Appendix B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of May, two thousand twenty,

Present: Rosemary S. Pooler,
Gerard E. Lynch,
Michael H. Park,

Circuit Judges,

Jerome Nathan Grant,

Plaintiff - Appellant,

v.

United States of America, Richard J. Arcara, George C. Burgasser, United States Attorneys Office, John Taberski, United States Probation Office, Barry J. Donohue, Donohue Law Offices,

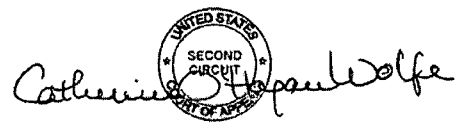
Defendants - Appellees.

ORDER
Docket No. 19-1824

Appellant Jerome Nathan Grant filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



Appendix B

W.D.N.Y.
19-cv-269
Vilardo, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of February, two thousand twenty.

Present:

Rosemary S. Pooler,
Gerard E. Lynch,
Michael H. Park,
Circuit Judges.

202-479 3011
United State
1 first st NE
Wash. DC 20543

Jerome Nathan Grant,

Plaintiff-Appellant,

v.

19-1824

United States of America, et al.,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis and assignment of pro bono counsel. Additionally, Appellant moves to recuse Judge Arcara and Richard Donohue. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

JEROME NATHAN GRANT

v.

UNITED STATES OF AMERICA, et al.

JUDGMENT IN A CIVIL CASE
CASE NUMBER 19-CV-269

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

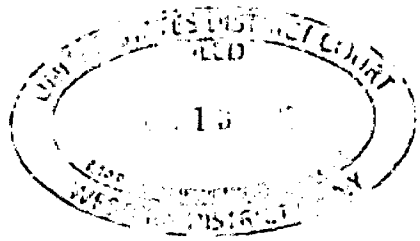
IT IS ORDERED AND ADJUDGED: that Plaintiff's motion to proceed in forma pauperis is granted; that all claims are dismissed with prejudice; that plaintiff's motion for appointment of counsel is denied as moot; and that leave to appeal to the Court of Appeals as a poor person is denied.

Date: June 13, 2019

MARY C. LOEWENGUTH
CLERK OF COURT

By: S/Kirstie L. Henry
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



PS

JEROME NATHAN GRANT,

Plaintiff,

-v-

19-CV-0269V
ORDER

UNITED STATES OF AMERICA, RICHARD J. ARCARA, GEORGE C. BURGASSER United States Attorneys Office, JOHN TABERSKI United States Probation Office, BARRY J. DONOHUE Donohue Law Offices,

Defendant.

INTRODUCTION

The pro se plaintiff, Jerome Nathan Grant, is an inmate currently incarcerated at the Federal Correctional Institution, Gilmer. He seeks relief under 42 U.S.C. § 1983, alleging that his constitutional rights were violated when he was incorrectly found to be a career offender during his prosecution in *United States v. Worthy, et al.*, No. 14-CR-0134A (W.D.N.Y. filed July 21, 2014). Docket Item 1. Because Grant is suing officials acting under color of federal, not state, law, the Court construes his action as one under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Grant also has moved to proceed *in forma pauperis* and has filed the required authorization. Docket Item 2. And he has moved for appointment of counsel as well. Docket Item 4.

Grant's motion to proceed *in forma pauperis* is granted. For the reasons that follow, however, his claims are dismissed. And his motion for appointment of counsel is denied as moot.

SCREENING

Because Grant has met the statutory requirements of 28 U.S.C. § 1915(a) and filed the required authorization, Docket Item 2, he is granted permission to proceed *in forma pauperis*. Therefore, under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(a), this Court screens his complaint.

Section 1915 "provide[s] an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). The court shall dismiss a complaint in a civil action in which a prisoner seeks redress from a governmental entity, or an officer or employee of a governmental entity, if the court determines that the action (1) fails to state a claim upon which relief may be granted or (2) seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1)-(2). Generally, the court will afford a pro se plaintiff an opportunity to amend or to be heard prior to dismissal "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Abbas*, 480 F.3d at 639. But leave to amend pleadings may be denied when any amendment would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

In evaluating the complaint, the Court accepts all factual allegations as true and draws all inferences in the plaintiff's favor. *See Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003) (per curiam); *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999). "Specific facts are not necessary," and a plaintiff "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93, (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Boykin*

v. Keycorp, 521 F.3d 202, 213 (2d Cir. 2008) (discussing pleading standard in pro se cases after *Twombly*: "even after *Twombly*, dismissal of a pro se claim as insufficiently pleaded is appropriate only in the most unsustainable of cases"). Although "a court is obliged to construe [pro se] pleadings liberally, particularly when they allege civil rights violations," *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004), even pleadings submitted pro se must meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure. *Wynder v. McMahon*, 360 F.3d 73 (2d Cir. 2004).

The allegations of the complaint, presumed true at this stage of the proceedings, tell the following story. From "2016 to 3/22/17"[1] Grant objected to being sentenced as a career offender, which substantially increased his recommended sentence under the United States Sentencing Guidelines. Docket Item 1 at 6. His attorney, defendant Barry J. Donohue, refused to make the arguments urged by Grant, who "put together a motion objecting to being a career offender." *Id.* He sent a letter with a copy of the motion he wished to make to the presiding judge, defendant Honorable Richard J. Arcara. *Id.* at 6-7. "But Judge Arcara disregarded [his] due process rights just like Barry J. Donohue, [defendant] George Burgasser/United States Attorney and [the author of the presentence report, Probation Officer] John Taberski." *Id.* at 7. Grant was sentenced on March 22, 2017, to 188 months in prison. He accuses the defendants of "collusion and malicious prosecution and equal protection, access to courts [and] failure to protect," *id.* at 8, and he seeks damages of $80,100,000.00. *Id.* at 11.

[1] The minute entry for proceedings held 3/22/2017 before Hon. Richard J. Arcara as to defendant Jerome Grant shows that the plaintiff was sentenced to 188 months on that date under 14-CR-0134A.

DISCUSSION

As noted above, Grant brings his claims under 42 U.S.C. § 1983, but the Court construes them as *Bivens* claims. "To state a valid claim under 42 U.S.C. § 1983, the plaintiff must allege that the challenged conduct (1) was attributable to a person acting under color of state law, and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Whalen v. County of Fulton*, 126 F.3d 400, 405 (2d Cir. 1997) (citing *Eagleston v. Guido*, 41 F.3d 865, 875-76 (2d Cir. 1994)). Section 1983 does not provide a cause of action against persons who act under color of federal law. 42 U.S.C. § 1983; *Bivens*, 403 U.S. at 398 (Harlan, J., concurring). But the Supreme Court recognized an individual's right to seek damages for a violation of his constitutional rights against a person acting under color of *federal* law in *Bivens*, 403 U.S. at 297.

So *Bivens* is the federal counterpart to § 1983 and extends protections afforded under § 1983 to individuals harmed by federal actors. *See Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995). Because all defendants other than Grant's attorney, Barry J. Donahue, are employees of the federal government, and because Donahue is a private attorney alleged to have colluded with federal prosecutors, none of the defendants are persons acting under color of state law for purposes of § 1983. Therefore, in light of Grant's pro se status, the Court construes his claims as brought under *Bivens*. *See Tavarez*, 54 F.3d at 110 ("Although [plaintiff] brought the action under § 1983, the district court properly construed the complaint as an action under *Bivens* . . . which requires a plaintiff to allege that a defendant acted under color of federal law to deprive plaintiff of a constitutional right.").

I. Challenges to Grant's Sentence

When success in an action would necessarily call into question the fact or duration of a sentence in a criminal prosecution and that sentence has not been set aside for some reason, no action lies under § 1983.

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). And that holds true for *Bivens* actions. *See Tavarez*, 54 F.3d at 110 ("Given the similarity between suits under § 1983 and *Bivens*, . . . *Heck* . . . appl[ies] to *Bivens* actions as well.") (internal quotation marks omitted). In other words, "*Heck* dictates that a cause of action seeking damages . . . for an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* (internal quotation marks omitted). Therefore, if Grant's success on his *Bivens* claims would necessarily imply the invalidity of his sentence, his claims must be dismissed because they have not yet accrued.

Here, Grant claims that his sentence as a career offender was legally incorrect, that his attorney refused to make the appropriate arguments in connection with that sentence, and that all the defendants conspired to improperly enhance his sentence. As the linchpin of his claim, Grant asserts that career offender status significantly and improperly increased the length of his sentence—from "70-87 months [to] 188-235 [months]." Docket Item 1 at 7. Thus, success on Grant's claims would plainly call into

question the validity of his sentence because that sentence can "not be reconciled with the claims of his civil action." *Poventud v. City of New York*, 750 F.3d 121, 132 (2d Cir. 2014). Because Grant's sentence has not been set aside, *see Worthy, et al.*, No. 14-CR-0134A, Grant's claims are barred by *Heck*. But even if they were not, they are subject to dismissal for other reasons.

II. Absolute Immunity

Grant sues Judge Arcara for his role in sentencing him as a career criminal. It is well settled that judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. *See, e.g., Mireles v. Waco*, 502 U.S. 9 (1991). This immunity is not pierced even by allegations that the judge acted in bad faith. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). The Supreme Court has applied the doctrine of judicial immunity in actions brought under 42 U.S.C. § 1983 and *Bivens*. *See Pierson*, 386 U.S. at 547; *see also Butz v. Economou*, 438 U.S. 478, 504 (1978) (no distinction for purposes of immunity between *Bivens* claims and § 1983 claims).

The Supreme Court has developed a two-part test for determining whether a judge is entitled to absolute immunity. *See Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). First, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Id.* at 356-57 (internal quotation marks omitted); *see also Maestri v. Jutkofsky*, 860 F.2d 50, 53 (2d Cir. 1988) (noting that Supreme Court has drawn a critical distinction "'between 'excess of jurisdiction' and 'clear absence of all jurisdiction'" and holding that "the scope of the

judge's jurisdiction [is to be] construed broadly."). Grant does not, nor on these facts could he plausibly, argue that Judge Arcara acted in clear absence of all jurisdiction.

Second, a judge is immune only for actions performed in the judge's judicial capacity. *See, e.g., Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (finding no immunity where judge assaulted litigant). The actions about which Grant complains were clearly undertaken within Judge Arcara's judicial capacity. The complaint alleges that Judge Arcara ignored Grant's complaints about his attorney and his objections to being adjudicated a career criminal. Judge Arcara took that alleged action precisely in his capacity as a judge, and Grant's claims against him are therefore barred.

Grant also sues Probation Officer Taberski for his role in Grant's sentencing. But Taberksi is entitled to absolute immunity as well. Like judges, "some officials who are not judges but who 'perform functions closely associated with the judicial process" are entitled to absolute immunity." *Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985)). "[A] federal probation officer acts as an arm of the court" and "is an integral part of one of the most critical phases of the judicial process." *Id.* Probation officers therefore are entitled to absolute immunity for their role in connection with a defendant's sentencing. *Id.* So Grant's claims against Taberski are barred as well.

Grant also sues the prosecutor in his case, the late George Burgasser. Like judges and probation officers, prosecutors performing traditional prosecutorial functions enjoy absolute immunity in § 1983 suits. *See Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).

> The absolute immunity accorded to government prosecutors encompasses not only their conduct of trials but all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation, including presentation of evidence to a grand jury to initiate a

> prosecution, activities in deciding not to do so, and conduct of plea bargaining negotiations.

Barrett v. United States, 798 F.2d 565, 571-72 (2d Cir. 1986) (citing *Lee v. Willins*, 617 F.2d 320 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980). And absolute prosecutorial immunity extends to federal prosecutors facing *Bivens* actions. *See Hartman v. Moore*, 547 U.S. 250, 261–62 (2006). Because Grant's claims against Burgasser involve only Burgasser's conduct in connection with Grant's sentencing, those claims also are barred.

III. Persons Not Acting Under Color of Law

The United States is not a person acting under color of state law pursuant to 42 U.S.C. § 1983, nor is it subject to a claim under *Bivens*. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994) ("An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself."); *see also Albert v. Yost*, 431 F. App'x 76, 81 (3d Cir. 2011) ("A *Bivens* claim can be maintained only against individual federal officers, not against a federal entity.") (citation omitted); *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 68, (2001) ("Since *Carlson* [in 1980] we have consistently refused to extend *Bivens* liability to any new context or new category of defendants"). Thus, the claims against the United States are not cognizable because the United States cannot be named as a defendant in this action.

Similarly, defendant Donohue, Grant's defense attorney, is not a person acting under color of law. *See Yancey v. City of Buffalo*, 2012 WL 6016890, at *2 (W.D.N.Y. Nov. 30, 2012) ("as attorneys that either represented plaintiff or were sought to be retained to represent plaintiff in the underlying criminal prosecution, they were not 'persons' acting under color of federal or state law for purposes of liability under either

Bivens or 42 U.S.C. § 1983."). Thus, the claims against defendant Donohue also are not cognizable.

CONCLUSION

Because the plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a) and has filed the required authorization, his request to proceed *in forma pauperis* is granted. For the reasons set forth above, however, the complaint is dismissed under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b) because (1) it fails to state a viable claim under *Heck*, and (2) it seeks monetary relief from defendants who are immune from such relief or who may not be sued in a *Bivens* action. Moreover, because amending the complaint would be futile, the Court declines to grant the plaintiff leave to amend despite his *pro se* status. *See Cuoco*, 222 F.3d at 112; *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 18 (2d Cir. 1997) (leave to amend need not be granted when amendment would be futile).

ORDER

In light of the above, it is hereby

ORDERED that the plaintiff's motion to proceed *in forma pauperis* is granted; and it is further

ORDERED that all claims are dismissed with prejudice, and the Clerk of Court shall close the file; and it is further

ORDERED that the plaintiff's motion for appointment of counsel is denied as moot; and it is further

ORDERED that the Court hereby certifies, pursuant to 28 U.S.C. § 1915(a), that any appeal from this order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal *in forma pauperis* should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

SO ORDERED.

DATED: June 12, 2019
Buffalo, NY

s/Lawrence J. Vilardo
Lawrence J. Vilardo
United States District Judge