No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin Griffin –PETITIONER

VS.

Thomas P. DiNapoli, et al. –RESPONDENT (S)

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR PETITIONER

Kevin Griffin
P.O. Box 2001
Dannemora, NY 12929

QUESTION(S) PRESENTED

1. Was petitioner erroneously denied *in forma pauperis* even though granted by the state courts and the Northern District Court.

2. Was petitioner erroneously denied the appointment of counsel as an *in forma pauperis* person, *U.S. Const*. Amends. VI & XIV?

3. Was petitioner's appeal erroneously dismissed even though sworn medical evidence supports petitioner's claims. *U.S. Const*. Amend. XIV?

LIST OF PARTIES

The caption of the case contains the names of the parties to the proceedings in the courts below and in this Court.

The Petitioner below is Kevin M. Griffin.

The Defendants are Thomas P. DiNapoli, in his official capacity as the N.Y.S. Comptroller; Kevin F. Murray, in his official capacity as the N.Y.S. Executive Deputy Comptroller; Hon. Eric Schneiderman, in his official capacity as the N.Y.S. Attorney General.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

U.S. SUPREME COURT

CIRCUIT COURTS

DISTRICT COURTS

STATE COURTS

STATUTES AND RULES

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

On March 15, 2018 the denial of the United States Court of Appeals for the Second Circuit, is unreported (Appendix-A). On April 18, 2018 the Reconsideration motion denial is reported at 2017WL3835334 (Appendix–B).

On August 30, 2018 the denial of the Northern District Court of New York is reported at 2017WL3835334 (Appendix-C).

On May 29, 2014 the denial of the New York State Appellate Division, Third Department is reported at 117 A.D.3d 1355 (3d Dept. 2014) (Appendix-D).

On September 16, 2014 the denial of the New York State Court of Appeals is reported at 24 N.Y.3d 903 (2014) (Appendix-E). On November 25, 2014 the reconsideration denial of the New York State Court of Appeals is reported at 24 N.Y.3d 1040 (2014) (Appendix-F).

On February 26, 2015 the denial of the New York State Appellate Division, Third Department is unreported (Appendix-G).

On May 14, 2015 the denial of the New York State Court of Appeals is reported at 25 N.Y.3d 1037 (2015) (Appendix-H). On September 1, 2015 the Reconsideration denial of the New York State Court of Appeals is reported at 26 N.Y.3d 940 (2015) (Appendix-I).

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2018 (Appendix - A). Its order denying reconsideration was entered on April 18, 2018 (Appendix - B). The jurisdiction of this Court rests in 28 *U.S.C.* § 1254 (1).

The judgment of the highest state court, New York State Court of Appeals, was entered on September 16, 2014 (Appendix - G). A petition for reconsideration was thereafter denied on November 25, 2014 (Appendix - H). The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> ... to have the Assistance of Counsel ....

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall ... deprive any person of life [or] liberty ... without due process of law ....

42 *U.S.C.* §421 (a)(2) states:

> The disability determination ... made by a state agency shall be made in accordance with the ... Commissioner of Social Security pertaining to matters such as disability determinations ....

42 *U.S.C.* §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article 1 §6 of the New York State Constitution provides in part:

> In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.

Article 1 §11 of the New York State Constitution provides in part:

> No person shall be denied equal protection of the laws of this state or any subdivision thereof. No person shall ... be subjected to any discrimination in his or her civil rights by ... the state or any agency or subdivision of the state.

Article 5 §7 of the New York State Constitution provides in part:

... membership in any pension or retirement system of the state ... the benefits of which shall not be diminished or impaired.

STATEMENT OF THE CASE

On July 1, 1988 petitioner was hired by the Town of Crawford Police Department as a Police Officer. Petitioner was a member of the New York State Retirement System.

On July 19, 2001 petitioner was involved in a motor vehicle accident while on duty as a police officer (App. N-47). Petitioner sustained neck and back injuries. Said injuries prevented petitioner from performing the duties of a police officer.

Petitioner was examined by numerous medical doctors who stated petitioner was disabled and no release forms were issued granting petitioner to return to work (App. N-70-250). Petitioner was determined disabled by the New York State Workers Compensation Board (App. N-45&46) and the Social Security Administration.

On September 24, 2003 Town of Crawford Chief Daniel P. McCann filed for Tier 1 & 2 Accident Disability Benefits and Police and Fire Retirement Disability Incurred in the Performance of Duty Benefits (*RSSL* 363 & 363c) as petitioner was/is unable to perform the duties of a police officer (App. N- 64 & 65, 67 & 68). Said disability applications indicated that petitioner is permanently disabled due to a motor vehicle accident as marked into evidence on November 16, 2011.

On May 18, 2004 Ms. Kathleen Nowak, Director of Disability Processing for the Retirement System denied petitioner's applications based only on the applications which only had information regarding the accident and without fifty-six pages of petitioner's medical reports (App. N- 66 & 69).

On July 20, 2004 petitioner and the Town of Crawford filed timely requests for a re-determination hearing which was not held until 7 years later on November 16, 2011 (App. N-1-

107).

On October 21, 2004 a Notice of Hearing for a re-determination was scheduled for November 18, 2004. The Notice stated: (1) It is the right of the applicant to be represented by counsel. (2) The sole purpose of this hearing is to dismiss your application(s) because of your failure to prosecute this claim. (3) This hearing has not been scheduled to go into the merits of your claim. (App.K-95). The respondent's erroneously pre-determined to dismiss petitioner's applications and went into the merits of petitioner's disabling injuries.

On November 17, 2004 Ms. Kathleen Mullin (petitioner's attorney) requested an adjournment. (App. N-38).

On March 16, 2005 Ms. Kathleen Mullin sent a letter to the Retirement System with copies of 56 pages of petitioner's medical records, that Ms. Nowak did not have when she made her denial, and requested to be notified of the date of the hearing in this matter. (App. N-38).

On November 15, 2011 J. Benjamin Gailey (Town of Crawford Attorney) notified the Retirement System that the Town of Crawford withdraws any and all disability retirement applications, (App. N-39), without any new medical evidence only based on the same reasons which the Town of Crawford determined petitioner as disabled from performing the duties of a police officer.

On November 16, 2011 seven years after Ms. Mullin's request for an adjournment the Retirement System scheduled a hearing via telephone conference before the Honorable Jack Economou. (App. N-1-107). Petitioner requested counsel and was denied said request by the Hon. Economou which was a violation of petitioner's Due Process Rights *U.S. Const.* Amend. VI & XIV; *N.Y.S. Const.* Art. 1§6 (App. N-6-12). The Retirement System (Mr. Riell) objected as "This is a 2004 hearing case." The Hearing Officer asked why he is only now getting a case

from 2004, seven years later. There were no correspondence issues which took seven years as Mr. Reil stated. (App. N-13&14).

On January 25, 2012 the Hon. Economou denied petitioner's request for Accident Disability Benefits and Police and Fire Retirement Disability Incurred in the Performance of Duty Benefits. (App. N- 4-7).

On June 25, 2012 petitioner commenced an Article 78 proceeding in the Albany County Supreme Court which was transferred to the Appellate Division.

On May 29, 2014 the Hon. McCarthy, Appellate Division, Third Department, filed a Memorandum and Judgment adjudging that the determination is confirmed, without costs, and petition dismissed *Griffin v. DiNapoli,* 117 A.D.3d 1355 (3d Dept. 2014). Petitioner filed numerous reconsideration motions and leave to appeal to the Court of Appeals which were all denied (Appendix- D-I).

On July 22, 2016 petitioner filed a *pro-se* complaint in the Northern District of New York pursuant to 42 *U.S.C.* §1983 against Thomas P. DiNapoli et al., (respondents acting under DiNapoli's authority). The complaint stated that, respondents erroneously denied petitioner his Due Process Rights, Accident Disability Benefits and Police and Fire Retirement Disability Incurred in the Performance of Duty Benefits, the right to counsel, in violation of the *United States Constitution*, Amends. VI & XIV; *New York State Constitution* Article V§1; Article 1§6 and Article V§7, respondents denials were against the weight of the evidence 42 *U.S.C.* § 421 (a)(2). (App. K).

On August 30, 2017 the Hon. Suddaby dismissed petitioner's complaint without leave to amend said complaint *Griffin v. DiNapoli*, 2017 WL 3835334 (N.D.N.Y. 2017) (Appendix- C).

On September 15, 2017 a Notice of Appeal was timely filed. (App. J-82).

On January 4, 2018 petitioner filed an appeal in the Second Circuit which was denied on March 15, 2018. (Appendix- A).

On March 30, 2018 petitioner filed a reconsideration motion to the Second Circuit Court of Appeals which was denied on April 18, 2018. (Appendix- B). Petitioner now seeks this Honorable Court's permission for a writ of certiorari granting petitioner his disability retirement benefits.

The Court of Appeals erred in denying petitioner's 1983 complaint pursuant to 28 *U.S.C.* 1915(e) regarding petitioner's poor person application and appointment of counsel. The Court also dismissed petitioner's appeal regarding alleged failure to state a claim, failure to raise a property interest claim, statute of limitations and the failure to amend complaint. (App. A-1).

The Court of Appeals erred in denying petitioner's application for *in forma pauperis* status which was not frivolous and contrary to the Court of Appeals rules in its decision pursuant to 28 *U.S.C.* 1915(e).

The Court of Appeals erred in denying petitioner the appointment of counsel as petitioner established that he could not afford counsel which was established in petitioner's non-frivolous *in forma pauperis* application.

The Court of Appeals erred by not granting petitioner (*pro-se*) permission to amend and cure any alleged deficiencies prior to dismissal of petitioner's complaint in violation of petitioner's due process rights under the Fourteenth Amendment.

The Court of Appeals erred in dismissing petitioner's appeal without any explanation as to the dismissal of each claim. The dismissal was a denial pursuant to 28 *U.S.C.* 1915(e); *Neitzke* which was based on 28 *U.S.C.* 1915 (d) not (e).

The Court of Appeals erred in dismissing petitioner's claims which were adequately

presented, which respondents acknowledged in the Motion to Dismiss and throughout prior proceedings.

Accordingly the Court of Appeals decision should be reversed and petitioner should be granted permission to file an amended brief to cure any possible deficiencies in the Northern District Court with the appointment of counsel.

REASONS FOR GRANTING THE PETITION

POINT ONE

THE SECOND CIRCUIT ERRED IN DENYING PETITIONER'S IN FORMA PAUPERIS APPLICATION.

Petitioner appeals the Court of Appeals denial of *in forma pauperis* status.

A federal litigant who is to poor to pay court fees may proceed *in forma pauperis*. This means that the litigant may commence a civil action without prepaying fees or paying certain expenses. See 28 *U.S.C.* §1915 (a); *Coleman v. Tollefson*, 135 S.Ct. 1759 (2015).

We must accept all well-pleaded facts as true and consider those facts in the light most favorable to the petitioner. *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir. 2006).

On September 14, 2016 The Northern District Court of New York granted petitioner *in forma pauperis* status, which was not revoked or voided (App. O). Petitioner's financial situation has not changed, yet the Court of Appeals denied petitioner *in forma pauperis* status in violation of petitioner's due process rights. *U.S. Const.* Amend. XIV. (Appendix- A).

The Second Circuit denied petitioner *in forma pauperis* status even though the Second Circuit's instructions Section A(2) states: "An incarcerated appellant who cannot afford to pay the fee must file in the district court a motion for *in forma pauperis* status unless the district court

has already permitted appellant to proceed *in forma pauperis* and has not revoked that status." (App. Q). Petitioner's in forma pauperis application was not revoked.

Under 28 *U.S.C.* §1915, a court may authorize the commencement of civil proceedings when the petitioner has not paid the requisite filing fees if the petitioner submits an affidavit disclosing all personal assets. The petitioner does not have to be completely destitute for a court to grant an application to proceed *in forma pauperis*. All that is necessary is that the petitioner would suffer substantial hardship if required to pay the fee. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948). The state trial court (Appellate Division, Third Dept.; court of first instance) granted petitioner *in forma pauperis* status at the commencement of petitioner's appeal (App. J-67).

Fed. Rules of App. Proc. 24 (a)(3) states: A party who was permitted to proceed *in forma pauperis* in the district court action, ..., may proceed on appeal *in forma pauperis* without further authorization, unless: (A) the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed *in forma pauperis* and states in writing its reasons for the certification or finding; or (B) a statute provides otherwise.

The court did not state in writing that petitioner's appeal was not taken in good faith or that petitioner was not entitled to proceed as *in forma pauperis*. (App. C). The Circuit Court should not have denied petitioner's application for *in forma pauperis* status. During petitioner's appeals the state court granted petitioner *in forma paupersis* (App. J-67) as well as the Northern District Court. (App. O). *Ortega, supra; Ball v. Berryhill,* 2017WL4475942 (ND Ga. 2017).

To prevent such abusive or capricious litigation, §1915(d) authorizes federal courts to dismiss a claim filed *in forma pauperis* "if the allegation of poverty is untrue, or if satisfied that

the action is frivolous or malicious." *Neitzke v. Williams*, 490 U.S. 319 (1989). Petitioner's *in forma pauperis* application was true and has not changed.

The §1915 good faith test does not require the petitioner to show any particular degree of merit. The court must grant leave to appeal IFP unless the issues raised, .. are so frivolous or lacking in merit .... *United States v. Ortuna-Herrera*, 2017 WL 2901705. Petitioner's case is not frivolous as the state (Worker's Compensation Board) and federal (Social Security Administration) agencies determined petitioner as disabled. Furthermore, the District Court's decision stated petitioner raised factual allegations. (App. C-5).

Petitioner requests this Honorable Court grant petitioner *in forma pauperis* status.

POINT TWO

THE SECOND CIRCUIT ERRED IN DENYING PETITIONER'S APPOINTMENT OF COUNSEL APPLICATION

Petitioner appeals the Court of Appeals denial of the appointment of counsel.

In the federal courts, the advice of counsel has long been required whenever a ... challenges ... that an appeal is not taken in good faith, *Johnson v. United States*, 352 U.S. 565 (1957), and such representation must be in the role of an advocate, *Ellis v. United States*, 356 U.S. 674, 675 (1958) ....

The court may request an attorney to represent any person unable to afford counsel. 28 *U.S.C.* §1915(e)(1). Equal protection of the law does not exist if the kind of an appeal a man enjoys depends on the amount of money he has. *U.S. Const.* Amend. 14. see also, *Douglas v. People of the State of Cal.*, 372 U.S. 353 (1963).

"The factors to be considered in ruling on a motion for the appointment of counsel include the merits of petitioner's case, the petitioner's ability to pay for counsel, his efforts to obtain a lawyer, the availability of counsel, and the petitioner's ability to gather the facts and

deal with issues if unassisted by counsel." *Pennington v. City of Rochester*, No. 13-cv-6304, 2014 WL 3894599 (W.D.N.Y. 2014) (*quoting Cooper v. Sargenti*, 877 F.2d 170, 172 (2d Cir. 1989).

Where the factors set forth in *Hodge v. Police Officers*, 802 F.2d 58 (2d Cir. 1986) are satisfied, we may appoint counsel. "These factors include: (1) whether the party's claim has substantial merit; (2) whether the nature of the factual issues requires an investigation, and whether the party's ability to investigate is inhibited; (3) whether the claim's factual issues turn on credibility, which benefits from the skills of those trained in presentation of evidence and cross-examination; (4) the party's overall ability to present its case; and (5) whether the legal issues presented are complex." *Dolan, v. Connolly,* 794 F.3d 290 (2d Cir. 2015); see also, *Garcia v. USICE (Dept. of Homeland Security)*, 669 F.3d 91, 98-99 (2d Cir. 2011) (*citing Hodge*, 802 F.2d at 60-61). Here, we find that all of the *Hodge* factors favor appointment and, therefore, direct the district court, ..., to appoint counsel to represent him. *See* 28 *U.S.C.* §1915(e), *Hodge* at 60-61.

The District Court stated petitioner presented factual allegations (App. C-5), therefore, petitioner's claim meets the Hodge standard.

As in *Gideon* "in our adversary system of criminal justice, any person hailed into court, who is to poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." at 372 U.S. 335, 344(1963); see also *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429 (1988). A failure to appoint counsel is a violation of the Sixth Amendment, as set forth in *Gideon, supra.*

The *N.Y.S. Const.* Art. 1 §6 states: In any trial <u>in any court</u> whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.

The Hearing Notice failed to state retained or appointed counsel, it only stated petitioner "had a right to counsel." (App. K-95 & 102). Petitioner was denied his due process right to counsel. *U.S. Const.* Amend. 6; *N.Y.S. Const.* Art. 1§6.

Petitioner or petitioner's attorney were not present at any prior proceedings. (App. M). Any decision made was in violation of petitioner's due process right to be present to confront any person making allegations or statements. Plaintiff was denied the right to testify or present evidence at the November 18, 2004 proceedings (App. N-13-24).

During plaintiff's Article 78 proceeding plaintiff requested the appointment of counsel, as he was not familiar with Article 78 proceedings and was denied. (App. J-67). Upon filing petitioner's §1983 claim, petitioner requested counsel twice and was denied (App. P). Had petitioner been appointed counsel, all motions would have been properly submitted to the courts.

Contrary to *Douglas*, *supra*, petitioner was granted *in forma pauperis* status in the first instance but was still denied appointment of counsel in the first instance. Petitioner had a right to appeal the Hearing Officer's decision by filing an Article 78 proceeding (1st instance) and should have been appointed counsel. *Douglas* stated that, a state must provide counsel for an indigent defendant in a first appeal as of right. The Retirement System's notice stated, had a right to counsel. (App. K-95 & 102).

As this Court recognized in *Custis*, the "failure to appoint counsel for an indigent [is] a unique constitutional defect ... ris[ing] to the level of a jurisdictional defect," which therefore warrants special treatment among alleged constitutional violations, *Custis v. U.S.*, 511 U.S. 485, 496 (1994).

As stated in *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir. 1978); "counsel will certainly be in a far better position to assist the litigant and the court than will the judge who chooses instead to

struggle with an unlearned and sometimes barely literate prisoner." *See also Hodge v. Police Officers, supra.*

The *Maclin* court felt, for obvious reasons, that the trial judge should be more inclined to appoint counsel if the legal issues presented are complex. *Maclin v. Freake*, 650 F.2d at 888-89 (7th Cir. 1981); *See also Hodge v. Police Officers, supra.*

Petitioner has qualified for *in forma pauperis* status and is unable to hire an attorney to represent him. Petitioner has filed numerous letters to law firms. (App. K-11-30). Petitioner claims this is a complex case and should not be tried without the appointment of counsel.

This Court has held that the right to appointed counsel applies not only to "criminal prosecutions" within the meaning of the Sixth Amendment, but also to proceedings denominated as "civil" .... *Turner v. Rogers*, 2011 WL 49898 (2011) @ 30.

POINT THREE

THE SECOND CIRCUIT ERRED IN DISMISSING PETITIONER'S APPEAL

1. Failure to State a Claim

The Court of Appeals reviews *de novo* a District Court's dismissal of a complaint pursuant to Rule 12 (b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, drawing all reasonable inferences in the petitioner's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002); *see also Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001).

We must accept all well-pleaded facts as true and consider those facts in the light most favorable to the petitioner. *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir. 2006). Moreover, it should be noted that "[t]his standard is applied with even greater force where the petitioner alleges civil rights violations or where the complaint is

submitted *pro se*." While all pleadings are to be construed liberally, *pro se* civil rights pleadings are generally to be construed with an *extra* degree of liberality. Generally "courts must construe *pro se* pleadings broadly, and interpret them to raise the strongest arguments that they suggest." *Jackson v. Onondaga County*, 549 F.Supp.2d 204, 213-14 (N.D.N.Y. 2008); *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011).

Since most *pro se* petitioners lack familiarity with the formalities of pleading requirements, we must construe *pro se* complaints liberally, applying a more flexible standard to evaluate their sufficiency than we would when reviewing a complaint submitted by counsel .... In order to justify the dismissal of petitioner's *pro se* complaint, it must be beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768 (2d Cir. 2002); *Lerman v. Bd. of Elections*, 232 F.3d 135, 139-40 (2d Cir. 2000).

The District Court's decision stated that petitioner's claims are constitutional in nature and arise under §1983. (App. C-16). The claims must have met the plausibility standard to be considered constitutional in nature.

This Court has reviewed the dismissal under Rule 12(b)(6) of a complaint based on 42 *U.S.C.* § 1983 and found that it had, in fact, stated a cognizable claim-a powerful illustration that a finding of a failure to state a claim does not invariably mean that the claim is without arguable merit. *Brower v. County of Inyo,* 489 U.S. 593 (1989).

A complaint that fails to state a claim may not be dismissed for want of subject matter jurisdiction unless it is frivolous. *Hagans v. Lavine,* 415 U.S. 528, 536-37 (1974).

The District Court acknowledged that it was made clear what relief the petitioner was seeking. The District Court stated; attached to petitioner's complaint are numerous exhibits, as

well as a "Memorandum of Law" containing factual allegations in numbered paragraphs as well as legal arguments. In the Court's decision the Court acknowledges that petitioner's claim states six claims brought by petitioner. (App. C-5).

It is well settled in the respondent's Motion to Dismiss (12-26-16) that the Attorney General's Office (A.G. Lynch & previous Attorney Generals) were well aware and informed as to petitioner's claims, his entitlement to said Disability Benefits and the relief that petitioner has requested, as presented throughout petitioner's proceedings. In the respondent's motion to dismiss petitioner's §1983 claim they clearly state what relief petitioner is seeking. (App. L).

Petitioner's claims are that he is entitled to Disability Benefits and Police and Fire Retirement Disability Incurred in the Performance of Duty Benefits as a result of disabling injuries from an in service motor vehicle accident which prevent petitioner from performing the duties of a police officer which respondents concede.

A member shall be entitled to accident disability retirement allowance if, at the time application therefore is filed, he is: 1) Physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by his own willful negligence sustained in such service and while actually a member of the policeman's and fireman's retirement system, and 2) Actually in service upon which his membership is based ... (*Retirement and Social Security Law* §363-c (b)(1)(2)). Petitioner has met these requirements. (App. N-79).

The State statute titled *Retirement and Social Security Laws*, since the Retirement System's disability determinations shall be made in accordance with the *Social Security Laws*, the respondents failure to adhere to the Social Security Administration (SSA) guidelines and criteria prejudice petitioner 42 *U.S.C.A.* 421 (a)(2). The respondents determination was contrary to the guidelines for which the state is required to adhere to.

Pursuant to regulations promulgated by the Commissioner, a five-step sequential evaluation process is used to determine whether the claimant's condition meets the Act's definition of disability. see 20 *C.F.R.* §404.1520 (4).

> "If the Commissioner determines (1) that the claimant is not working, (2) that he has a 'severe impairment,' (3) that the impairment is not one that conclusively requires a determination of disability, and (4) that the claimant is not capable of continuing in his prior type of work, the Commissioner must find him disabled if (5) there is not another type of work the claimant can do." *see Burgess v. Astrue,* 537 F.3d 117@120 (2d Cir. 2008).

With respect to "the nature and severity of [a claimant's] impairment(s)," 20 *C.F.R.* §404.1527(d)(2), "[t]he SSA recognizes a 'treating physician' rule of deference to the views of the physician who has engaged in the primary treatment of the claimant," *Green-Younger v. Barnhardt*, 335 F.3d 99, 106 (2d Cir. 2003). The opinion of claimant's treating physician as to the nature and severity of the impairment is given "controlling weight" so long as it "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." see also, *Shaw v. Chater,* 221 F.3d 126, 134 (2d Cir. 2000); *see also, Burgess supra.*

Under the Act "disability" means an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment ... which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 *U.S.C.* 423(d)(1)(A), *Burgess v. Astrue*, *supra*. Petitioner has met these requirements. (App. N-79, 64,65,67 68).

'When determining disability, we will consider <u>all evidence</u> in your case record when we make a determination or decision whether you are disabled 20 *C.F.R.* §404.1520 (a)(3). The Social Security Administration reviewed the same medical evidence as the respondents, yet the

respondents conclude that petitioner is not disabled. The respondents did not consider all evidence, they relied on Dr. Storey's report (App. N-70-72). Dr. Storey examined petitioner once, reviewing the same medical records as all the other physicians. Petitioner's physicians examined petitioner numerous times (App. N).

Petitioner's complaint stated he was involved in a motor vehicle accident and was determined permanently disabled from performing the duties of a police officer. The Town of Crawford filed for petitioner's disability benefits because petitioner was disabled from performing the duties of a police officer. (App. N – 64 & 65, 67 & 68).

Petitioner has provided numerous medical reports (App. N-70-250) as well as the Town's disability applications stating petitioner is permanently disabled from performing the duties of a police officer. (App. N- 64 &65, 67 & 68). And that petitioner is entitled to Accident Disability Benefits and Police and Fire Retirement Disability Incurred in the Performance of Duty Benefits.

There is nothing in the record to suggest that petitioner suffered from any pre-existing conditions or injuries. Petitioner was appointed and qualified as police officer in 1987. There were no symptoms until after petitioner was involved in a motor vehicle accident while on duty. There is nothing in the record to suggest that petitioner's subsequent condition was degenerative or arthritic or related to lack of bone density. Nor was there anything in the record to suggest that any treating or consulting physician was of the view that petitioner's condition was not work related. The record shows substantial evidence that petitioner's disability was service related.

The Social Security Administration granted petitioner's Social Security Disability Benefits, as a result of his disabling injuries incurred in the performance of duty on July 19, 2001, which respondents concede. Petitioner was receiving Social Security payments for his children. After petitioner's conviction his ex-wife continued to receive the same payments.

(App. R-1). For the Social Security Administration to grant petitioner disability benefits, the administration has concluded that petitioner is disabled from performing his required duties as a police officer.

There is substantial evidence that petitioner's disability was the natural and proximate result of line-of-duty injuries, and thus is entitled to Accident Disability Retirement Benefits under New York law *Cusick v. Kerik*, 305 A.D.2d 247 (1st Dept. 2003). Petitioner's accident was conceded by the respondents. There are numerous expert medical reports to support this fact. *See, Cartagena v. City of New York*, 345 F. Supp. 2d 414 (S.D.N.Y. 2004). (App. N).

Petitioner received benefits pursuant to *New York State General Municipal Law* 207-c(1) which determined petitioner disabled as a result of the same accident which the respondents concede. (App. N-73,77,78).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible "when the petitioner pleads factual content that allows the court to draw the reasonable inference that the respondent is liable for the misconduct alleged." *Hogan v. Fischer*, 738 F.3d 509 (2d Cir. 2013); *see also DiFoloco v. MSNBC Cable LLC*, 622 F.3d 104, 113 (2d Cir. 2010).

"A complaint must include ... a plain statement of the claim ...[that] give[s] the respondent fair notice of what the petitioner's claim is and the grounds upon which it rests." Petitioner's factual statement is detailed enough to avoid dismissal under this standard. *Patane v. Clark*, 508 F.3d 106 (2d Cir. 2007).

Petitioner stated a claim, which was adequately presented in the statement of claim, statement of facts, the cause of action, the Prayer for Relief and the Memorandum of Law.

Petitioner has shown that he is entitled to the Disability Benefits regarding this claim and that he was denied his due process rights *U.S. Const.* Amends. VI & XIV.

The District Court erred in not accepting petitioner's documented medical reports in petitioner's favor that he is permanently disabled from performing the duties of a police officer.

Although it is essentially true, as petitioner's civil rights complaint need only set forth facts giving rise to the cause of action, *see Fed. Rules Civ. Proc.* 8(a) (1), (3), it hardly follows that a law library or other legal assistance is not essential to frame such documents. *Bounds v. Smith,* 430 U.S. 817 (1977).

As the *Bounds* Court has "constantly emphasized," civil rights actions are of "fundamental importance ... in our constitutional scheme" because they directly protect our most valued rights. *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Wolff v. McDonnell*, 418 U.S.539, 579 (1974).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "give the defendants fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Erickson v. Pardus*, 551 U.S. 89 (2007). In addition, when ruling on a respondent's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic supra; Neitzke v. Williams*, 490 U.S.319, 327 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A document filed *pro se* is "to be liberally construed," *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."

The fact that a *pro se, in forma pauperis* complaint fails to state a claim upon which relief could be granted under Rule 12(b)(6) does not, in and of itself, warrant the *sua spnte* dismissal of the case as frivolous under §1915(d). *Brandon v. District of Columbia*, 734 F.2d 56, 59 (D.C. Cir. 1984).

Failure to provide such "'good reasons' for not crediting the opinion of a claimant's treating physician is a ground for remand." *Snell v. Apfel*, 177 F.3d 128, 133 (2d Cir. 1999); *Burgess v. Astrue*, *supra.*

It is well-settled that *pro se* litigants generally are entitled to a liberal construction of their pleadings, which should be read to raise the strongest arguments that they suggest. *Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001); *see also Hemphill v. New York*, 380 F.3d 680, 687 (2d Cir. 2004) ("It is well-established that 'when [a] plaintiff proceeds *pro se* ... a court is obligated to construe his pleadings liberally, particularly when they allege civil rights violations.'"). Moreover, "a *pro se* litigant should be afforded every reasonable opportunity to demonstrate that he has a valid claim." *Satchell v. Dilworth*, 745 F.2d 781, 785 (2d Cir. 1984).

In the Court of appeals view, petitioner was required to allege in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253-254 (1981).

To be entitled to disability benefits under the Social Security Act a person must not only be unable to perform his former work but must also be unable, considering his age, education,

and work experience, to perform any other kind of gainful work that exists in the national economy *Heckler v. Campbell*, 461 U.S. 458 (1983).

The Court did not provide any evidence of specific alternative jobs that petitioner could perform, that in the absence of such evidence that he could not perform the types of jobs identified by the guidelines, and that therefore the determination that he was not disabled was not supported by substantial evidence *Campbell, supra.*

The Court of Appeals held that "in failing to show suitable available alternative jobs ... of 'not disabled' is not supported by substantial evidence. *U.S. v. Evans*, 665 F.2d 54 (2d Cir. 1981).

The respondents failed to introduce evidence that specific alternative jobs existed, the determination was not supported by substantial evidence. The Retirement Systems physician (Dr. Storey) failed to state that he was in any way familiar with the duties of a police officer when filing his opinion.

The statute required both an "inability" to engage in any substantial gainful activity and an "impairment" providing "reason" for the "inability," adding that the "impairment" must last or be expected to last not less than 12 months. *Barnhardt v. Walton*, 535 U.S. 212 (2002).

Petitioner has stated a claim and should be granted Disability Retirement Benefits as requested.

2. Property Interest Right

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of "property, without due process of law," *U.S. Const. Amend.* XIV.

The Second Circuit held that, petitioner does have a contractual right to a pension under the State Constitution upon fulfilling the statutory conditions, and this contractual right is a

property interest under State law." *Morris v. N.Y.C.E.R.S.* 129 F.Supp.2d 599 (S.D.N.Y. 2001); *Winston v. City of New York*, 759 F.2d 242, 247 (2d Cir. 1985).

The District & Circuit Court found that petitioner's "entitlement to disability retirement is a constitutionally protected property interest for the purpose of Section 1983." *Morris, supra; see e.g. Ortiz v. Regan,* 749 F. Supp. at 1258 (S.D.N.Y. 1990) (citing *Russell v. Dunston*, 896 F.2d 664, 669 (2d Cir. 1990) (holding that state disability retirement benefits are a constitutionally protected property interest). *U.S. Const.* Amend. 14; *King, supra.*

Two property interests that are protected by the Due Process Clause are petitioner's right to receive the benefits of his New York State Retirement membership. The right to receive the benefits of membership in a state plan is protected under the *New York Constitution*, Art. 5 §7. It provides: "'[M]embership in any pension or retirement system of the state ... shall be a contractual relationship, the benefits of which shall not be diminished or impaired.'" *Weaver v. N.Y.C.E.R.S.*, 717 F. Supp. 1039, 1043 (S.D.N.Y. 1989).

Procedural due process claims require a party satisfy three elements "*first* identify a property right, *second* show that the government has deprived him of that right, and *third* show that the deprivation was effected without due process." *Ahmed v. Town of Oyster Bay,* 7 F. Supp. 3d 245, 254 (E.D.N.Y. 2014). Petitioner has met these requirements.

"Courts examine procedural due process questions in two steps: ... whether there exists a liberty or property interest ...." *Jackson, supra*; *Kentucky Dept. of Corr. v. Thompson,* 490 U.S. 454, 460 (1989).

To allege a violation of substantive due process, petitioner must claim: "(1) a 'valid property ' interest or 'fundamental right'; and (2) that the respondents infringed on that right by conduct that 'shocks the conscience' or suggests a 'gross abuse of governmental authority.'"

Leder v. Am. Traffic Solutions, Inc., 81 F. Supp. 3d 211, 223 (E.D.N.Y. 2015). Petitioner has met these requirements.

Six states, including New York, take the approach that pensions are protected as a property right under the due process clause of the United States Constitution. *See Morris v. N.Y.C.E.R.S., supra.*

Contrary to respondents claim, pensions are protected as a property right under the due process clause. Contrary to Attorney General Lynch's statement that petitioner made no plausible allegation that he was denied due process at the November 16, 2011 hearing, is the District Court's decision stating that petitioner raised factual allegations (App. C-5) and the fact that all other Attorney Generals assigned to this case clearly understood petitioner's claims.

The entitlement to disability retirement is a constitutionally protected property interest for purposes of Section 1983. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). The Second Circuit previously held that municipal employee retirement benefits are constitutionally protected property, *Winston v. City of New York, supra*; *Basciano v. Herkimer*, 605 F.2d 605, 609 (2d Cir. 1978), and the New York State Constitution itself provides: "membership in any pension or retirement system of the state ... shall be a contractual relationship, the benefits of which shall not be diminished or impaired," *NY Const.* Art. V§7.

The clear import of Article 5§7 of the State Constitution is to "give all employees ... a guarantee that no future legislative body can take away the benefits which petitioner may be presumed to have fairly *earned by reason of his previous service.*" *Winston v. City of New York, supra.*

Petitioner is entitled to his disability retirement benefits as they are property interest which petitioner has earned, and as the Town of Crawford has determined petitioner unable to perform the duties of a police officer.

3. Denial to Amend Brief

On August 30, 2017 the Northern District Court erred in dismissing petitioner's complaint without granting petitioner leave to amend his complaint to cure any deficiencies. *Griffin v. DiNapoli*, 2017 WL 3835334 (N.D.N.Y. 2017).

A *pro se* petitioner bringing suit *in forma pauperis* is entitled to notice and an opportunity to amend the complaint to overcome any deficiency. *Denton, supra.*

When addressing a *pro se* complaint, generally a district court "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Jackson v. Onondaga County, supra.*

The Second Circuit directed the District Court to grant petitioner an opportunity to amend his complaint. *Dolan v. Connolly, supra.* The *Dolan* Court also stated, "[a] *pro se* complaint should not be [be] dismiss[ed] without [the court] granting leave to amend at least once ...."

It was error to deny a *pro se* civil rights litigant to leave amend his complaint even though he did not state in his motion for how he would cure the deficiencies in his pleading. *Gordon v. Leake*, 574 F.2d 1147 (4th Cir. 1978).

The District Court's Order dismissing the complaint was in error by not granting petitioner permission to amend his complaint to cure any deficiencies set forth in the Court's decision. Without being granted permission to file an Amended Complaint, it is premature to state that any amendment would be futile. (App. C-17,18).

The District Court's decision stated that "Memorandum of Law" containing factual

allegations .... By not allowing petitioner to amend his complaint, the District Court did not construe the complaint in a liberal manner, and was not accepting all factual allegations as true in the petitioner's favor. (App. C-5).

The District Court erred by not granting petitioner permission to amend his complaint. Petitioner could have attempted to cure any deficiencies that the Court claimed petitioner failed to properly file. The Court erroneously claimed that any amendment would be futile. (App. C-17,18). Without petitioner being afforded an opportunity to cure any deficiencies the Court's statement is in error.

The Court of Appeals reviews *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the petitioner's favor." *Mirabilio v. Reg'l Sch. Dist. 16*, 761 F.3d 212, 213 (2d Cir. 2014); see also *Dolan v. Connolly*, 794 F.3d 290 (2d Cir. 2015).

"A *pro se* petitioner who brings a civil rights action should be 'fairly freely' afforded an opportunity to amend his complaint, even if he makes the request after the court has entered judgment dismissing the original complaint." *Satchell v. Dilworth*, 745 F.2d 781 (2d Cir. 1984); *Bradley v. Coughlin*, 671 F.2d 686, 690 (2d Cir. 1982).

Since we cannot say that this *pro se* petitioner is incapable of alleging sufficient facts and circumstances to meet this requirement, we think the wiser course is to vacate the District Court's dismissal of petitioner's complaint and remand with instructions to give petitioner the opportunity to amend his complaint. *Mian v. Donaldson, Lufkin & Jenrette Securities Corporation,* 7 F.3d 1085, 1088 (2d Cir. 1993).

4. Statute of Limitations

While the Supreme Court decision in *Patsy v. Board of Regents,* 457 U.S. 496 (1982); and *Felder v. Casey,* 487 U.S. 85 (1984) generally allow §1983 claimants to bypass state and local administrative remedies and proceed directly to federal or state court, they do not preclude a §1983 claimant from choosing to exhaust administrative remedies before seeking judicial relief. *Patsy* and *Felder* afford §1983 claimants the option of whether or not to exhaust administrative remedies before commencing suit.

Contrary to the District & Circuit Courts decisions petitioner's "harm" was not known until his final denial on appeal. Petitioner's three year statute of limitations period should be accrued from May 29, 2014, the date of the Appellate Division's denial of petitioner's Article 78 proceeding. Three years from that would be May 29, 2017. Petitioner filed his 1983 claim on July 26, 2016 prior to the limitation period of May 29, 2017, *citing, King v. N.Y.C.E.R.S.*, 212 F. Supp. 3d 371 (E.D.N.Y. 2016) (the statute of limitations which began to run on January 23, 2012, the date that the state court decision regarding *King's* Article 78 claim was issued).

Section 1983 does not provide a specific statute of limitations. Thus, courts apply the statute of limitations for personal injury actions under state law. *See, Owens v. Okure*, 488 U.S. 235, 249-51 (1989); *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002).

The Northern District of *New York Court Rule* 7, titled (Have I exhausted all other available remedies?) states:

> You should be aware that, in some instances, it is necessary for you to pursue certain remedies **before** you can properly pursue a claim in federal court. Two common instances are discussed below.
>
> Administrative Procedures: People frequently want to appeal the decision of a government agency that affects them. For example, a person may want to appeal the decision of the Social

Security Administration to deny him or her social security benefits.

> If you want to appeal the denial of a benefit that is provided through an agency of the United States government, you must pursue **all** of the administrative procedures established by the agency for appealing its rulings **before** you file a lawsuit. **Only after** you have exhausted your administrative remedies, and you still believe you are entitled to a benefit that you have not received, may you initiate a lawsuit.

Petitioner is appealing the denial of a benefit that is provided through a government agency, which petitioner must pursue all administrative remedies established by the agency, before filing a lawsuit. Petitioner followed the Court's rule.

On September 26, 2003 the Town of Crawford filed for petitioner's disability benefits. (App. N-64,65,67,68). On May 14, 2004 the respondents denied petitioner's applications. (App. N-66,69). The Town of Crawford filed a timely request for a hearing and re-determination. (App. N-5). The Town of Crawford was acting as petitioner's representative as well as the Town's attorney who failed to compel the state to hold a timely hearing before the seven years which it took.

After the Hon. Economou denied petitioner's disability benefits the respondents sent petitioner a notice advising petitioner that if he were dissatisfied with the decision his next cause of action is an administrative appeal Article 78 which must be filed within four months (App. N-1). Petitioner was required to file an Article 78 proceeding as he was appealing the Hearing Officer's determination. It would have been premature for petitioner to file a §1983 claim prior to appealing the hearing officer's decision.

Petitioner's claim must not be dismissed as it was timely filed.

5. Res Juducata

Under both New York law and federal law, the doctrine of *res judicata*, or claim

preclusion, provides that "[a] final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc., v. Moitie*, 452 U.S. 394, 398 (1981); *see also, Maharaj v. Bankamerica Corp. supra*; *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1876); *see also, Dolan v. Connolly,* 794 F.3d 290 (2d Cir. 2015).

The full faith and credit clause of the Constitution of the United States requires a federal court to give the same preclusive effect to a state court judgment as would be given in the state in which it was rendered. *Migra v. Warren City School District*, 465 U.S. 75, 81 (1984); *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986).

The Court of Appeals for the Second Circuit has in effect held that the state court did not issue what could be construed as a decision on the merits. *See King v. N.Y.C. Employees Ret. Syst., supra*; *see also, Cloverleaf Realty of New York, Inc., v. Town of Waywayanda,* 572 F.3d 93, 96 (2d Cir. 2009).

A dismissal of an action "may not be considered as a dismissal on the merits" if it does not specifically state that the dismissal is on the merits. *Hanrahan v. Riverhead Nursing Home*, 592 F.3d 367 (2d Cir. 2010).

The *res judicata* bar of petitioner's claims, applies where a "final judgment on the merits bars a subsequent action between the parties over the same cause of action." *Chandler v. Dept. of Homeland Security*, 527 F.3d 275, 279 (2d Cir. 2008).

Unlike the Court's reference to *Steuerwald v. Cleveland*, 651 F.Appx. 49, 51 (2d Cir. 2016), petitioner's claim was not barred by *res judicata* as petitioner's claims were not dismissed on the merits.

Contrary to the respondents *res judicata* argument, none of petitioner's final judgments

were on the merits. (App. A-I). Not one of the decisions stated on the merits. Therefore, petitioner's claims are not barred by the *res judicata* doctrine.

In order for petitioner (*pro-se*) to show and explain his claims he had to refer to the issues raised in petitioner's Article 78 proceedings. This is the reason petitioner requested the assistance of counsel, to make sure all motions are properly filed.

The respondents claim *res judicata* "generally" requires identity of parties. Petitioner has identified the individual parties in his Article 78 proceeding which the New York State Court of Appeals changed to "et al". Petitioner continued the "et al" caption as the Court knows better than petitioner.

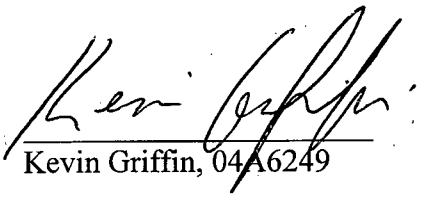
Contrary to respondents argument, petitioner did raise his due process violation. As this Court reads the respondents motion to dismiss it will be evident that the respondents were and are aware of petitioner's claims (denial of disability benefits and due process violations). (App. L). Petitioner's claim is not barred by *res judicata* for the reasons stated above.

Petitioner claims that *res judicata* should not be used to bar his individual causes of action because each of these causes arose from events that occurred subsequent to the filing of the complaint. Federal Courts have not definitively resolved this issue, and decline to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Kevin Griffin, 04A6249

Sworn to before me on the
7th day of June 2018

NOTARY PUBLIC

LARRY J CHRISTON
NOTARY PUBLIC, STATE OF NEW YORK
NO: 01CH6287138
QUALIFIED IN CLINTON COUNTY
COMMISSION EXPIRES 08/05/21