

[ORAL ARGUMENT NOT REQUESTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1057

SHELLIELLE S. YOUHOING-NANAN, *et al.*,

Petitioners

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent

ON PETITION FOR REVIEW FROM THE CRIMINAL SECTION,
CIVIL RIGHTS DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

RESPONDENT'S MOTION TO DISMISS THE PETITION FOR REVIEW
FOR LACK OF SUBJECT-MATTER JURISDICTION AND RESPONSE
TO PETITIONERS' MOTION TO PROCEED IN FORMA PAUPERIS

Petitioners Shellielle Youhoing-Nanan, *et al.*, proceeding *pro se*, have petitioned this Court for review of the December 19, 2016, decision of the United States Department of Justice's (Department) Civil Rights Division, Criminal Section. The Criminal Section's December 19, 2016, letter to petitioners' agent, Betty Lewis, stated that the Criminal Section would not take enforcement action on Lewis's complaint alleging a possible civil-rights violation. See Dec. 19, 2016

Letter (Attachment A). Pursuant to Circuit Rule 27(g), the Department respectfully moves this Court to dismiss the petition for review of this decision for lack of jurisdiction. In addition, the Court should dismiss as moot petitioner Shellielle Youhoing-Nanan's pending motion to proceed in forma pauperis.

BACKGROUND

1. Betty Lewis, the self-described Field Operations Manager for the Legal Injustice Committee, sent nearly identical letters to then-President Barack Obama and then-Attorney General Eric Holder in October 2014.¹ Both letters alleged that Clayton County, Georgia, law-enforcement officials and the Georgia Division of Family and Children Services abducted petitioner Shellielle Youhoing-Nanan's daughter at gunpoint and were holding her as a prisoner in state custody. See Lewis Letters (Attachment B). The letters requested that the White House and the Department, respectively, intervene "to insure that these injustices are not inflicted upon other law-abiding citizens of the United States," and that the Department "conduct a thorough investigation into this matter." *Ibid.* These letters were forwarded to the Criminal Section of the Department's Civil Rights Division.

2. The Criminal Section sent Lewis a response by letter dated December 19, 2016. In its response, the Criminal Section informed Lewis that it "is responsible

¹ Some of the relevant correspondence is signed by Betty Lewis-Scott, some by Betty Scott-Lewis, and some by Betty Lewis. For convenience, we refer to this individual as Lewis.

for enforcing federal criminal civil rights statutes” and that “[m]uch of our enforcement activity relates to the investigation and prosecution of deprivations of civil rights under color of law.” Dec. 19, 2016 Letter. The response explained that “[t]hese matters generally involve allegations of excessive physical force or sexual abuse by law enforcement officers.” *Ibid.* The response then stated that the Criminal Section “ha[s] carefully reviewed the information [Lewis] furnished” and concluded that it was unable to assist her because her complaint “does not involve prosecutable violations of federal criminal civil rights statutes.” *Ibid.*²

3. On February 6, 2017, petitioners, acting through Lewis, petitioned this Court for review of the Criminal Section’s decision. It is not clear from the petition for review what relief they are requesting from this Court. On March 10, at the direction of the Court, Lewis filed a letter stating that petitioners would proceed pro se and attaching a motion by petitioner Shellielle Youhoing-Nanan to proceed in forma pauperis.

ARGUMENT

Petitioners ask this Court to review the Department’s decision declining to take action on Lewis’s letters on their behalf. This Court lacks jurisdiction to

² The Criminal Section has received and responded to other correspondence from Youhoing-Nanan and Lewis. The Criminal Section’s December 2016 letter challenged here was a response to Lewis’s October 2014 letters.

review that decision, and accordingly should dismiss the petition for review and deny petitioners' pending motion to proceed in forma pauperis as moot.

“Federal courts are courts of limited subject-matter jurisdiction. A federal court created by Congress pursuant to Article III of the Constitution has the power to decide only those cases over which Congress grants jurisdiction.” *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012) (citing *Micei Int’l v. Department of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010)). The party claiming federal subject-matter jurisdiction has the burden of proving it exists. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). Petitioners cannot meet that burden.

First, “[i]n this circuit, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals.”

American Petroleum Inst. v. SEC, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (quoting *National Auto. Dealers Ass’n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012)).

“‘[O]nly when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action’ may a party seek initial review in an appellate court.” *Micei Int’l*, 613 F.3d at 1151 (quoting *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007)).

Here, petitioners cite no direct-review statute specifically giving a federal court of appeals subject-matter jurisdiction to review the Criminal Section’s decision not to take enforcement action on a complaint. The Administrative

Procedure Act (APA), which authorizes judicial review of final agency action, see 5 U.S.C. 704, also does not provide a federal appellate court with such jurisdiction. It is well-established that “the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions.” *Califano v. Sanders*, 430 U.S. 99, 105 (1977). If the Criminal Section’s decision were reviewable under the APA, it would be in district court, which has jurisdiction to review an APA claim in the first instance pursuant to 28 U.S.C. 1331. See *Trudeau v. FTC*, 456 F.3d 178, 185 & n.10 (D.C. Cir. 2006).

In any event, judicial review of the Criminal Section’s decision is not available in *any* court, under the APA or any other statute. The APA precludes judicial review for “agency action * * * committed to agency discretion by law.” 5 U.S.C. 701(a)(2). In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court held that this provision renders an agency’s “refusal to take requested enforcement action” presumptively unreviewable. *Id.* at 831. The Court reasoned that an agency’s decision not to enforce is akin to a prosecutor’s decision not to bring criminal charges, and thus entitled to the same type of absolute discretion. See *ibid.* The Court also noted that the “complicated balancing of * * * factors which are peculiarly within [the agency’s] expertise” and which inform its decision not to enforce – *e.g.*, “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular

enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all" – confirm the "general unsuitability" of judicial review. *Ibid.* Only where the party seeking judicial review shows that the "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" can that party rebut this presumption of non-reviewability. *Id.* at 832-833.

The Criminal Section's decision not to prosecute Lewis's claimed civil-rights violation after reviewing the information she provided is a presumptively unreviewable "refusal to take requested enforcement action," *Heckler*, 470 U.S. at 831, that is "committed to agency discretion by law," 5 U.S.C. 701(a)(2). See, e.g., *Drake v. FAA*, 291 F.3d 59, 70-71 (D.C. Cir. 2002) (agency's decision to dismiss complaint without hearing because facts stated in complaint "were insufficient to warrant further action" is analogous to exercise of prosecutorial discretion and "presumptively committed to agency discretion by law"), cert. denied, 537 U.S. 1193 (2003). For example, in a decision this Court summarily affirmed on appeal, a D.C. district court dismissed a pro se plaintiff's claims against the Federal Bureau of Investigation, the Department's Office of Inspector General, and the United States Attorney's Office for failing to respond to his complaints of criminal judicial misconduct. *Caldwell v. Kagan*, 865 F. Supp. 2d 35, 44 (D.D.C. 2012), *aff'd*, No. 12-5298, 2013 WL 1733710 (D.C. Cir. Mar. 22,

2013). The district court reasoned that these entities “owe no duty to investigate every complaint brought before them” in light of the *Heckler* factors, and that their “decisions not to prosecute are decisions unreviewable by the judicial branch.” *Caldwell*, 865 F. Supp. 2d at 44.

So too here. The Criminal Section concluded that it was unable to assist Lewis because her complaint did not involve a “prosecutable” violation of a criminal statute that the Criminal Section typically enforces. Dec. 19, 2016 Letter. The Criminal Section’s reliance on its enforcement priorities and the likelihood of a successful prosecution given the information Lewis provided, as the basis for its decision, was both appropriate and unreviewable. See *Heckler*, 470 U.S. at 831. Petitioners do not, and cannot, rebut the presumption of non-reviewability. Nowhere in Chapter 13 of Title 18 of the United States Code, which sets forth the most potentially applicable federal criminal civil rights statutes, see 18 U.S.C. 241-249, are there any guidelines governing the Department’s exercise of its prosecutorial discretion. See *Heckler*, 470 U.S. at 832-833; see also *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460-461 (D.C. Cir. 2001) (FERC’s decision to settle enforcement action against natural-gas vendor was within its nonreviewable discretion under the APA where Natural Gas Act lacked guidelines for the agency to follow in exercising its enforcement power).

Petitioners have filed a motion to proceed in forma pauperis. Because this Court lacks jurisdiction to consider the petition for review, it should dismiss this motion as moot.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court dismiss the petition for review for lack of jurisdiction and dismiss Shellielle Youhoing-Nanan's pending motion to proceed in forma pauperis as moot.

Respectfully submitted,

T.E. WHEELER, II
Acting Assistant Attorney General

s/ Christopher C. Wang
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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT, TYPEFACE
REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 1524 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point, Times New Roman font.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: March 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2017, I electronically filed the foregoing RESPONDENT'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF SUBJECT-MATTER JURISDICTION AND RESPONSE TO THE MOTION TO PROCEED IN FORMA PAUPERIS with the Clerk of the Court using the appellate CM/ECF system. I certify that non-minor petitioners Shellielle S. Youhoing-Nanan, Mahabir Nanan, Mohoberry Youhoing, and Jahaberri Youhoing-Nanan will be served by certified U.S. mail at the following address:

Office of Betty J. Lewis-Scott
c/o Betty J. Lewis-Scott
P.O. Box 741742
Riverdale, GA 30274

I further certify that, within two business days of March 22, 2017, I will cause to be hand-delivered four paper copies of the foregoing motion to the United States Court of Appeals for the District of Columbia Circuit.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Attachment A: Dec. 19, 2016 Letter



CIVIL RIGHTS DIVISION

TJK:JF:sh:kj
DJ 144-13-0

Criminal Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

DEC 19 2016

Ms. Betty Lewis
Legal Injustice Committee
PO Box 741742
Riverdale, GA 302274

Dear Ms. Lewis:

This is in response to your letter to our office, alleging a civil rights violation.

The Criminal Section of the Civil Rights Division is responsible for enforcing federal criminal civil rights statutes. Much of our enforcement activity relates to the investigation and prosecution of deprivations of civil rights under color of law. These matters generally involve allegations of excessive physical force or sexual abuse by law enforcement officers.

We have carefully reviewed the information that you furnished. However, we have concluded that your complaint does not involve prosecutable violations of federal criminal civil rights statutes. This is not a judgment on the truth or merit of your complaint; it is simply to inform you that this is not the type of case that this office prosecutes. Therefore, we regret that we are unable to assist you.

Thank you for bringing this matter to our attention. We apologize that we were unable to assist you further.

Sincerely,

The Criminal Section

Attachment B: Lewis Letters

FROM THE LEGAL INJUSTICE COMMITTEE

PO Box 741742
RIVERDALE, GA. 30274
(770) 603- 6660

October 07, 2014

TO: The White House
1600 Pennsylvania AVE NW
Washington, DC

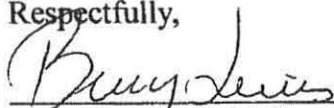
Dear President Obama,

Until present, this Committee has not receive response to our numerous correspondence, asking the President of the United States to instruct the Justice Department to investigate the abduction and disappearance of 7 year old Diana M. Daughter of Dr. Shellielle S. Youhoing, who was taken at gun-point at 1:30 am by Clayton County, Georgia, law-enforcement and Division of Family & Children Service, DHS on May 13, 2013.

This child is now held as prisoner in state custody and the parents and family are forbidden to see the child, or having any contact whatsoever with her. These acts are Un-American, no state should be allowed to function in such illegal fashion. We need the intervention of the White House to insure that these injustices are not inflicted upon other law-abiding citizens of the United States..

Once again, this committee ask that the President to call upon the Dept. of Justice to conduct a thorough investigation into this matter, forthwith. We have also enclosed our contact with the Governor of the state of Georgia, who, until present, refuses to demand investigation by the Georgia Bureau of Investigation (GBI) OR the release of the child from state custody.

Respectfully,



Betty Lewis- Field Operational Manager for the LIC.



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CFL

FROM THE LEGAL INJUSTICE COMMITTEE

PO Box 741742
RIVERDALE, GA. 30274
(770) 603- 6660

October 07, 2014

TO: The US-Department of Justice
950 Pennsylvania AVE NW
Washington, DC 20530

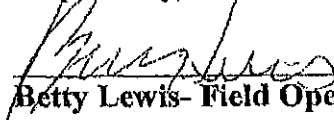
Dear Attorney General Holder,

Until present, this Committee has not receive response to our numerous correspondence, asking for federal intervention into the abduction and disappearance of 7 year old Diana M. Daughter of Dr. Shellielle S. Youhoing, who was taken at gun-point at 1:30 am by Clayton County, Georgia law-enforcement and Division of Family & Children Service, DHS on May 13, 2013.

This child is now held as prisoner in state custody and the parents and family are forbidden to see the child, or having any contact whatsoever with her. These acts are Un-American, no state should be allowed to function in such illegal fashion. We need the intervention of the Justice Department to insure that these injustices are not inflicted upon other law-abiding citizens of the United States..

Once again, this committee ask that the Dept. of Justice conduct a thorough investigation into this matter, forthwith. We have also enclosed our contact with the Governor of the state of Georgia, who, until present, refuses to demand investigation by the Georgia Bureau of Investigation (GBI) OR to release the child from state custody.

Respectfully,



Betty Lewis- Field Operational Manager for the LIC.

FROM THE LEGAL INJUSTICE COMMITTEE

PO Box 741742
RIVERDALE, GA. 30274
(770) 603- 6660

October 07, 2014

TO :Office of the Governor
206 Washington Street
111 State Capitol
Atlanta, Georgia 30334

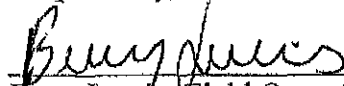
Dear Governor Deal ,

Until present several months after this committee's request, asking you the Governor of the State of Georgia, to direct the Georgia Bureau of Investigation (GBI) and federal authorities to investigate the abduction of little Diana M. (Daughter of Dr. Shellielle S. Youhoing) who was taken at gun-point at 1:30 am by Clayton County, Georgia, law-enforcement and Division of Family & Children Service, DHS on may 13, 2013. This child is now held as prisoner in state custody as the parents and family are forbidden to see the child, or having any contact whatsoever with her.

We are asking not only that you insure that a thorough investigation is conducted into this child's disappearance, but that you instruct DFCS or whosoever holding this child illegally, to allow the parents access to the child, forthwith.

Please also find enclosed, correspondence from the office of Mr. Saxby Chambliss US Senator for the state of Georgia which was sent to Dr. Youhoing on October 06, 2014.

Respectfully,



Betty Lewis- Field Operational Manager for the LIC.

cc: The White- House
cc: Attorney General Eric Holder US Dept. of Justice.
Cc: Mr. Saxby Chambliss US Senate