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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TIMOTHY WAYNE ARNETT,)	NO. CV 11-5896-JAK(E)
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
UNKNOWN,)	UNITED STATES MAGISTRATE JUDGE
)	
Defendant.)	
)	
)	

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

On July 22, 2011, Timothy Wayne Arnett, a federal prisoner proceeding pro se, filed a document titled: "NOTICE AND REQUEST FOR UNITED STATES ATTORNEY TO INFORM GRAND JURY OF THE DEPRIVATION OF PETITIONER'S RIGHTS IN VIOLATION OF 18 U.S.C. § 242, HIS IDENTITY, AND

1 SUCH U.S. ATTORNEY'S ACTION OR RECOMMENDATION PURSUANT TO 18 U.S.C.
2 § 3332a; SUPPORTING DECLARATION, AND AFFIDAVIT TO PROCEED IN FORMA
3 PAUPERIS" ("Notice and Request"). Although the first two pages of the
4 document requested that the Court issue a "summons" directing the
5 United States Attorney to respond to the "Complaint" by informing the
6 grand jury that Mr. Arnett purportedly has been deprived of his civil
7 rights, page two of the Notice and Request contained the legend
8 "COMPLAINT[;] DECLARATION OF TIMOTHY WAYNE ARNETT IN SUPPORT OF
9 COMPLAINT" (see Notice and Request, p. 2). On August 4, 2011, the
10 Court issued a Memorandum and Order: (1) construing the Notice and
11 Request as a civil rights Complaint ("Complaint"); (2) deeming
12 Mr. Arnett to be the Plaintiff on the Complaint; and (3) dismissing
13 the Complaint with leave to amend.

14
15 On August 17, 2011, Plaintiff filed a document titled: "FIRST
16 AMENDED CRIMINAL COMPLAINT [¶] NOTICE AND REQUEST FOR UNITED STATES
17 ATTORNEY TO INFORM GRAND JURY OF THE DEPRIVATION OF PETITIONER'S CIVIL
18 RIGHTS IN VIOLATION OF 18 U.S.C. §§ 241 and 242, HIS IDENTITY, AND
19 SUCH UNITED STATES ATTORNEY'S ACTION OR RECOMMENDATION IN ACCORD WITH
20 18 U.S.C. § 3332(a); AND SUPPORTING DECLARATION AND EXHIBITS" ("First
21 Amended Criminal Complaint"). At the same time, Plaintiff filed
22 "Petitioner's Memorandum of Points and Authorities in Support of First
23 Amended Criminal Complaint" ("Plaintiff's Memorandum"). Plaintiff
24 expressly disclaims any intent to file a civil rights action, claiming
25 that his document is a criminal complaint assertedly authorized
26 pursuant to 18 U.S.C. section 3332(a) (Plaintiff's Memorandum, pp. 6-
27 7).

28 ///

1 stock market class, persuaded the Supervisor of Education to invest in
2 certain stock, and continued to make recommendations (id.).

3
4 In June 2010, Plaintiff allegedly was transferred to FCI Terminal
5 Island, where he assertedly "noticed" that the institution did not
6 offer "CNBC on the prison's TV network" or courses such as "Forbes'
7 Investment Course" (id.). Plaintiff allegedly submitted a proposal to
8 the Supervisor of Education, Arnel Abril, requesting authorization to
9 teach such a course and expressing a need for CNBC. Abril allegedly
10 refused to approve such a course and threatened to transfer Plaintiff
11 if he continued "to press for such a class through administrative
12 remedies" (id., pp. 3-4). Thereafter, a senior prison employee
13 allegedly told Plaintiff that staff members assertedly knew they could
14 threaten inmates who submitted complaints or administrative grievances
15 with transfer, loss of family visits or denial of the opportunity to
16 participate in the Residential Drug Abuse Program (id., p. 4).

17
18 Plaintiff allegedly submitted an informal resolution request
19 ("BP-8") asking that the prison add CNBC to its television network
20 (id.). Abril allegedly did not respond (id., pp. 4-5). Plaintiff
21 allegedly submitted a similar request to the warden, along with the
22 information that Abril assertedly had threatened Plaintiff, but
23 allegedly received no response (id., p. 5). Plaintiff allegedly
24 discussed the matter with Assistant Warden Pete Spartz, who assertedly
25 said he would add CNBC to the list of television channels (id.).
26 Instead, however, Spartz reportedly added the Cartoon Network and the
27 Animal Planet Channel (id.).

28 ///

1 Thereafter, on April 25, 2011, Disciplinary Hearing Officer
2 Joe DeVore allegedly warned Plaintiff that Plaintiff was violating a
3 policy of the federal Bureau of Prisons ("BOP") prohibiting inmates
4 from conducting a business by using the prison email system to contact
5 a family member with investment advice (id.). Plaintiff alleged that
6 DeVore's conclusion that Plaintiff was conducting a business in
7 violation of BOP policy was erroneous and inconsistent in light of the
8 prison's alleged tolerance of other inmates who were "doing what
9 [Plaintiff] had been doing" (id., p. 6). Plaintiff alleged that
10 inmates are permitted to provide laundry services for other inmates in
11 exchange for "stamps or commissary," yet assertedly are never
12 disciplined for operating a business (id., p. 7).

13
14 Allegedly believing DeVore was mistaken, Plaintiff assertedly
15 submitted a BP-8 to DeVore, which DeVore reportedly denied in a
16 written response (id.). Plaintiff submitted a formal grievance
17 ("BP-9") to his housing unit counselor, D. Egeonuigwe, who alerted the
18 Unit Manager, Mark Colangelo (id., p. 8). On May 3, 2011, Colangelo
19 allegedly directed Plaintiff into a private area, told Plaintiff that
20 he, Colangelo, agreed with DeVore, and asked Plaintiff to tear up the
21 BP-9 (id.). When Plaintiff assertedly refused, Colangelo allegedly
22 said he was going to assign Plaintiff to a job that would keep
23 Plaintiff tied up all day because Plaintiff assertedly had too much
24 free time on his hands (id.). Colangelo allegedly advised Egeonuigwe
25 of this plan, and a few minutes later Egeonuigwe assertedly laughingly
26 told Plaintiff that Plaintiff was being transferred to another job
27 (id.). Plaintiff allegedly was transferred to a job in the laundry,
28 effective the next morning (id., pp. 8-9). Plaintiff alleged that he

1 is a 58-year-old man with chronic back and hip pain who assertedly
2 cannot sit or stand without pain for more than short periods of time,
3 and that in the laundry Plaintiff is forced "to sit for painfully long
4 periods of time doing nothing" (*id.*, p. 11). Plaintiff alleged that
5 the laundry did not need another worker, such that the only reason for
6 the transfer assertedly was to punish Plaintiff for submitting a BP-9
7 challenging DeVore's policy interpretation (*id.*, pp. 11-12).

8
9 Plaintiff also alleged that Colangelo interfered with the
10 grievance process, assertedly by: (1) holding for seventeen days a
11 notice from the BOP Regional Director advising Plaintiff to file a
12 BP-9 instead of a BP-10; and (2) intercepting and holding for three
13 months the BOP Central Office's response and threatening to transfer
14 Plaintiff to a higher level prison after Plaintiff allegedly asked the
15 warden for maximum halfway house time (*id.*, pp. 9 n.2, 10).

16
17 Plaintiff alleged that, as a result of the asserted First
18 Amendment violations by Colangelo, Egeonuigwe and DeVore, Plaintiff
19 was forced to seek psychiatric treatment (*id.*, p. 12). Plaintiff
20 alleged that he now fears to use the prison administrative remedy
21 process for fear of further retaliation (*id.*). Plaintiff alleged that
22 Colangelo, Egeonuigwe, DeVore and Spartz have conspired to deprive
23 Plaintiff of his First Amendment rights (*id.*, p. 13).

24
25 **II. The "First Amended Criminal Complaint"**

26
27 The "First Amended Criminal Complaint" is substantially similar
28 to the original Complaint. Indeed, it appears that some portions of

1 the "First Amended Criminal Complaint" are verbatim copies of portions
2 of the original Complaint. Plaintiff names as Respondent the United
3 States Attorney for the Central District of California.

4
5 Plaintiff again alleges that "several Federal Bureau of Prisons
6 senior staff at FCI Terminal Island" deprived Plaintiff of his alleged
7 First Amendment rights to communicate with a family member and to file
8 grievances, threatened to transfer Plaintiff for submitting
9 grievances, and retaliated against Plaintiff for submitting a
10 grievance by assigning Plaintiff to a laundry job (First Amended
11 Criminal Complaint, pp. 1-2). The pleading contains the same
12 allegations concerning Plaintiff's purported investment activities and
13 prison officials' responses thereto, and concerning Plaintiff's
14 alleged administrative grievances and the responses thereto (id.,
15 pp. 2-7). Plaintiff again alleges that prison officials transferred
16 Plaintiff to a laundry job in asserted retaliation for Plaintiff's
17 grievances (id., pp. 7-10, 12-14). Plaintiff adds some new
18 allegations, including allegations that the warden allegedly subjected
19 Plaintiff to retaliation by assertedly rejecting Plaintiff's appeal
20 concerning the laundry assignment, and that Plaintiff allegedly
21 suffered a hernia from working in the laundry (id., pp. 11-12).

22
23 Plaintiff again asserts that, as a result of the alleged First
24 Amendment violations by Colangelo, Egeonuigwe and DeVore, Plaintiff
25 was forced to seek psychiatric treatment (id., pp. 13-14). Plaintiff
26 again alleges that he fears to use the prison administrative remedy
27 process for fear of further retaliation (id.). Plaintiff alleges that
28 Colangelo, Egeonuigwe, DeVore and Spartz have conspired to deprive

1 Plaintiff of his First Amendment rights (id., pp. 14-15). The "First
2 Amended Criminal Complaint" requests that the Court issue a summons
3 ordering the United States Attorney to inform the grand jury of
4 Plaintiff's allegations (id., p. 15).

5
6 **DISCUSSION**

7
8 In the Order of August 4, 2011, the Court advised Plaintiff that
9 Plaintiff may not seek an order directing the United States Attorney
10 to inform the grand jury of Plaintiff's allegations. "In our criminal
11 justice system, the Government retains 'broad discretion' as to whom
12 to prosecute." Wayte v. United States, 470 U.S. 598, 607 (1985).

13 "[A] private citizen lacks a judicially cognizable interest in the
14 prosecution or nonprosecution of another." Linda R. S. v. Richard D.,
15 410 U.S. 614, 619 (1973); see also United States v. Batchelder, 442
16 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or
17 bring before a grand jury are decisions that generally rest in the
18 prosecutor's discretion."). "In our system, so long as the prosecutor
19 has probable cause to believe that the accused committed an offense
20 defined by statute, the decision whether or not to prosecute, and what
21 charge to file or bring before a grand jury, generally rests entirely
22 in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 669 (1978).

23 "[I]nitiating a criminal case by presenting evidence before the grand
24 jury qualifies as an executive function within the exclusive
25 prerogative of the Attorney General." United States v. Chanen, 549
26 F. 2d 1306, 1312-13 (9th Cir.), cert. denied, 434 U.S. 825 (1977)
27 (citations and internal quotations omitted).

28 ///

1 Plaintiff acknowledges the rule of Wayte v. United States, but
2 asserts a purported right to compel the United States Attorney to
3 present information to a grand jury pursuant to 18 U.S.C. section
4 3332(a) (Plaintiff's Memorandum, pp. 1-5).

5
6 Section 3332(a) is part of the special grand jury statute, 18
7 U.S.C. section 3331 et seq. Section 3331 authorizes a district court
8 to summon a special grand jury in a district containing more than four
9 million inhabitants or in which the Attorney General or a subordinate
10 certifies in writing to the chief judge that a special grand jury is
11 necessary because of criminal activity in the district. Congress
12 enacted the special grand jury statute in order to combat organized
13 crime. See United States v. Taylor, 841 F.2d 1300, 1307 (7th Cir.),
14 cert. denied, 487 U.S. 1236 (1988).¹ Special grand juries may serve
15 for longer periods than regular grand juries, and have other
16 distinctive features. See United States v. Fein, 504 F.2d 1170, 1179-
17 80 (2d Cir. 1974) ("It seems evident from the fact of the statute,
18 that it was the intent of Congress . . . to provide for a distinctive
19 type of grand jury.").

20
21 Section 3332(a) provides:

22
23 It shall be the duty of each such grand jury impaneled
24 within any judicial district to inquire into offenses
25

26
27 ¹ The investigative powers of a special grand jury
28 are not limited to organized crime activities, however. See
18 U.S.C. § 3332(a); United States v. Koliboski, 732 F.2d 1328,
1330 (7th Cir. 1984).

1 against the criminal laws of the United States alleged to
2 have been committed within that district. Such alleged
3 offenses may be brought to the attention of the grand jury
4 by the court or by any attorney appearing on behalf of the
5 United States for the presentation of evidence. Any such
6 attorney receiving information concerning such an alleged
7 offense from any other person shall, if requested by such
8 other person, inform the grand jury of such alleged offense,
9 the identity of such other person, and such attorney's
10 action or recommendation.

11
12 Section 3332(a) applies only to special grand juries. See 1 Charles
13 Alan Wright and Andrew D. Leipold, Federal Practice and Procedure,
14 § 104 n.29.3 (West 2011).

15
16 Plaintiff's claim fails for a number of reasons. First,
17 Plaintiff has not alleged that any such special grand jury exists in
18 this district. Second, to the extent Plaintiff alleges that section
19 3332(a) grants Plaintiff "the private right to request the U.S.
20 Attorney" to inform the grand jury of the alleged offenses (see
21 Plaintiff's Memorandum, p. 6), Plaintiff fails to allege that he was
22 hindered from making such a request.

23
24 Moreover, and in any event, several District Courts have held
25 that section 3332(a) "does not confer a private right of action."
26 Lundy v. United States, 2007 WL 4556702, at *2 (C.D. Ill. Dec. 21,
27 2007), corrected on other grounds, 2007 WL 2510172 (C.D. Ill. June 19,
28 2008); see also Walters v. Vallani, 2010 WL 597086, at *7 (D. Nev.

1 Feb. 16, 2010) (decision regarding what charge to file or bring before
2 a grand jury is that of the prosecutor, not the court); Hantzis v.
3 Grantland, 772 F. Supp. 2d 1, 3-4 (D.D.C. Oct. 30, 2009) (no private
4 right of action available for violation of criminal statutes pursuant
5 to section 3332(a)); Bryant v. Fienberg, 2006 WL 2924744, at *2 (E.D.
6 Mich. Oct. 20, 2006) ("plaintiff does not have a private right of
7 action under 18 U.S.C. § 3332(a), the Special Grand Jury statute").
8

9 This Court agrees. "The ability to bring a private right of
10 action may be authorized by the explicit statutory text or, in some
11 instances, may be implied from the statutory text." Nisqually Indian
12 Tribe v. Gregoire, 623 F.3d 923, 929 (9th Cir. 2010). "[A]n implied
13 right of action is only authorized when there is clear evidence
14 Congress intended such a right to be part of the statute." Id. at 929
15 (citation omitted). In interpreting section 3332(a), the Court must
16 presume that Congress did not intend to limit the power of the
17 Attorney General to prosecute offenses under the criminal laws of the
18 United States. See United States v. General Dynamics Corp., 828 F.2d
19 1356, 1366 (9th Cir. 1987). Although Congress may limit or reassign
20 prosecutorial responsibility, "to graft such an exception upon the
21 criminal law would require a clear and unambiguous expression of the
22 legislative will." Id. (citations, brackets and internal quotations
23 omitted).

24
25 Section 3332(a) contains no "clear and unambiguous" statement
26 conferring a private right of action on an individual to present
27 evidence to a special grand jury or to compel a United States Attorney
28 to do so. Indeed, Plaintiff acknowledges as much, alleging that

1 "Congress overlooked and neglected to provide a mechanism in this
2 criminal statute that would force the U.S. Attorney to act and in a
3 specified time because they assumed the U.S. Attorney would
4 voluntarily comply with the statute" (Plaintiff's Memorandum, p. 5).
5 Regardless, the Ninth Circuit has held that a court may not exercise
6 supervisory power over a grand jury "in a way that encroaches on the
7 prerogative of the other two [branches of government] to determine
8 what evidence is presented to a grand jury unless there is a clear
9 basis in fact and law for doing so." United States v. Chanen, 549
10 F.2d at 1311. "[T]o enable individuals to present to a grand jury any
11 complaint of purported criminal activity would interfere with the
12 executive branch's prerogative to direct the enforcement of the laws,
13 and thus would not be an appropriate exercise of judicial authority."
14 Phillips v. City of Oakland, 2008 WL 1901005, at *2 (N.D. Cal.
15 Apr. 28, 2008), aff'd, 311 Fed. App'x 14 (9th Cir. 2009), cert.
16 denied, 130 S. Ct. 1691 (2010); see also Stimac v. Wieking, ___ F.
17 Supp. 2d ___, 2011 WL 1158562, at *2-3 (N.D. Cal. Mar. 29, 2011)
18 (dismissing claim that section 3332(a) required the United States
19 Attorney to bring plaintiff's evidence of alleged judicial corruption
20 to the grand jury in light of limits on judicial review of
21 prosecutorial discretion).² The Court concludes that section 3332(a)

22
23 ² Plaintiff relies on In re Application of Wood, 833 F.2d
24 113, 116 (8th Cir. 1987), a case in which the United States
25 Attorney presented allegations to a grand jury which declined to
26 take action. In the circumstances of that case, the Eighth
27 Circuit upheld a district court order authorizing Wood to appear
28 before a grand jury if the United States Attorney did not
resubmit the matter to the grand jury. The case does not support
Plaintiff's request for a court order requiring the United States
Attorney to provide information concerning alleged violations of

(continued...)

1 does not authorize the relief sought in the present case.

2

3 Nor is mandamus relief available. See Bryan v. Defense
4 Technology U.S., 2011 WL 590902, at *4 (E.D. Cal. Feb. 10, 2011)
5 (mandamus unavailable to compel United States Attorney to investigate
6 alleged violations of 28 U.S.C. sections 241 and 242); Cooper v.
7 Welsh, 2010 WL 3943000, at *5 (E.D. Cal. Oct. 1, 2010) (district court
8 lacks jurisdiction to refer case for criminal investigation or
9 prosecution); Hantzis v. Grantland, 772 F. Supp. 2d at 3-4 ("the
10 United States Attorney General has absolute discretion in deciding
11 whether to investigate claims for possible criminal or civil
12 prosecution"); In re Phillips, 2007 WL 687290, at *1 (N.D. Cal.
13 Mar. 5, 2007) ("To the extent petitioner wants alleged criminal
14 activity investigated or prosecuted, the court has no authority to
15 make that happen. Decisions whether to investigate and prosecute, and
16 what criminal charges to file, are decisions that rest in the
17 prosecutor's discretion and not in the court's discretion") (citation
18 omitted); contra, In re Grand Jury Application, 617 F. Supp. 199
19 (S.D.N.Y. 1985) (construing section 3332(a) to require Attorney
20 General to present information to grand jury when requested to do so;
21 granting mandamus relief).

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25 _____
26 ²(...continued)

27 federal criminal law to a grand jury. See Ripley v. Fry, 2008 WL
28 4527795, at *2 n.3 (D. Minn. Sept. 29, 2008) (distinguishing Wood
where Ripley sought "much greater intrusion on the executive
branch by seeking the initiation of a new criminal
investigation").

1 Finally, Plaintiff lacks standing to enforce section 3332(a),
2 because he has no legally protected interest in the prosecution of
3 others. See Banks v. Buchanan, 336 Fed. App'x 122, 123 (3d Cir. 2009)
4 (section 3332(a) "does not . . . confer standing upon Banks to enforce
5 the U.S. Attorney's obligation, as Banks's interest in the prosecution
6 of [another] is not a legally protected interest") (citations
7 omitted); see also Zaleski v. Burns, 606 F.3d 51, 52-53 (2d Cir.),
8 cert. denied, 131 S. Ct. 805 (2010) (even if plaintiff had a legally
9 cognizable interest in mounting collateral attack to his conviction by
10 convincing a grand jury to indict the federal officers who prosecuted
11 him, plaintiff lacked standing to do so, because it is "too
12 speculative" that plaintiff's interest would be vindicated by a
13 favorable decision); Sargeant v. Dixon, 130 F.3d 1067, 1069 (D.C. Cir.
14 1997) (same).

15
16 When the Court dismissed the original Complaint, the Court
17 admonished Plaintiff that he may not obtain a court order requiring
18 the United States Attorney to provide information to the grand jury.
19 Nevertheless, in the "First Amended Criminal Complaint," Plaintiff
20 again seeks the same relief to which the law does not entitle him.
21 In such circumstance, further amendment would be futile. See Zucco
22 Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009)
23 (affirming dismissal without leave to amend where court advised
24 plaintiff of pleading deficiencies but plaintiff failed to correct
25 those deficiencies in amended pleading); Simon v. Value Behavioral
26 Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000), amended, 234 F.3d
27 428 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001), overruled on
28 other grounds, Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.), cert.

1 denied, 552 U.S. 985 (2007) (affirming dismissal without leave to
2 amend where plaintiff failed to correct deficiencies in complaint,
3 where court had afforded plaintiff opportunities to do so, and had
4 discussed with plaintiff the substantive problems with his claims);
5 Plumeau v. School District #40, County of Yamhill, 130 F.3d 432, 439
6 (9th Cir. 1997) (denial of leave to amend appropriate where further
7 amendment would be futile); Bryan v. Defense Technology U.S., 2011 WL
8 590902, at *8 (dismissing claim seeking order requiring Attorney
9 General to investigate alleged criminal violations without leave to
10 amend, because the claim's defects could not be cured by amendment).
11 The Court should dismiss the "First Amended Criminal Complaint" and
12 the action without leave to amend, but without prejudice.³

13
14 **RECOMMENDATION**

15
16 For the reasons discussed above, IT IS RECOMMENDED that the Court
17 issue an order: (1) approving and adopting this Report and
18 Recommendation; (2) dismissing the "First Amended Criminal Complaint"
19 without leave to amend; and (3) ordering that Judgment be entered
20 dismissing the action without prejudice.

21
22 DATED: August 23, 2011.

23
24
25 _____/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE
26 _____

27 ³ In view of this disposition, the Court need not and
28 does not determine at this time whether Plaintiff could state a
constitutional claim for relief.

1 | **NOTICE**

2 | Reports and Recommendations are not appealable to the Court of
3 | Appeals, but may be subject to the right of any party to file
4 | objections as provided in the Local Rules Governing the Duties of
5 | Magistrate Judges and review by the District Judge whose initials
6 | appear in the docket number. No notice of appeal pursuant to the
7 | Federal Rules of Appellate Procedure should be filed until entry of
8 | the judgment of the District Court.

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