

cl rec'd 4/29/24

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 23-7300**

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MUHIDIN SALAD OMAR,

Plaintiff - Appellant,

v.

JOHN C. GARDNER, Attorney at Law,

Defendant - Appellee.

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:23-cv-00057-AWA-LRL)

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Submitted: April 18, 2024

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Decided: April 22, 2024

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Before WILKINSON, NIEMEYER, and THACKER, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Muhidin Salad Omar, Appellant Pro Se.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Muhidin Salad Omar appeals the district court's order dismissing his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), under 28 U.S.C. § 1915(e)(2). We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Omar v. Gardner*, No. 2:23-cv-00057-AWA-LRL (E.D. Va. Nov. 28, 2023). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

MUHIDIN SALAD OMAR,

Plaintiff,

v.

ACTION NO. 2:23cv57

JOHN C. GARDNER,

Defendant.

**DISMISSAL ORDER**

Plaintiff, a federal inmate, submitted this *pro se* action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to redress alleged violations of his constitutional rights. Am. Compl., ECF No. 12. This matter is before the Court for preliminary review of Plaintiff's Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2). This matter is also before the Court to address Plaintiff's Motion for Declaratory Judgment, ECF No. 10, and Motion for Extension, ECF No. 11.

**I. Relevant Background and Procedural History**

By Order entered on August 9, 2023, the Court reviewed Plaintiff's initial Complaint pursuant to its statutory screening obligation. *See Order at 1-2*, ECF No. 9; 28 U.S.C. § 1915(e)(2). Upon review of Plaintiff's Complaint, the Court stated that it was "unable to determine whether Plaintiff has stated a cognizable claim upon which relief may be granted." *Id.* at 1. Specifically, the Court noted that Plaintiff's claims that his "former court-appointed defense counsel violated his rights to due

process and equal protection" were "not cognizable in a *Bivens* action." *Id.* (citing *Conner v. Hart*, No. 7:10cv17, 2010 WL 149893, at \*1 (W.D. Va. Jan. 14, 2010)).

Rather than dismissing this action, the Court, in deference to Plaintiff's *pro se* status, provided Plaintiff with an opportunity to particularize his claims by filing an Amended Complaint. *Id.* at 2–3. The Court ordered Plaintiff to file his Amended Complaint, in accordance with the Court's instructions, within twenty-one days. *Id.* at 2. Thereafter, Plaintiff filed his Amended Complaint, ECF No. 12, along with a Motion for Declaratory Judgment, ECF No. 10, and a Motion for Extension, ECF No. 11.

## **II. Plaintiff's Amended Complaint<sup>1</sup>**

### **A. Parties to this Action**

Plaintiff is a federal inmate currently housed at USP Coleman II in Coleman, Florida. Am. Compl. at 9. Defendant John C. Gardner is Plaintiff's former court-appointed criminal defense attorney. *Id.* at 1.

### **B. Factual Allegations**

In his Amended Complaint, Plaintiff states that Defendant Gardner was appointed to represent Plaintiff on charges of piracy. *Id.* Plaintiff pleaded guilty and was sentenced on October 3, 2011, to life in prison and assessed a \$100.00 special assessment. *Id.* at 2. Plaintiff claims that "on February 23, 2012, . . . another 'closed door' sentencing hearing" was held and a restitution order was issued that requires Plaintiff "to pay [\$]408,000.00." *Id.* Plaintiff alleges that Defendant Gardner

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<sup>1</sup> The Court employs the pagination assigned to the Amended Complaint by the CM/ECF docketing system. The Court also corrects the spelling, capitalization, and punctuation in its references to the Amended Complaint.

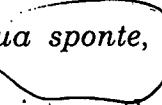
“impermissibly acquiesced” to the restitution order “without Plaintiff’s knowledge . . . [or] authority.” *Id.* at 2–3. Plaintiff claims that Defendant Gardner acted “far beyond the scope of his representation, long after the criminal case against Plaintiff was finalized.” *Id.* at 3. Plaintiff claims that Defendant Gardner’s actions violated Plaintiff’s Fifth, Sixth, and Eighth Amendment rights. *Id.* at 4–6. Plaintiff seeks monetary damages in the amount of \$408,000.00. *Id.* at 8.

### **III. Standard of Review**

Pursuant to the Prison Litigation Reform Act, the Court must dismiss any action filed by a prisoner if the Court determines that the action (1) “is frivolous” or (2) “fails to state a claim on which relief may be granted.” 28 U.S.C. § 1915(e)(2). The first standard includes claims based upon “an indisputably meritless legal theory,” or claims where the “factual contentions are clearly baseless.” *Clay v. Yates*, 809 F. Supp. 417, 427 (E.D. Va. 1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)), *aff’d*, 36 F.3d 1091 (4th Cir. 1994). The second standard is the familiar standard for a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

→ A motion to dismiss under Rule 12(b)(6) should be granted if a complaint fails to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To state a claim on which relief may be granted, a complaint’s factual allegations “must be enough to raise a right to relief above the speculative level.” *Id.* at 555. Under this standard, bare legal conclusions “are not entitled to the assumption of truth” and are insufficient to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678.

Moreover, “[w]here a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* (internal quotation marks omitted).

In determining whether a plaintiff has met the requisite threshold, “a court must consider the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.” *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020). “Importantly, when a plaintiff raises a civil rights issue and files a complaint *pro se*, the court must construe his pleadings liberally.” *Carter v. Fleming*, 879 F.3d 132, 137 (4th Cir. 2018). Nevertheless, the Court will not act as a plaintiff’s advocate and develop, *(sua sponte,*  statutory and constitutional claims that the plaintiff failed to clearly raise on the face of the complaint. *See Brock v. Carroll*, 107 F.3d 241, 243 (4th Cir. 1997) (Luttig, J., concurring); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

#### IV. Analysis

It is both unnecessary and inappropriate to engage in an extended discussion of the lack of merit of Plaintiff’s claims for relief. *See Cochran v. Morris*, 73 F.3d 1310, 1315 (4th Cir. 1996) (emphasizing that “abbreviated treatment” is consistent with Congress’s vision for the disposition of frivolous or “insubstantial claims” (citing *Neitzke*, 490 U.S. at 324)). For the reasons set forth below, Plaintiff’s *Bivens* claims will be **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2) as legally frivolous and for failure to state a claim upon which relief may be granted, and Plaintiff’s Amended Complaint will be **DISMISSED**.

“In order to state a viable claim under *Bivens*, a plaintiff must allege that a person acting under color of federal authority deprived him or her of a constitutional right or of a right conferred by a law of the United States.” *White v. Caroline Det. Facility*, No. 3:20cv906, 2021 WL 2955901, at \*1 (E.D. Va. July 14, 2021) (citing *Williams v. Burgess*, No. 3:09cv115, 2010 WL 1957105, at \*2 (E.D. Va. May 13, 2010)).

Here, Plaintiff alleges that Defendant Gardner, in his capacity as Plaintiff’s court-appointed defense counsel, violated Plaintiff’s constitutional rights. Am. Compl. at 1–6. As the Court noted in its prior Order, however, such claims are not cognizable in a *Bivens* action because “attorneys appointed to represent defendants in federal proceedings are not federal officials for purposes of Bivens.” *Conner v. Hart*, No. 7:10cv17, 2010 WL 149893, at \*1 (W.D. Va. Jan. 14, 2010) (quoting *Anderson v. Sonenberg*, 111 F.3d 962 (D.C. Cir. 1997)). As this Court has previously explained, *Bivens* claims against criminal defense attorneys are “legally frivolous, because a criminal defense attorney does not act under color of federal law and is not amenable to suit under *Bivens*.” *Lee v. Mastandrea-Miller*, No. 3:20cv318, 2020 WL 7407871, at \*4 n.3 (E.D. Va. Dec. 17, 2020) (citing *Cox v. Hellerstein*, 685 F.2d 1098, 1099 (9th Cir. 1982)), *aff’d*, 851 F. App’x 390 (4th Cir. 2021); *see also Butts v. Babineau*, No. 2:08cv309, 2008 WL 7164683, at \*1 (E.D. Va. July 28, 2008) (dismissing plaintiff’s *Bivens* and 42 U.S.C. § 1983 claims against his former defense counsel for failure to state a claim upon which relief may be granted because such a “defendant is not amenable to suit under either § 1983 or *Bivens*”), *aff’d*, 318 F. App’x 165 (4th Cir. 2009).

Accordingly, under the legal standards discussed above, Plaintiff's *Bivens* claims against Defendant Gardner are **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2) as legally frivolous and for failure to state a claim upon which relief may be granted. Further, the Court finds that granting Plaintiff leave to amend his claims against Defendant Gardner would be futile and declines to do so.

**V. Plaintiff's Motion for Extension**

In his extension motion, Plaintiff seeks additional time to obtain photocopies of the transcripts of his sentencing hearing and the Court's restitution order in his criminal case. Mot. Extension at 1. As discussed above, the claims that Plaintiff seeks to raise in this case are not cognizable in a *Bivens* action because Defendant Gardner did not act under color of federal law in his capacity as Plaintiff's criminal defense attorney. The Court has determined this action should be dismissed on that basis and the documents that Plaintiff seeks to submit have no possible bearing on that determination. Accordingly, the Court finds that Plaintiff's Motion for Extension, ECF No. 11, should be **DENIED**.

**VI. Conclusion**

For the reasons set forth above, Plaintiff's Motion for Extension, ECF No. 11, is **DENIED**; Plaintiff's *Bivens* claims against Defendant Gardner are **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2) as legally frivolous and for failure to state a claim upon which relief may be granted; and this action is **DISMISSED**. Finally, Plaintiff's Motion for Declaratory Judgment, ECF No. 10, is **DISMISSED as moot**.

Plaintiff may appeal from this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse,

600 Granby Street, Norfolk, Virginia 23510. Plaintiff's written notice must be received by the Clerk within thirty days of the date of entry of this Dismissal Order. If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* shall be submitted to the Clerk of the United States Court of Appeals, Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **DIRECTED** to please send a copy of this Dismissal Order to Plaintiff Muhidin Salad Omar.

**IT IS SO ORDERED.**

/s/

Arenda L. Wright Allen  
United States District Judge

Norfolk, Virginia  
November 28, 2023

2 Recd 7/2/24

FILED: June 25, 2024

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 23-7300  
(2:23-cv-00057-AWA-LRL)

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MUHIDIN SALAD OMAR

Plaintiff - Appellant

v.

JOHN C. GARDNER, Attorney at Law

Defendant - Appellee

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ORDER

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The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court ~~denies~~ the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk