UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ELECTRONIC NOTICE OF CIVIL OR PRISONER APPEAL & CLERK'S CERTIFICATION

Dear Clerk of the Court,

Please take notice that on September 3, 2021 the court received a notice of appeal. This notice serves to inform you of the pending appeal and provides you with the information needed to process the appeal.

I, JOHN M. DOMURAD, CLERK, U.S. District Court for the Northern District of New York, DO, HEREBY CERTIFY that the foregoing docket entries are maintained electronically on the court's CM/ECF system and constitute the Record on Appeal in the below listed action.

Received:
09/08/2021
at CNYPC
H.G.

IN TESTIMONY WHERE OF, I have hereunto set my hand and caused the Seal of said Court to be hereto affixed at the City of Syracuse, New York, this 3rd day of September, 2021.

John Domurad
Clerk of Court

By: G. Demyttenaere
Deputy Clerk

Case Information

Case Name: Howard Griffith and Rebecca Sklaney v. New York State, et al.
Case No. 5:20-cv-01312-GLS-ML
Docket No. of Appeal: #34 - Notice of Appeal
Document Appealed: #27 - Order

Fee Status: Waived (IFP/CJA) X

Counsel: Pro Se X

Time Status: Timely X

Motion for Extension of Time: N/A X

Certificate of Appealability: N/A X

State Court Papers are being sent by UPS as of: _____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HOWARD GRIFFITH et al.,

Plaintiffs,

v.

NEW YORK STATE ATTORNEY GENERAL et al.,

Defendants.

5:20-cv-1312 (GLS/ML)

APPEARANCES: **OF COUNSEL:**

FOR THE PLAINTIFF:
HOWARD GRIFFITH
Pro Se
447941
CNY PC
PO Box 300
Marcy, NY 13403

Received
at CNYPC
08/06/2021
H.G.

REBECCA SKLANEY
Pro Se
2903 James Street
#1R
Syracuse, NY 12306

Gary L. Sharpe
Senior District Judge

ORDER

The above-captioned matter comes to this court following an Order and Report-Recommendation (R&R) by Magistrate Judge Miroslav Lovric, duly filed July 14, 2021. (Dkt. No. 24.) Following fourteen days from the service thereof, the Clerk has sent the file, including any and all objections filed by the

parties herein.

No objections having been filed, and the court having reviewed the R&R for clear error, it is hereby

ORDERED that the Order and Report-Recommendation (Dkt. No. 24) is **ADOPTED** in its entirety; and it is further

ORDERED that plaintiffs' amended complaint (Dkt. No. 20) is **DISMISSED** pursuant to 28 U.S.C. 1915(e)(2)(B)(i); and it is further

ORDERED that plaintiffs' petitions for extraordinary writ (Dkt. No. 21), rehearing for petition for writ of certiorari (Dkt. No. 22), and extraordinary writ-supplemental brief (Dkt. No. 23) are **STRICKEN**; and it is further

ORDERED that the Clerk close this case; and it is further

ORDERED that the Clerk provide a copy of this Order to the parties in accordance with the Local Rules of Practice.

IT IS SO ORDERED.

August 3, 2021
Albany, New York

Gary L. Sharpe
U.S. District Judge

Received at
CNYPC on
September 21, 2021
H. G.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

September 17, 2021

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Griffith v. New York State, Attorney General,*
No. 21-2113

Dear Ms. Wolfe:

I write to advise the Court that the New York State Attorney General's Office will not be appearing in this matter and will not be filing an appellee's brief. *See* N.Y. Pub. Officers Law § 17(4) (requiring proper service of "summons, complaint, process, notice, demand or pleading" before defendant may request representation from the Office); N.Y. Exec. Law § 63(1). As explained further below, this Office is not a party to the litigation; therefore this Court lacks personal jurisdiction over the state defendant and may not rule adversely to this Office.

Accordingly, I respectfully request that you remove this Office as counsel and designate the state defendant-appellee only as a defendant.

The district court never authorized issuance of a summons, *see* Fed. R. Civ. Proc. 4, because it sua sponte dismissed the complaint for failure to state a claim after granting plaintiff(s) an opportunity to amend. *See* 28 U.S.C. § 1915(e)(2)(B). As a result, neither the State, nor its agencies, officials, or employees were served in accordance with the federal rules. Personal jurisdiction over the defendant was thus lacking in the district court: a defect this Office cannot—or here will not—cure in this action.

Because personal jurisdiction over the state defendant was not obtained in the first instance in the district court, this Court similarly lacks such jurisdiction

over the state defendant and thus this Office is not a party to this appeal.[1] Jurisdiction is neither conferred, nor any challenge to jurisdiction waived, by the Attorney General's receipt of notice of this appeal or by the filing of this letter affirmatively stating that this Court lacks jurisdiction over the state defendant and that this Office will not be appearing before this Court given the failure of service. *See Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972) (general appearance contesting jurisdiction does not waive jurisdictional objections); *see also Vázquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1, 3 (1st Cir. 2014) (filing of notice of appeal by defendants, who challenged service of process in district court, did not create personal jurisdiction).

Moreover, because the Court lacks personal jurisdiction over the state defendant, it may not rule adversely to this Office, e.g., by concluding that the complaint does state a claim on which relief may be granted. Such a ruling would affect the State and, therefore, should not issue without affording notice and an opportunity to be heard; that is an "essential principle of due process." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The Court may affirm the dismissal, however, because it has personal jurisdiction over the plaintiff.

Consistent with due process requirements, if the Court doubts the propriety of affirmance here, then it should vacate and remand—with directions for further proceedings consistent with the Court's order, including issuance of a summons if appropriate—on the ground that "a liberal reading of the complaint gives an[] indication that a valid claim might be stated," *Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003) (per curiam). Such a remand should be without prejudice to future dispositive motions, or to any other defense or argument that the state defendant—who is not yet before the courts—may advance. *See, e.g.*, *Encarnacion v. Goord*, 669 F. App'x 61, 62 n.2 (2d Cir. 2016) (vacating sua sponte dismissal and remanding "without prejudice to any dispositive motion that defendants may file after they have been served with the amended complaint"); *Dotson v. Fischer*, 613 F. App'x 35, 39 & n.3 (2d Cir. 2015) (same).

Respectfully yours,
/s/ Oren L. Zeve
Oren L. Zeve
Managing Assistant Solicitor General

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[1] *See Encarnacion v. Goord*, 669 F. App'x 61, 61 n.1 (2d Cir. 2016) ("The defendants were never served and, therefore, are not parties to this appeal."); *see also Petway v. N.Y. City Transit Auth.*, 450 F. App'x 66, 66 n.2 (2d Cir. 2011) ("Because the District Court dismissed [plaintiff's] complaint pursuant to 28 U.S.C. § 1915(e)(2) prior to its service on any defendant, no defendant has appeared in the case, either in the District Court or on appeal.").

cc: Howard Griffith
Central New York Psychiatric Center
P.O. Box 300
Marcy, NY 13403

Jan Nastri
2501 James Street
Syracuse, NY 13206

613 Fed.Appx. 35
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Tyrone DOTSON, Plaintiff–Appellant,

v.

Brian FISCHER, Commissioner, New York State Department of Corrections and Community Supervision, Dr. Carl J. Koenigsmann, Deputy Commissioner and Chief Medical Officer, New York State Department of Corrections and Community Supervision, Dr. Eileen Dinisio, Regional Medical Director, New York State Department of Corrections and Community Supervision, Dr. Beverly Prince, Erie County Medical Center, Dale Artus, Superintendent, Wende Correctional Facility, New York State Department of Corrections and Community Supervision, Rosalyn Killinger, Deputy Superintendent for Health Services, Wende Correctional Facility, New York State Department of Corrections and Community Supervision, Thomas Sticht, Deputy Superintendent for Security Services, Wende Correctional Facility, New York State Department of Corrections and Community Supervision, Dr. Jacqueline Levitte, Facility Health Services Director, Wende Correctional Facility, New York State Department of Corrections and Community Supervision, Defendants.*

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform to the above.

No. 13–4428–pr.
|
June 2, 2015.

Synopsis
Background: State prisoner filed § 1983 action against prison officials alleging violations of his First and Eighth Amendment rights when he was allegedly denied adequate medical treatment and then retaliated against for making the complaints. The United States District Court for the Western District of New York, Arcara, J., dismissed, sua sponte. Prisoner appealed.

Holdings: The Court of Appeals held that:

[1] complaint sufficiently alleged Eighth Amendment violation based on delayed ear surgery, and

[2] complaint sufficiently alleged Eighth Amendment violation based on medical malpractice of surgeon.

Vacated and remanded.

*36 Appeal from a judgment of the United States District Court for the Western District of New York (Arcara, J.).
UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the November 5, 2013 judgment of the District Court is **VACATED** and the cause is **REMANDED** for further proceedings consistent with this order.

Attorneys and Law Firms

Bryan J. Wegrzyn (Ross E. Morrison, on the brief), BuckleySandler LLP, New York, N.Y., for Plaintiff–Appellant.

Andrew Ayers and Kate H. Nepveu, Assistant Solicitors General, and Barbara D. Underwood, Solicitor General, for Eric T. Schneiderman, Attorney General of the State of New York, Albany, N.Y., for the Attorney General of New York as Amicus Curiae.

PRESENT: ROBERT D. SACK, BARRINGTON D. PARKER and SUSAN L. CARNEY, Circuit Judges.

SUMMARY ORDER

Plaintiff Tyrone Dotson brings claims under 42 U.S.C. § 1983 for alleged violations *37 of his First and Eighth Amendment rights during his incarceration at the state-run Wende Correctional Facility in Alden, New York. He alleges that he was deliberately denied adequate medical treatment by prison officials and was retaliated against for making related complaints. Acting *sua sponte*, the District Court dismissed his *pro se* complaint and amended complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). We assume the parties' familiarity with the underlying facts and the procedural history of the case, to which we refer only as necessary to explain our decision to vacate and remand. [1]

1 Because the District Court dismissed the action before process was served, the defendants listed in the complaint are not parties to this appeal and filed no brief as appellees. At our invitation, however, the Office of the Attorney General of the State of New York filed a brief as *amicus curiae* in support of the position of the state defendants and of one defendant, Dr. Prince, who was a state contractor.

Dotson challenges the District Court's dismissal of his Eighth Amendment claims against Drs. Dinisio, Koenigsmann, and Prince, and of his First Amendment claim against Sticht. Dotson alleges that Drs. Dinisio and Koenigsmann, each of whom had supervisory authority over inmates' medical care, violated the Eighth Amendment by denying an urgent recommendation that he receive surgery to remove a cyst in his left ear, delaying the surgery for one year and prolonging his severe symptoms. He asserts that Dr. Prince provided unconstitutionally inadequate medical care in connection with the surgery that she performed on his left ear. Finally, he claims that Sticht, the Deputy Superintendent for Security, violated the First Amendment by imposing on Dotson conditions akin to disciplinary confinement in retaliation for Dotson's repeated filing of grievances. Sticht accomplished this, Dotson alleges, by changing to a "medical keeplock" permit a "feed-in-cell" permit that Dotson was issued for medical reasons.

The District Court (Judge Larimer) reviewed Dotson's initial complaint as required by 28 U.S.C. §§ 1915(e)(2)(B) and 1915A, which apply to actions brought by prisoners proceeding *in forma pauperis* and provide for dismissal of a complaint that is frivolous, malicious, or fails to state a claim on which relief may be granted. *See Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir.2007). In May 2013, the court dismissed with prejudice the Eighth Amendment count against Dr. Prince for failure to state a claim. It further dismissed without prejudice the claims against Drs. Dinisio and Koenigsmann under the Eighth Amendment and against Sticht under the First Amendment, permitting Dotson to file an amended complaint as to these defendants. Dotson did so, supplementing his original allegations.

On November 5, 2013, the District Court (by then, Judge Arcara) determined—also under §§ 1915(e)(2) and 1915A—that the amended complaint, too, failed to state a claim to relief as to the remaining defendants and entered judgment dismissing the action with prejudice. Dotson timely appealed, and our Court granted Dotson's motions for leave to proceed *in forma pauperis* on appeal and for appointment of counsel. [2]

2 Pro bono counsel Bryan J. Wegrzyn and Ross E. Morrison of BuckleySandler have performed ably in this matter, and the Court appreciates their service, which it hopes may continue on remand. If counsel is disinclined, however, to continue its representation in further proceedings, the District Court should appoint new counsel.

*38 Now ably counseled, Dotson argues on appeal that the District Court erred in dismissing his constitutional claims against Sticht and Drs. Dinisio, Koenigsmann, and Prince. We review *de novo* a District Court's *sua sponte* dismissal of a complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A. *See Giano v. Goord*, 250 F.3d 146, 149–150 (2d Cir.2001); *see also Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir.2003) (per curiam). To avoid dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We afford a *pro se* litigant "special solicitude" by interpreting a complaint filed *pro*

se "to raise the strongest claims that it suggests." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir.2011) (internal alterations and quotation marks omitted).

[1] Upon considered review, we conclude that the District Court erred by dismissing Dotson's Eighth Amendment claims that Drs. Dinisio and Koenigsmann unconstitutionally denied him medical care. A prisoner pressing such a claim must colorably allege that the defendant acted with deliberate indifference to his serious medical needs. *See Hilton v. Wright*, 673 F.3d 120, 127 (2d Cir.2012) (per curiam). A "serious medical need" exists where, objectively, "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Harrison v. Barkley*, 219 F.3d 132, 136 (2d Cir.2000) (internal quotation marks omitted). "Deliberate indifference" requires allegations of the defendants' subjective state of mind: that the prison official "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir.2003) (internal quotation marks omitted).

The amended complaint plausibly alleges a serious medical need. Dotson alleges that a CAT scan revealed a cyst in his left ear, and that Nurse Practitioner Jennifer Wrest recommended surgery and requested an "urgent" level of attention. App. 41. Over the year following that "urgent" recommendation, while the recommended surgery was delayed, Dotson complained on numerous occasions of "vertigo, blinding headaches, extreme pain in his left ear, and increased hearing loss." *Id.* at 41–42. When the cyst was finally removed, one year later, it was of "significant size." *Id.* at 42. Such allegations of a "condition of urgency" that "may produce ... extreme pain" satisfy the objective prong of the analysis. *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir.1996) (internal quotation marks omitted).

The amended complaint also plausibly alleges that Drs. Dinisio and Koenigsmann acted with sufficiently culpable states of mind to support liability. To satisfy this prong of the deliberate indifference test, a plaintiff must allege only that the defendant was "aware of facts" from which one could infer that "a substantial risk of serious harm" existed, and that the defendant actually drew that inference. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also Hilton*, 673 F.3d at 127. Here, Dotson asserts that Drs. Dinisio and Koenigsmann reviewed Wrest's evaluation and recommendation that his condition demanded "urgent" care and rejected it, apparently without causing him to be examined again in person or taking any further step. As noted, their denials are alleged to have delayed Dotson's surgery for one year and *39 resulted in the continuation of severe symptoms. Allegations of delayed medical care may support a finding of deliberate indifference to a serious medical need, *see, e.g., Hathaway v. Coughlin*, 841 F.2d 48, 50–51 (2d Cir.1988), and allegations that delayed treatment resulted in serious harm may bear on the reasonableness of an inference of a defendant's knowledge of the risks to which he or she subjected the plaintiff, *see Hilton*, 673 F.3d at 127. We believe Dotson's allegations suffice at this early stage of the litigation to state a plausible claim to relief.

[2] We similarly conclude that the District Court erred by dismissing Dotson's Eighth Amendment claim against Dr. Prince for her affirmative acts. Although mere allegations of medical malpractice are generally insufficient to support liability, *see Estelle v. Gamble*, 429 U.S. 97, 105–06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), allegations regarding the provision of medical care may be actionable under the Eighth Amendment when the alleged malpractice involves culpable recklessness, that is, "an act ... by a prison doctor that evinces a conscious disregard of a substantial risk of serious harm." *Hill*, 657 F.3d at 123 (internal alterations and quotation marks omitted). Here, Dotson alleges that Dr. Prince mismanaged his first surgery by leaving gauze in his ear; that after a second surgery by Dr. Prince, he experienced months of vertigo, "excessive bleeding at the incision, and pain in the eyes," App. 14; and that when he saw Dr. Prince for a follow-up appointment, she admitted that Dotson "now ha[d] a hole in his left ear drum" and that she needed to refer him to someone "more qualified," App. 15. Construing Dotson's *pro se* pleadings, as we must, to raise the strongest arguments they suggest, we rule that Dotson's allegations permit a reasonable inference that Dr. Prince's malpractice rose to a level of culpable recklessness and suffice to state an Eighth Amendment claim.

Finally, we conclude that the District Court improperly dismissed Dotson's First Amendment retaliation claim against Sticht. To state such a claim, an inmate must allege that he engaged in protected conduct and that his conduct was a "substantial or motivating factor" for

an adverse action taken by a prison official. *Holland v. Goord*, 758 F.3d 215, 225 (2d Cir.2014) (internal quotation marks omitted). "[T]emporal proximity of an allegedly retaliatory misbehavior report to a grievance may serve as circumstantial evidence of retaliation." *Gayle v. Gonyea*, 313 F.3d 677, 683 (2d Cir.2002) (citing *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995)). Although Dotson's pleadings on this matter are not a model of clarity, they suggest sufficient temporal proximity between Dotson's complaints of inadequate medical care and Sticht's decision placing Dotson in keeplock to support Dotson's retaliation claim at this pleading stage. With the assistance of counsel, Dotson may replead this claim if he so chooses and the District Court can then reassess its viability.

* * *

We therefore VACATE the judgment of the District Court and REMAND the cause for further proceedings consistent with this order. [3]

3 Our vacatur and remand are without prejudice to any motion to dismiss the complaint that defendants may file after they have been served with the amended complaint. We also leave open the possibility that, represented by counsel, Dotson may propose an additional amended complaint appending any relevant medical documents that he has procured.

All Citations

613 Fed.Appx. 35

End of Document

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

June 2, 2021

Received at:
Central New York
Psychiatric Center
300 River Road
Marcy, NY 13403:
August 24, 2021
H.G.

Howard Griffith
2903 James Street, #1R
Syracuse, NY 13206

RE: In Re Howard Griffith

Dear Mr. Griffith:

The above-entitled petition for an extraordinary writ seeking unspecified relief was received on June 2, 2021. The papers are returned for the following reason(s):

You must specify the type of relief being sought. Rule 20.

Please specify on the cover of your writ the type of relief being sought.

The petition does not state the reasons for not making application to the district court of the district in which you are held. Rule 20.4(a) pertaining to petitions for writs of habeas corpus.

You have not appended a copy of the judgment or order in respect of which the writ is sought. Rule 20.3 pertaining to petitions for writs of prohibition and mandamus.

The petition does not follow the form prescribed by Rule 14 as required by Rule 20.2.

Failure to reflect the changes requested in prior correspondence.

A copy of the corrected petition must be served on opposing counsel.

Sincerely,
Scott S. Harris, Clerk
By: Clayton R. Higgins, Jr.
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HOWARD GRIFFITH; and
REBECCA SKLANEY,

Plaintiffs,

v.

5:20-CV-1312
(GLS/ML)

NEW YORK STATE, Attorney General; and
JAN NASTRI, Lessor, Realtor,

Defendants.

APPEARANCES:

OF COUNSEL:

HOWARD GRIFFITH
Plaintiff, *Pro Se*
2903 James Street, #1R
Syracuse, New York 13206

REBECCA SKLANEY
Plaintiff, *Pro Se*
2903 James Street, #1R
Syracuse, New York 13206

MIROSLAV LOVRIC, United States Magistrate Judge

ORDER and REPORT-RECOMMENDATION

The Clerk has sent this *pro se* Amended Complaint filed by Howard Griffith and Rebecca Sklaney ("Plaintiffs") to the Court for review. (Dkt. No. 20.) Also before the Court are Plaintiffs' "Petition for Extraordinary Writ" (Dkt. No. 21), "Petition for Rehearing for Petition for Writ of Certiorari" (Dkt. No. 22), and "Petition for Extraordinary Writ – Supplemental Brief" (Dkt. No. 23). For the reasons discussed below, I recommend that Plaintiffs' Amended Complaint be dismissed in its entirety without leave to amend. I also recommend that Plaintiffs' petitions (Dkt. Nos. 21, 22, 23) be stricken from the docket, or in the alternative, denied without prejudice.

I. BACKGROUND

On October 22, 2020, Plaintiffs (who are roommates) attempted to commence this matter by filing a motion for a temporary restraining order (Dkt. No. 1) and a motion for leave to proceed *in forma pauperis* (Dkt. No. 2). On October 27, 2020, Senior United States District Judge Gary L. Sharpe issued an order directing that the case be administratively closed for failure to comply with Fed. R. Civ. P. 3. (Dkt. No. 3.) On November 9, 2020, Plaintiffs filed a Complaint (Dkt. No. 4) and an amended motion to proceed *in forma pauperis* (Dkt. No. 5). On December 15, 2020, Plaintiffs filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging Plaintiff Griffith's 2002 conviction for first degree rape. (Dkt. No. 13.)

On December 28, 2020, I issued my first Order and Report-Recommendation, granting Plaintiffs' motion to proceed *in forma pauperis* and recommending dismissal of the Complaint with leave to amend and dismissal of the petition for a writ of habeas corpus without prejudice. (Dkt. No. 17.) In my Order and Report-Recommendation, I recognized that Plaintiffs' Complaint, while extraordinarily difficult to decipher, appeared to allege that Plaintiff Griffith's sex offender status would somehow impinge upon Plaintiffs' voting and housing rights. (*Id.* at 2.) I also found that, while unclear, Plaintiffs' Complaint appeared to assert claims against the New York State Attorney General and Jan Nastri (collectively, "Defendants"), pursuant to: (1) 52 U.S.C. § 10303; (2) 13 U.S.C. § 223, (3) 34 U.S.C. § 30505; (4) the Fifth Amendment and 42 U.S.C. § 1983; (5) the Ninth Amendment and 42 U.S.C. § 1983; (6) the Tenth Amendment and 42 U.S.C. § 1983; and (7) the Fourteenth Amendment and 42 U.S.C. § 1983. (*Id.*)

Because the allegations in Plaintiffs' Complaint consisted of incoherent, rambling text, I was unable to construe whether Plaintiffs stated any colorable claim against Defendants. I

therefore recommended that the Court dismiss Plaintiffs' Complaint as frivolous, pursuant to 28 U.S.C. § 1915(e)(2), with leave to amend. (*Id.* at 6-8.)

On May 4, 2021, Judge Sharpe adopted my Order and Report-Recommendation in its entirety. (Dkt. No. 19.) Plaintiffs thereafter filed the Amended Complaint (Dkt. No. 20), a "Petition for Extraordinary Writ" (Dkt. No. 21), and a "Petition for Rehearing for Petition for Writ of Certiorari" (Dkt. No. 22). On June 9, 2021, Plaintiffs filed a "Petition for Extraordinary Writ – Supplemental Brief." (Dkt. No. 23.)

II. ALLEGATIONS OF THE AMENDED COMPLAINT

Construed as liberally as possible,[1] the Amended Complaint (much like the original Complaint) is very difficult to interpret. The Amended Complaint contains erratic, unintelligible allegations generally relating to Plaintiff Griffith's sex offender status and United States census information. (*See generally* Dkt. No. 20.) Plaintiffs also reference several New York state civil actions where it appears Plaintiff Griffith was a party. (*Id.*)

In a section of the Amended Complaint titled "Basis for Jurisdiction," Plaintiffs list several sections of the United States Code and certain amendments of the United States Constitution, including: (1) 52 U.S.C. § 10303; (2) 13 U.S.C. § 141; (3) 13 U.S.C. § 223; (4) 13 U.S.C. § 231(a)(3); (5) the Fifth Amendment; (6) the Ninth Amendment; (7) the Tenth Amendment; and (8) the Fourteenth Amendment. *(Id.* at 2.) In a section titled "Requested Relief," Plaintiffs appear to request a "[d]eclaration determining that the census without citizenship question needs to be considered as a "test or device" in determining the eligibility to vote, an "injunction [against] law enforcement[,]" and a "[d]eclaration that Jan Nastri can be

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[1] The court must interpret pro se complaints to raise the strongest arguments they suggest. *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir. 1995) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)).

fined up to $500 for refusing or neglecting to furnish the names of the residents at 2903 James Street, Apt. 5, Syracuse, NY 13206." (*Id.* at 6.)

III. LEGAL STANDARD FOR INITIAL REVIEW OF COMPLAINT

"Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).

In order to state a claim upon which relief can be granted, a complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The requirement that a plaintiff "show" that he or she is entitled to relief means that 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) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief . . . requires the . . . court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not shown–that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (internal citation and punctuation omitted).

"In reviewing a complaint . . . the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal

conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

Courts are "obligated to construe a pro se complaint liberally." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009); *see also Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (reading the plaintiff's *pro se* complaint "broadly, as we must" and holding that the complaint sufficiently raised a cognizable claim). "[E]xtreme caution should be exercised in ordering sua sponte dismissal of a pro se complaint before the adverse party has been served and [the] parties . . . have had an opportunity to respond." *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). The Court, however, also has an overarching obligation to determine that a claim is not legally frivolous before permitting a *pro se* plaintiff's complaint to proceed. *See, e.g., Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000) (holding that a district court may *sua sponte* dismiss a frivolous complaint, notwithstanding the fact that the plaintiff paid the statutory filing fee). "Legal frivolity . . . occurs where 'the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint." *Aguilar v. United States*, 99-MC-0304, 99-MC-0408, 1999 WL 1067841, at *2 (D. Conn. Nov. 8, 1999) (quoting *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998)); *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[D]ismissal is proper only if the legal theory . . . or factual contentions lack an arguable basis."); *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995) ("[T]he decision that a complaint is based on an indisputably meritless legal theory for purposes of dismissal under section 1915(d), may be based upon a defense that appears on the face of the complaint.").

IV. ANALYSIS

In addressing the sufficiency of a plaintiff's complaint, the court must construe his pleadings liberally. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008). For the following reasons, I recommend that Plaintiffs' Amended Complaint be dismissed in its entirety.

Plaintiffs' Amended Complaint is type-written and contains numbered sections, including a "Statement of Claim." (Dkt. No. 20 at 2.) However, the allegations contained in the "Statement of Claim" section are unintelligible and do not appear to state any plausible claims against either Defendant. (*Id.*) For example, Plaintiffs allege that "New York State should have been liable for protecting Plaintiff Griffith from Penalties pursuant to N[ew] Y[ork] Correction Law Section 168-t with regard to errors involving the census and invalid identities of people identified as residing in his household." (*Id.* at 2-3.) Plaintiffs also allege that:

> Plaintiff Griffith provided it needed to have been considered for it to have been necessarily appropriate to take actions which may be considered to have obstructed, impeded, or interfered with the distribution of the census, pursuant to 18 USC Section 231(a)(3), as was provided for his sex offender registry, as this was to maintain his safety. The primary cause for this action taken to the state court: "Howard Griffith v. Onondaga County, NY Civil Practice Law and Rules Article 78, SU-2020-005851", was to obtain law [e]nforcement, with regard to the perpetration provided by his landlord and perpetrators on the property of his [shared] policy.

(*Id.* at 3.)

Much like the original Complaint, the Court is unable to meaningfully analyze whether Plaintiffs have pleaded any plausible claims against Defendants in the Amended Complaint. Plaintiffs' Amended Complaint again places an unjustified burden on the Court and would require Defendants to "select the relevant material from a mass of verbiage." *Salahuddin v. Cuomo*, 861 F.2d 40, 41-42 (2d Cir. 1988) (quoting 5 C. Wright & A. Miller, Federal Practice

and Procedure § 1281, at 365 (1969)). Put differently, the Amended Complaint is "confused, ambiguous, vague, or otherwise unintelligible [such] that its true substance, if any, is well disguised." *Salahuddin*, 861 F.2d at 42. As a result, I recommend that the Amended Complaint be dismissed as frivolous. *See Canning v. Hofmann*, 15-CV-0493, 2015 WL 6690170, at *5 (N.D.N.Y. Nov. 2, 2015) (Hurd, J.) ("Under these circumstances, having found that none of the allegations in Plaintiff's meandering and indecipherable Complaint raise a cognizable cause of action, the Court concludes that the Complaint fails to state a claim upon which relief may be granted and is subject to dismissal.").

V. OPPORTUNITY TO AMEND

Generally, a court should not dismiss claims contained in a complaint filed by a *pro se* litigant 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." *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir. 1991); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

Plaintiffs' Amended Complaint, like the original Complaint, again fails to state any non-frivolous claims. Because Plaintiffs have already been granted leave to amend once, I recommend that the Amended Complaint be dismissed without leave to amend. *See Official Comm. of Unsecured Creditors of Color Title, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 168 (2d Cir. 2003) (quoting *Dluhos v. Floating & Abandoned Vessel, Known as "New York,"* 162 F.3d 63, 69 (2d Cir. 1998)) (finding that the "District Court did not abuse its discretion in denying [the plaintiff] leave to amend the complaint because there was a 'repeated failure to cure deficiencies by amendments previously allowed.'"); *Georges v. Rathner*, 17-CV-1245, 2017 WL 7244525, at *3 (N.D.N.Y. Dec. 11, 2017) (Stewart, M.J.) (dismissing, without leave to amend,

pro se complaint that did not suggest any non-frivolous causes of action), *report and recommendation adopted*, 2018 WL 671248 (N.D.N.Y. Jan. 31, 2018) (Sannes, J.).

VI. PLAINTIFFS' PETITIONS

On May 26, 2020, Plaintiffs filed a "Petition for Extraordinary Writ" (Dkt. No. 21) and a "Petition for Rehearing for Petition for Writ of Certiorari." (Dkt. No. 22.) On June 9, 2021, Plaintiffs filed a "Petition for Extraordinary Writ – Supplemental Brief." (Dkt. No. 23.) For the following reasons, I recommend that these petitions be stricken from the docket or denied without prejudice.

While the substance is unclear, the Petition for Extraordinary Writ and Petition for Rehearing for Petition for Writ of Certiorari filed on May 26, 2020 appear as if they were intended to be filed at the United States Supreme Court. (*See generally* Dkt. Nos. 21, 22.) Plaintiffs' third petition, "Petition for Extraordinary Writ – Supplemental Brief," appears to be a supplemental brief associated with one of Plaintiffs' May 26, 2020 petitions. (*See generally* Dkt. No. 23.) In any event, none of these petitions seek relief from this Court, and as a result, fail to comply with Local Rule 7.1(b). I therefore recommend that the Court strike these petitions from the docket. In the alternative, if Plaintiffs intend for these petitions to be construed as an appeal of the Court's May 4, 2021, summary order adopting my first Order and Report-Recommendation, they should be denied without prejudice because no notice of appeal was filed within 30 days of that order. *See* Fed. R. App. P. 4(a)(1)(A).

ACCORDINGLY, it is respectfully

RECOMMENDED that the Court **DISMISS WITHOUT LEAVE TO REPLEAD** Plaintiff's Amended Complaint (Dkt. No. 20) in its entirety, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i); and it is further respectfully

RECOMMENDED that Plaintiff's Petition for Extraordinary Writ (Dkt. No. 21), Petition for Rehearing for Petition for Writ of Certiorari (Dkt. No. 22), and Petition for Extraordinary Writ – Supplemental Brief (Dkt. No. 23) be **STRICKEN** from the docket or **DENIED** without prejudice; and it is further

ORDERED that the Clerk of the Court shall file a copy of this Order and Report-Recommendation on Plaintiffs, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit's decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.[2] Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW**. 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)).

Dated: July 14, 2021
Binghamton, New York

Miroslav Lovric
U.S. Magistrate Judge

[2] If you are proceeding *pro se* and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Howard Griffith et al

vs.

New York State et al

No. 5:20-cv-1312 (GLS/ML)

ORDER TO STRIKE

IT IS HEREBY ORDERED, that the Notice of Entry, DKT #31 in the above-entitled action shall be stricken from the docket for the following reason(s) listed below. Because the submission is being stricken from the docket, it will not be considered by the Court.

1. Document was filed by a non-party

SO ORDERED,

DATED:
August 13, 2021
Albany, NY

Gary L. Sharpe
Senior U.S. District Judge