APPENDIX

Confidential Pursuant to New York Civil Rights Law § 50-b

Exhibit A

State of New York
Court of Appeals

Received:
January 25, 2023
H.G.

BEFORE: HON. MICHAEL J. GARCIA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

HOWARD GRIFFITH,

Appellant.

ORDER DISMISSING LEAVE

Ind. No. 2001-0883-1

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law (CPL) § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is dismissed because the order sought to be appealed from is not appealable under CPL § 450.90(1).

Dated: January 19, 2023

Associate Judge

*Description of Order: Order of the Appellate Division, Fourth Department, entered October 25, 2022, dismissing as unnecessary a motion pursuant to CPL 460.30 to extend the time to move for leave to appeal from an order of County Court, Onondaga County, dated March 28, 2022.

Howard Griffith
2903 James Street, # 1R
Syracuse, NY 13206
315-726-2958

November 17, 2022

New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

RE: People v Griffith, KA 22-01525, 2001-0883-1, 2001-0927

Subject: Application for Request for Leave to Appeal, 22 NYCRR 500.20

Attn.: Clerk of the Court

To Whom It Concerns:

This application is based on a Motion to Vacate Judgment (CPL § 440.10) dated February 3, 2022, in which I attacked my underlying conviction of Rape in the First Degree, NY Penal Law § 130.35(1), with regard to the above referenced matter, in the Onondaga County Court. I am requesting that Leave to Appeal be granted based on a remedy that is with regard to how the Supreme Court of the State of New York, Appellate Division/Fourth Department, "dismissed" my [M]otion dated September 23, 2022, on October 25, 2022. That [M]otion was taken to consider a request for an extension of time (CPL § 460.30) to request leave to appeal (CPL § 460.15) from the Decision/Order of the Onondaga County Court dated March 28, 2022, which denied my Motion to Vacate Judgment. The dismissal is based on the Response by the People conceding that the [M]otion was "unnecessary", with regard to how the People had not yet served me a Notice of Entry for the Decision/Order. The People made that Response on September 29, 2022, and they served me a Notice of Entry with the Decision/Order dated March 28, 2022, on the same date. However, the People served me the Notice of Entry in a separate

mailing package from the Response and did not identify any filing with the Supreme Court of the State of New York, Appellate Division/Fourth Department. I have attached that Notice [ ] to this application. My intention is to proceed with an attempt to obtain a Decision by the New York State Court of Appeals to reconsider my [M]otion dated September 23, 2022, to be deemed to be "dismissed without prejudice". With it, I will need the Court to consider that I intend to pursue to the United States Supreme Court, as I have demonstrated that there was a more fundamental [m]atter that I intend to have considered with [t]his matter, which I need to have further considerations made, with regards to [ ], in the United States Supreme Court. That [m]atter is "People v Griffith, 2020-552", and it will need to be understood how extraordinary circumstances will need to be considered with regard to how it may be deemed how that [m]atter has not yet been finally concluded. It needs to be considered how [t]his matter is affected by another matter which had been decided in the United States Circuit Court of Appeals for the Second Circuit, "Griffith v New York State [ ], 21-2133", and that matter will be able to be considered with [t]his matter in the United States Supreme Court. Once that process is concluded, at that juncture, my [M]otion will be necessary to be reconsidered, along with "People v Griffith, 2020-552", via 22 NYCRR 500.24. With this Court reviewing my [M]otion dated September 23, 2022, the Court will be able to understand the remedies and the process. With it, to be deemed as additional relief that the Court would deem just and proper, I will need the Court to provide a declaration that matters involving the Sex Offender Registration Act are "Confidential" pursuant to NY Civil Rights Law § 50-b. No previous applications have been made with regard to leave to appeal [t]his matter.

Sincerely yours,

Howard Griffith

Howard Griffith

cc: People of the State of New York/County of Onondaga
New York State Attorney General

Attachments:

1) People v Griffith, KA 22-01525, Order: **October 25, 2022,** NY Slip Op 73646(U) **(emphasis added)**

2) Notice of Entry for March 28, 2022. [O]rder of the Onondaga County Court: **September 29, 2022,** with [O]rder dated March 28, 2022, attached **(emphasis added)**

3) Motion for Request for Extension of Time to Take an Appeal: **September 23, 2022 (emphasis added)**

4) People's Response to Defendant's Motion to Request an Extension of Time to Take an Appeal: **September 29, 2022 (emphasis added)**

5) Motion to Vacate Judgment: **February 3, 2022 (emphasis added)**

6) People's Response to Defendant's Motion to Vacate Judgment: **February 28, 2022 (emphasis added)**

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

KA 22-01525

PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

HOWARD GRIFFITH, DEFENDANT-APPELLANT.

Indictment No: 2001-0883-1

Defendant having moved pursuant to CPL 460.30 to extend the time to move for leave to appeal from an order of the Onondaga County Court dated March 28, 2022,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is dismissed as unnecessary.

Memorandum: The People concede that defendant was not served with the decision and order denying his CPL 440.10 motion, and thus his 30-day period in which to file his application for leave to appeal to this Court has not expired (see CPL 460.10 [4][a]).

Received:
November 5, 2022
H.G.

Entered: October 25, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **ANN DILLON FLYNN**, *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original document, now on file in this office.*

SUPREME COURT APPELLATE DIVISION · FOURTH DEPARTMENT ·

***IN WITNESS HEREOF**, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* OCT 25 2022

Ann Dillon Flynn
Clerk

20221025T110025798449 3Z

COUNTY COURT
COUNTY OF ONONDAGA : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-v-

Ind. No. 2001-0883-1
Index No. 2001-0927

HOWARD GRIFFITH,

Defendant.

DECISION/ORDER

The defendant, Howard Griffith, has moved, *pro se*, pursuant to *Article 440 of the Criminal Procedure Law*, for an order of this court setting aside his judgment of conviction upon an *Alford* plea to the crime of *Rape in the First Degree* and vacating the determinate sentence imposed of five years in state prison and five years post-release supervision. The People have opposed the motion.

The defendant has previously filed various post-judgment motions, seeking to vacate his judgment of conviction on various grounds, including: (1) "the indictment [was] fatally flawed as the defect on the face of the indictment is lack of corroboration"; (2) the People's purported withholding of *Brady* material; (3) an alleged deprivation of the effective assistance of counsel; (4) purported failures by the trial court to apprise him of his right to appeal and to hold a hearing following his plea allocution; (5) newly discovered evidence with regard to the victim's accusations against other individuals;

and (6) a claim that he was unconstitutionally confined in the Central New York Psychiatric Center. Each of these claims have been previously considered and denied, based upon procedural and/or substantive grounds.

Initially, the Court notes that defendant never filed a direct appeal of his conviction. Nevertheless, after his release from custody, defendant was deemed to be both a level three offender and a sexually violent offender in accordance with the Sex Offender Registration Act. Defendant subsequently sought a downward modification of the rating, which was denied by this Court. The Appellate Division, Fourth Department subsequently granted defendant a new hearing, on the ground that his counsel had been ineffective in arguing for a lower rating *(People v. Griffith, 166 AD3d 1518, 1519)*. When this Court attempted to schedule a new hearing date, however, defendant declined to participate. Defendant now contends, inter alia, that he has improperly been charged with failing to register as a sex offender.

Denial of an application brought pursuant to *Criminal Procedure Law § 440.10* is mandatory when "[t]he judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal" (*CPL § 440.10[2][b]*). The legislative intent underlying this provision is to prohibit using such a motion as a substitute for direct appeal *(Preiser's Practice Commentaries, McKinney's Consolidated Laws of New York, Book 11A, Criminal Procedure Law § 440.10, pp. 249-250)*. Thus, to the extent that defendant could have raised the instant issues on a direct

appeal and has not done so, the motion is denied. Moreover, with regard to his claims that he is in possession of newly discovered evidence covered evidence and that he was unconstitutionally confined in the Central New York Psychiatric Center, they have already been ruled upon in the context of post-judgment motions. As such, the motion is denied in accordance with *CPL §440.10[3][b]*.

Although defendant has identified new issues that were not included in his prior post-judgment motions, defendant was previously in a position to have raised them. With regard to those claims, then, the motion is denied in accordance with *CPL §440.10[3][b]*.

In any event, defendant is not entitled to expungement of all relevant records because there has been no reversal of the underlying conviction *(Corr. L. 168-n[5])*. Moreover, contrary to his assertions, the People have not waived any opposition to defendant's various filings with the United States Supreme Court.

As such, the defendant's motion is in all respects DENIED without the need for a hearing. This shall constitute the decision and order of the Court.

Dated: March 28, 2022

Thomas J. Miller
Onondaga County Court Judge

To: Howard Griffith
Bradley Oastler, Esq.
Clerk of the Court

NOTICE AS TO FURTHER APPEAL

Pursuant to Section 460.15 of the Criminal Procedure Law, defendant has the right to apply for a certificate granting leave to appeal to an intermediate appellate court. An application for such a certificate must be made in the manner set forth in the rules of the appellate division of this department (see, 22 NYCRR §1000.13[o]).

Received:
September 30, 2022
H.G.

SUPREME COURT
COUNTY OF ONONDAGA STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

HOWARD GRIFFITH,

Defendant.

NOTICE OF ENTRY

Index No. 2001-0883-1
Indictment No. 2001-0927

SIR:

PLEASE TAKE NOTICE of a Decision/Order, of which the within is a copy, duly entered in the Onondaga County Clerk's Office on the 30th day of March, 2022.

DATED: September 29, 2022
Syracuse, New York

WILLIAM J. FITZPATRICK, ESQ.
District Attorney of Onondaga County
Criminal Courthouse, 4th Floor
505 South State Street
Syracuse, NY 13202
Tel: (315) 435-2470

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

Exhibit 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 25th day of August, two thousand twenty-two,

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Howard Griffith,

Plaintiff - Appellant,

Rebecca Sklaney,

Plaintiff,

v.

Jan Nastri, Lessor, Realtor,

Defendants - Appellees.

New York State, Attorney General,

Defendant.

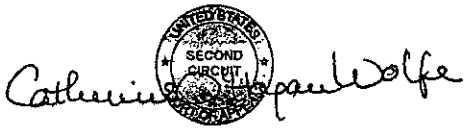
ORDER
Docket No. 21-2133

Received:
August 30, 2022
H.G.

Appellant's Howard Griffith submission of a Motion to recall mandate, reinstate appeal, Motion to proceed in forma pauperis, Acknowledgment and Notice of Appearance, and Form D-P does not comply with the Court's prescribed filing requirements. Despite due notice, the defect has not been cured.

IT IS HEREBY ORDERED that the said Motion to recall mandate, reinstate appeal, Motion to proceed in forma pauperis, Acknowledgment and Notice of Appearance, and Form D-P is stricken from the docket.

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



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: July 28, 2022
Docket #: 21-2133cv
Short Title: Griffith v. New York State

DC Docket #: 20-cv-1312
DC Court: NDNY (SYRACUSE)
DC Judge: Lovric
DC Judge: Sharpe

NOTICE OF DEFECTIVE FILING

On July 28, 2022 the **motion to recall mandate and reinstate appeal, motion to proceed in forma pauperis, acknowledgment and notice of appearance, and form D-P,** on behalf of the **Appellant Howard Griffith,** was submitted in the above referenced case. The documents do not comply with the FRAP or the Court's Local Rules for the following reason(s):

_____ Failure to submit acknowledgment and notice of appearance *(Local Rule 12.3)*
_____ Failure to file the Record on Appeal *(FRAP 10, FRAP 11)*
_____ Missing motion information statement *(T-1080 - Local Rule 27.1)*
_____ Missing supporting papers for motion (e.g, affidavit/affirmation/declaration) *(FRAP 27)*
_____ Insufficient number of copies *(Local Rules: 21.1, 27.1, 30.1, 31.1)*
__X___ **Improper proof of service *(FRAP 25)***
    _____ Missing proof of service
    ___X__ **Served to an incorrect address**
    _____ Incomplete service *(Anders v. California 386 U.S. 738 (1967))*
_____ Failure to submit document in digital format *(Local Rule 25.1)*
_____ Not Text-Searchable *(Local Rule 25.1, Local Rules 25.2),* click here for instructions on how to make PDFs text searchable
_____ Failure to file appendix on CD-ROM *(Local Rule 25.1, Local Rules 25.2)*
_____ Failure to file special appendix *(Local Rule 32.1)*
_____ Defective cover *(FRAP 32)*
    _____ Incorrect caption *(FRAP 32)*
    _____ Wrong color cover *(FRAP 32)*
    _____ Docket number font too small *(Local Rule 32.1)*
_____ Incorrect pagination, click here for instructions on how to paginate PDFs *(Local Rule 32.1)*
_____ Incorrect font *(FRAP 32)*
_____ Oversized filing *(FRAP 27 (motion), FRAP 32 (brief))*
_____ Missing Amicus Curiae filing or motion *(Local Rule 29.1)*

_____ Untimely filing
_____ Incorrect Filing Event
__X___ **Other: you must serve all documents upon the party listed below. You must list the Motion to recall mandate and reinstate appeal, motion to proceed in forma pauperis, acknowledgment and notice of appearance, and form D-P on the certificate of service. Complete the enclosed form and return to the court.**

Jan Nastri
2501 James Street
Syracuse, NY 13206

Please cure the defect(s) and resubmit the document, with the required copies if necessary, no later than **August 18, 2022**. The resubmitted documents, if compliant with FRAP and the Local Rules, will be deemed timely filed.

Failure to cure the defect(s) by the date set forth above will result in the document being stricken. An appellant's failure to cure a defective filing may result in the dismissal of the appeal.

Inquiries regarding this case may be directed to 212-857-8513.

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

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.,

Plaintiffs,

v.

NEW YORK STATE
ATTORNEY GENERAL et al.,

Defendants.

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

SUMMARY ORDER

The above-captioned matter comes to this court following an Order and Report-Recommendation (R&R) by Magistrate Judge Miroslav Lovric, duly filed on December 28, 2020. (Dkt. No. 17.) Following fourteen days from the service thereof, the Clerk has sent the file, including any and all objections filed by the parties herein. Plaintiffs *pro se* Howard Griffith and Rebecca Sklaney filed timely objections to the R&R. (Dkt. No. 18.) For the reasons that follow, the R&R is adopted in its entirety, Griffith's petition[1] for a writ of habeas corpus, (Dkt. No. 13), is dismissed without prejudice, and plaintiffs' complaint, (Compl., Dkt. No. 4), is dismissed with leave to

[1] As noted in the R&R, (Dkt. No. 17 at 10), both plaintiffs signed the petition for a writ of habeas corpus. However, the relief requested only applies to Griffith.

replead.

Plaintiffs bring this action pursuant to 52 U.S.C. § 10303, 13 U.S.C. § 223, 34 U.S.C. § 30505, and 42 U.S.C. § 1983 against defendants New York State Attorney General and Jan Nastri, Lessor, Realtor, asserting various claims, which, although difficult to decipher, appear to revolve around their belief that, because of Griffith's sex offender status, incorrect census information impinged upon their voting and housing rights.[2] (*See generally* Compl.) Prior to initial review, Griffith filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging Griffith's 2002 conviction, upon a guilty plea, for first degree rape in New York State Supreme Court in Onondaga County. (Dkt. No. 13.)

After granting *in forma pauperis* status, Judge Lovric conducted an initial review of the complaint pursuant to 28 U.S.C. §§ 1915(e) and 1915A, as well as a review of the petition for a writ of habeas corpus, and issued the R&R, which recommends dismissal of Griffith's petition, without prejudice, as well as dismissal of plaintiffs' complaint with leave to replead.

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[2] Plaintiffs initially commenced this action by filing a motion for a temporary restraining order. (Dkt. No. 1.) Shortly thereafter, the court issued an order directing that the case be administratively closed for failure to comply with Fed. R. Civ. P. 3. (Dkt. No. 3.)

(Dkt. No. 17 at 15.)

Before entering final judgment, this court routinely reviews all report and recommendation orders in cases it has referred to a magistrate judge. If a party has objected to specific elements of the magistrate judge's findings and recommendations, this court reviews those findings and recommendations *de novo*. *See Almonte v. N.Y. State Div. of Parole*, No. Civ. 904CV484, 2006 WL 149049, at *3 (N.D.N.Y. Jan. 18, 2006). In cases where no party has filed an objection, or only vague or general objections have been filed, this court reviews the findings and recommendations of the magistrate judge for clear error. *See id.* at *5.

Plaintiffs have filed a largely incoherent and incomprehensible document that arguably objects to the R&R. (Dkt. No. 18.) It is extraordinarily difficult for the court to make sense of plaintiffs' objections, if there are any. However, it is clear that plaintiffs do not object to any specific element of Judge Lovric's findings, and, thus, their objections, if they can be considered objections at all, are general and subject to review only for clear error. *See Almonte*, 2006 WL 149049 at *4. The court has carefully considered the R&R, and finds no clear error in Judge Lovric's thorough analysis, which squarely addresses the issues with plaintiffs'

complaint and Griffith's petition for a writ of habeas corpus, and provides multiple, appropriate reasons for dismissal. Accordingly, the R&R is adopted in its entirety.

Accordingly, it is hereby

ORDERED that the Order and Report-Recommendation (Dkt. No. 17) is **ADOPTED** in its entirety; and it is further

ORDERED that Griffith's petition for a writ of habeas corpus (Dkt. No. 13) is **DISMISSED WITHOUT PREJUDICE**; and it is further

ORDERED that plaintiff's complaint (Dkt. No. 4) is **DISMISSED WITHOUT PREJUDICE AND WITH LEAVE TO REPLEAD**; and it is further

ORDERED that plaintiffs may file an amended complaint[3] within thirty (30) days of the date of this Summary Order; and it is further

ORDERED that, if plaintiffs file a timely amended complaint, the Clerk shall forward it to Judge Lovric for review; and it is further

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[3] Any proposed amended complaint must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the court. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). This means that any proposed amended complaint cannot merely refer back to their previous complaint.

ORDERED that, if plaintiffs do not file a timely amended complaint, the Clerk shall enter judgment without further order of the court; and it is further

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

IT IS SO ORDERED.

May 4, 2021
Albany, New York

Gary L. Sharpe
U.S. District Judge

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

I. INTRODUCTION

The Clerk has sent this *pro se* complaint (Dkt. No. 4) together with an amended application to proceed *in forma pauperis* (Dkt. No. 5) and a petition for writ of habeas corpus (Dkt. No. 13) filed by Howard Griffith and Rebecca Sklaney ("Plaintiffs") to the Court for review. For the reasons discussed below, I grant Plaintiffs' amended *in forma pauperis* application (Dkt. No. 5) and recommend that Plaintiffs' (1) Complaint (Dkt. No. 4) be dismissed

with leave to amend, and (2) petition for writ of habeas corpus (Dkt. No. 13) be dismissed without prejudice.

II. BACKGROUND

On October 22, 2020, Plaintiffs (who are roommates) attempted to commence this action 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 the Complaint (Dkt. No. 4) and an amended motion to proceed *in forma pauperis* (Dkt. No. 5). The Complaint asserts causes of action against the New York State Attorney General and Jan Nastri, Lessor, Realtor (collectively "Defendants"). (*See generally* Dkt. No. 4.)

While the Complaint is extraordinarily difficult to decipher, Plaintiffs appear to allege that, because of Plaintiff Griffith's sex offender status, incorrect census information will somehow impinge upon their voting and housing rights. (*Id.*) The Complaint appears to assert causes of action 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. (Dkt. No. 4 at 3.) As relief, Plaintiffs seek "injunctive relief for a restraining order . . . against Jan Nastri[,] [i]njunctive relief with [d]eclaratory [j]udgment, providing this to the United States Attorney General is this is substantive to the unprecedented procedures to complete the 2020 election." (Dkt. No. 4 at 4.)

On December 15, 2020, Plaintiffs filed a petition for a writ of habeas corpus (Dkt. No. 13, Attach. 1), along with a memorandum of law in support (Dkt. No. 13). This filing seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254 and challenges Plaintiff Griffith's 2002 conviction, upon a guilty plea, in Onondaga County for first degree rape. (Dkt. No. 13, Attach. 1 at 1-2.) Plaintiff Griffith appears to argue that his plea was invalid and that his counsel was constitutionally ineffective during his plea and subsequent sex offender registration modification hearings. (Dkt. No. 8 at 49-61.)

III. PLAINTIFFS' AMENDED APPLICATION TO PROCEED *IN FORMA PAUPERIS*

When a civil action is commenced in a federal district court, the statutory filing fee, currently set at $402, must ordinarily be paid. 28 U.S.C. § 1914(a). A court is authorized, however, to permit a litigant to proceed *in forma pauperis* status if a party "is unable to pay" the standard fee for commencing an action. 28 U.S.C. § 1915(a)(1).[1] After reviewing Plaintiffs'

[1] The language of that section is ambiguous because it suggests an intent to limit availability of IFP status to prison inmates. *See* 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). The courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. *Hayes v. United States*, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); *Fridman v. City of N.Y.*, 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002).

amended *in forma pauperis* application (Dkt. No. 5), the Court finds that Plaintiffs meet this standard.[2] Therefore, Plaintiffs' amended application to proceed *in forma pauperis* is granted.[3]

IV. 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

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[2] The United States Department of Health and Human Services publishes yearly Poverty Guidelines. Those guidelines reflect that, for 2020, the poverty threshold for a family/household of one is $12,760. *See* United States Dep't of Health & Human Servs., https://aspe.hhs.gov/poverty-guidelines (last visited December 22, 2020). Individually, Plaintiffs are below this threshold amount. (Dkt. No. 5 at 2-3.) The guidelines also reflect that the poverty threshold for a family/household of two is $17,240. When the incomes of Plaintiffs are combined and considered as one household—because they live together—Plaintiffs are above the threshold for a household of two. However, because it is not clear whether Plaintiffs are financially co-dependent or independent, the Court grants their motion for to proceed *in forma pauperis*.

[3] Plaintiffs are reminded that, although the amended application to proceed *in forma pauperis* has been granted, they will still be required to pay fees that they may incur in this action, including copying and/or witness fees.

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.").

V. 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). Having reviewed Plaintiffs' Complaint with this principle in mind, I recommend that all causes of action be dismissed.

Plaintiffs' Complaint is comprised of twelve pages of incoherent text, written on a form-complaint from the Clerk's office with orders from this Court and New York State Supreme Court, attached to it. (*See generally* Dkt. No. 4.) By way of example, in the "Statement of Claim" portion of the Complaint, Plaintiffs allege as follows:

> The People of the State of New York (10/01/19) and the mayor of Syracuse (04/13/2020) authorized Plaintiff to contact authorities. Governor Cuomo's signed bill, (06/12/2020) interferes as was the remedy provided on 07/27/2020, when the Onondaga County Sheriff ignored the complaint of dangerous activity on the premises of his landlord, Jan Nastri. Plaintiff addressed this to lessor with documents to provide behavior of Perpetrators would be enforced. (08/24/2020)

(Dkt. No. 4 at 4.) Plaintiffs further allege that:

> Lessor's negligence or willfulness to improperly handle the Census construed additional perpetration developing errors with regard to identifying a proper address or household, (09/16/2020) Plaintiff attempted to address all necessary causes or concerns with regard to failure to enforce the law on the property of his proprietor (via state, special proceeding) with regard to both New York State's and Lessor's

> failure to enforce this, as Plaintiff's latest concern was that the census could interfere with his sex offender registry, causing him to be punished.

(Dkt. No. 4 at 5.)

As the Complaint is currently drafted, the Court is unable to meaningfully analyze, whether, and to what extent, Plaintiffs have pleaded any colorable claim against Defendants. (*See generally* Dkt. No. 4.)[4] Plaintiffs' Complaint places an unjustified burden on the Court and, ultimately, on 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)).

As a result, I recommend the Complaint be dismissed as frivolous. *See, e.g., Gillich v. Shields*, 18-CV-0486, 2018 WL 2926299 (N.D.N.Y. Apr. 30, 2018) (Peebles, M.J.), *report and recommendation adopted by* 2018 WL 2926302, at *3 (N.D.N.Y. Jun. 8, 2018) (D'Agostino, J.); *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."); *see also Salahuddin*, 861 F.2d at 42 ("Dismissal [for failure to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure] . . . is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised."). [5]

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[4] The Court also notes that, despite there being two Plaintiffs in this action, the statement of claims portion of the Complaint repeatedly refers to a single Plaintiff. It is unclear whether Plaintiffs' singular use of the word "Plaintiff" was an oversight, and intended to refer to both Plaintiffs, or whether the alleged facts relate only to one of the two Plaintiffs.

[5] In the alternative, the Court recommends that to the extent Plaintiffs seek to assert any causes of action pursuant to 13 U.S.C. § 223, those causes of action be dismissed for failure to

VI. 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."). An opportunity to amend is not required, however, where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *see also Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice."). Stated differently, "[w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend." *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993); *accord, Brown v. Peters*, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.).[6]

In this case, it is not clear whether better pleading would permit Plaintiffs to assert a cognizable cause of action against Defendants. Out of deference to Plaintiffs' *pro se* status, however, I recommend that they be granted leave to amend the Complaint.

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state a claim. "There is no private right of action to enforce either state or federal criminal statutes." *George v. Progressive Ins. Agency, Inc.*, 18-CV-1138, 2018 WL 4660379, at *3 (N.D.N.Y. Sept. 28, 2018) (Baxter, M.J) (citing *Carvel v. Ross*, 09-CV-0722, 2011 WL 856285, at *11-12 (S.D.N.Y. Feb. 6, 2011)).

[6] *See also Carris v. First Student, Inc.*, 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.) (explaining that the standard set forth in *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999)—that the Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)), *rev'd on other grounds*, 682 F. App'x 30.

If Plaintiffs choose to avail themselves of an opportunity to amend, such amended pleading must set forth a short and plain statement of the facts on which they rely to support any legal claims asserted. Fed. R. Civ. P. 8(a). In addition, the amended complaint must include allegations reflecting how the individuals named as Defendants are involved in the allegedly unlawful activity. Finally, Plaintiffs are informed that any such amended complaint will replace the existing Complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (internal quotation marks omitted)).

VII. PLAINTIFFS' PETITION FOR HABEAS CORPUS

Whether an individual can seek habeas relief as an additional method of recovery after a civil complaint has been filed need not be answered because, even assuming that was possible, there are too many deficiencies in Plaintiff Griffith's habeas petition for it to continue in this action.

An individual may only challenge the fact or duration of his confinement through a habeas corpus petition. *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973) (explaining that "the traditional purpose of habeas corpus" is to "attack[] . . . the fact or length of . . . confinement," and if an individual is "seeking something other than immediate or more speedy release," the remedy lies in a different type of action)). A habeas petition requires that "a person [be] in custody pursuant to the judgment of a State Court[.]" 28 U.S.C. § 2254(a).

Further, an application for a writ of habeas corpus may not be granted until a petitioner has exhausted all remedies available in state court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(A), (B)(i), (ii). "A [petitioner] may not circumvent the exhaustion requirement for habeas corpus relief by [attacking a conviction] in a civil action." *Crocker v. Bedford Hills Corr. Facility*, 19-CV-11401, 2020 WL 626374, at *4 (S.D.N.Y. Oct. 23, 2020) (citing *Preiser*, 411 U.S. at 489-90).

Here, there are several problems with Plaintiff Griffith's attempt to seek habeas relief during the course of his civil action. First, federal law provides that a habeas corpus petition "shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. "When the motion is brought by a person other than the prisoner, that 'next friend' must demonstrate that he or she has standing to act on the prisoner's behalf." *Nelson v. Thompson*, 14-CV-3414, 2014 WL 3882322, at *2 (E.D.N.Y. Aug. 7, 2014). Here, the civil action includes two plaintiffs and the habeas petition was signed by Plaintiff Sklaney, despite purporting to challenge Plaintiff Griffith's conviction. (*See* Dkt. No. 13, Attach. 1 at 1, 15.) However, the habeas petition can only concern one individual unless it is being brought by a "next friend" on the petitioner's behalf. Nothing in the pleading indicates that Plaintiff Griffith is incapable of asserting his own rights or advocating for himself. Therefore, there is no reason that Plaintiff Sklaney should have signed the petition on his behalf since it is clear Plaintiff Griffith is the individual who is seeking relief through the petition. Thus, I recommend that the habeas petition be dismissed as deficient.

Second, the habeas statute requires an individual to meet the "in custody" requirement for this Court to have jurisdiction over the petition. *See Hurdle v. Sheehan*, 13-CV-6837, 2016 WL

4773130, at *2 (S.D.N.Y. Sept. 12, 2016) (quoting 28 U.S.C. § 2254(a)) ("A district court has subject matter jurisdiction to consider a state prisoner's petition for habeas relief 'only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States' at the time he files the petition."). It is not clear whether Plaintiff Griffith meets this threshold requirement from these submissions.[7]

Third, Plaintiff Griffith has failed to exhaust his state court remedies with respect to his conviction. To satisfy the exhaustion requirement, a petitioner must do so both procedurally and substantively. Procedural exhaustion requires that a petitioner raise all claims in state court prior to raising them in a federal habeas corpus petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Substantive exhaustion requires that a petitioner "fairly present" each claim for habeas relief in "each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted). In other words, petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.

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[7] The Court notes that on February 13, 2015, Plaintiff Griffith commenced a *pro se* civil rights action in the Northern District of New York, Civil Action No. 5:15-CV-0168 (MAD/ATB) ("*Griffith I*") against New York State Court/Onondaga County and New York State Division of Criminal Justice Services. (*Griffith I*, Dkt. No. 1.) On February 23, 2015, United States Magistrate Judge Andrew T. Baxter issued an order and report-recommendation, that granted Plaintiff Griffith's amended motion to proceed IFP and recommended that the action be dismissed with prejudice for failure to state a claim. (*Griffith I*, Dkt. No. 6.) Judge Baxter concluded that "the plaintiff is requesting relief available only in a habeas corpus application" and "such application is unavailable to him" because his "sentence expired in 2011, so he is not in custody for purposes of a petition for habeas corpus." (*Id.* at 6.) On March 13, 2015, Plaintiff Griffith filed a letter motion requesting that *Griffith I* be dismissed. (*Griffith I*, Dkt. No. 7.) On August 7, 2015, United States District Judge Mae A. D'Agostino granted Plaintiff's notice to withdraw the complaint without ruling on Judge Baxter's report and recommendation. (*Griffith I*, Dkt. No. 8.)

While Plaintiff Griffith includes an Appellate Division decision in support of his filings, it concerns a "modification of his previously-imposed classification as a level three risk pursuant to the Sex Offender Registration Act [("SORA")]." *People v. Griffith*, 166 A.D.3d 1518 (4th Dep't 2018).[8] This decision affirmed Plaintiff Griffith's argument that "he was denied effective assistance of counsel [during his SORA hearing] . . . and . . . reinstate[d] the petition, and remit[ted] the matter to County Court for a new hearing on the [modification] petition." *Griffith*, 166 A.D.3d at 1519. However, the Fourth Department was careful to point out to Plaintiff Griffith that he was not able "to challenge his plea or other aspects of his underlying conviction [because i]t is well settled that a SORA hearing may not be used to challenge the underlying conviction." *Id.* at 1520 (citing cases).

It appears that Plaintiff Griffith mistakenly believes he has exhausted his state law remedies, (Dkt. No. 13, Attach. 1 at 2-3); however, Plaintiff Griffith never raised the issue of the validness of his plea nor the quality of his representation during his underlying criminal proceedings to the state courts. As explained to Plaintiff Griffith in correspondence from Onondaga County Court Judge Thomas J. Miller,

> [T]here is no legal basis for [the court] to order the expungement of any records because the Appellate Division, Fourth Department has not reversed [Plaintiff Griffith's] conviction . . . . Rather, the Fourth Department held that [Plaintiff Griffith] had been deprived of the effective assistance of counsel with regard to [his] prior application for a downward modification of [his] classification as a level three risk under the Sex Offender Registration Act[.]

(Dkt. No. 8 at 70; *accord id.* at 72.) Accordingly, his claims challenging his plea and conviction remain unexhausted.

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[8] Plaintiffs include a copy of the Fourth Department's Decision. (Dkt. No. 8 at 64-66.)

Finally, the petition appears untimely. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year statute of limitations for prisoners to seek federal review of their state court criminal convictions. 28 U.S.C. § 2244(d)(1). The one-year period generally begins to run from the date on which the state criminal conviction became final by the conclusion of direct review or by the expiration of the time to seek direct review. 28 U.S.C. § 2244(d)(1)(A); *Gonzalez v. Thaler*, 565 U.S. 134, 149-50 & n.9 (2012).[9]

The one-year limitation period under AEDPA is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *Saunders v. Senkowski*, 587 F.3d 543, 548 (2d Cir. 2009). The tolling provision "excludes time during which properly filed state relief applications are pending, but does not reset the date from which the one-year statute of limitations begins to run." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam). The tolling provision excludes from the limitations period only the time that the state relief application remained undecided, including the time during which an appeal from the denial of the motion was taken. *Saunders*, 587 F.3d at 548; *Smith*, 208 F.2d at 16.

Here, it does not appear that Plaintiff Griffith filed a direct appeal challenging his conviction. Therefore, because Plaintiff Griffith failed to file a notice of appeal, his conviction became final thirty days after he was sentenced. *See Bethea v. Girdich*, 293 F.3d 577, 578 (2d

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[9] Other dates from which the limitations period may start running are the date on which an unconstitutional, state-created impediment to filing a habeas petition is removed, the date on which the constitutional right on which the petitioner bases his habeas application was initially recognized by the Supreme Court, if the right was newly recognized and made retroactively applicable, or the date on which the factual predicate for the claim or claims presented could have been discovered through the exercise of due diligence (newly discovered evidence). 28 U.S.C. § 2244(d)(1)(B)-(D). None of the bases for a later date upon which the statute of limitations could have begun to run appear to apply in this case.

Cir. 2002) (per curiam) (explaining that the one-year statute of limitations began to run when the petitioner's time for filing a notice of appeal from the judgment of conviction expired); *Vaughan v. Lape*, 05-CV-1323, 2007 WL 2042471, *4 (N.D.N.Y. July 12, 2007) (Hurd, J.) (quoting CPL § 460.10(1)(a)) ("In New York, a defendant has thirty days after the 'imposition of the sentence' to notify the court that he will appeal."); *Gonzalez*, 565 U.S. at 150; *Saunders v. Senkowski*, 587 F.3d 543, 547-49 (2d Cir. 2009). Accordingly, Plaintiff Griffith's conviction became final on February 28, 2002. Therefore, Plaintiff Griffith had until February 28, 2003, to timely file his habeas petition. 28 U.S.C. § 2244(d)(1). The present petition, signed December 14, 2020, is over seventeen years past the termination of the statute of limitations.

Further, based on the information presented in the petition, it does not appear that the statute of limitations should be statutorily or equitably tolled. First, it does not appear that any of Plaintiff Griffith's state-court challenges regarding his SORA modification are properly filed collateral challenges to his underlying conviction. *See Griffith*, 166 A.D.3d at 1520 (citing cases). Second, Plaintiff Griffith's Article 78 petition, assuming it was a proper collateral challenge, was not filed until 2020. This is seventeen and a half years after the statute of limitations expired. Therefore, the Article 78 motion would have no bearing on the present analysis because an application for collateral relief cannot serve to "revive [an] expired statute of limitations." *Gillard v. Sticht*, 16-CV-0513, 2017 WL 318848, at *3 (N.D.N.Y. Jan. 23, 2017) (D'Agostino, J.) (citations omitted); *accord, Roberts v. Artus*, 16-CV-2055, 2016 WL 2727112, at *2 (E.D.N.Y. May 5, 2016) ("If the 440 motion was filed after the one-year statute of limitations period expired, it cannot be counted for purposes of statutory tolling."). Moreover, nothing in Plaintiff Griffith's filings indicate equitable tolling applies to excuse any delays.

Accordingly, at a minimum, I recommend that the habeas petition be dismissed because it is unexhausted. To the extent that this recommendation is accepted by the Court, Plaintiff Griffith may individually file a petition for a writ of habeas corpus; however, any such motion must be filed after all available state remedies have been exhausted, or should explain why such remedies were unavailable to Plaintiff Griffith, as well as address why any such petition should not be dismissed as untimely.

ACCORDINGLY, it is

ORDERED that Plaintiffs' amended IFP application (Dkt. No. 5) is GRANTED; and it is further respectfully

RECOMMENDED that the Court DISMISS WITH LEAVE TO REPLEAD Plaintiffs' Complaint (Dkt. No. 4) for frivolousness, pursuant to 28 U.S.C. § 1915(e)(2)(B); and it is further respectfully

RECOMMENDED that the Court DISMISS WITHOUT PREJUDICE Plaintiffs' petition for habeas corpus (Dkt. No. 13), for failure to exhaust available state court remedies; 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.[10] Such objections shall be filed with the

[10] 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

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: December 28, 2020
Binghamton, New York

Miroslav Lovric
U.S. Magistrate Judge

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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).

Additional material from this filing is available in the Clerk's Office.