by Larry S. Loigman, Esq.*, No. A-5546-02T2 (N.J. 6/29/2004) (N.J. 2004) (includes federal citations).

Respectfully Submitted,

Freddie Heard
202097
E. C. F.
200 Wallace Dr.
Clio, Ala. 36017

Certificate of Service

This certifies that I have on this 23rd day of January, 2023 placed a true and exact copy of my

MOTION FOR RECONSIDERATION
F. R. Civ. P. 59(e), 60(b)

in the U.S. Mails, first-class postage prepaid, addressed to:

Office of the Attorney General
501 Washington Ave.
Montgomery, Al. 36130

Marylou E. Bowdre
U S Atty's Office
131 Clayton St
Montgomery, AL 36104

Freddie Heard

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE

MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FREDDIE D. HEARD,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	2:21cv125-MHT
	)	
DIRECTOR, OFFICE OF INFORMATION POLICY, United States Dept. of Justice, and SANDRA J. STEWART,	)	
	)	
Defendants.	)	

ORDER

It is ORDERED that plaintiff's motion for reconsideration (Doc. 26) is denied.

DONE, this the 26th day of January, 2023.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE