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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODRICK C. REED,)	Case No. CV 10-8315-SVW (OP)
)	
v.)	MEMORANDUM AND ORDER
Plaintiff,)	DISMISSING COMPLAINT WITH
)	LEAVE TO AMEND
TY LABBE, et al.,)	
)	
Defendants.)	

I.
PROCEEDINGS

On November 3, 2010, Rodrick C. Reed (“Plaintiff”) filed a pro se Civil Rights Complaint pursuant to 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (“Complaint”), after having paid the requisite filing fee. (ECF No. 1.) The named Defendants are as follows: (1) Ty Labbe, investigative agent, Los Angeles County Sheriff’s Department/Federal Bureau of Investigation (“FBI”); (2) David Hand, FBI; (3) Carlos Quezada, investigative agent, L.A. County Sheriff’s Dept.; (4) John Sieder, investigative agent, Drug Enforcement Administration (“DEA”); (5) Groenow, investigative agent, L.A. County Sheriff’s Dept.; (6) Bradley Clemmer, investigative agent, DEA; (7) Heather Thomas,

1 Verizon Telephone Company; (8) Verizon Telephone Company; (9) David
2 Stinnett, intelligence analyst/investigative agent, DEA; (10) Kevin Pang, special
3 agent, DEA; (11) Steven Woodland; (12) Charles Duncan, investigative agent,
4 L.A. County Sheriff's Dept.; (13) Laverne Mathews, investigative agent, DEA;
5 (14) Dennis Barpon, investigative agent, L.A. County Sheriff's Dept.; (15) Sandra
6 Lopez, investigative agent, DEA; (16) William Tackaberry, investigative agent,
7 L.A. County Sheriff's Dept.; (17) Phillip Marquez, investigative agent, L.A.
8 County Sheriff's Dept.; (18) Joe Moussiauy, investigative agent, DEA; (19) John
9 Maxwell, investigative agent, L.A. County Sheriff's Dept.; (20) Jorre Valdez,
10 investigative agent, L.A. County Sheriff's Dept.; (21) Jeffrey Boset, investigative
11 agent, L.A. County Sheriff's Dept.; (22) Quilnes Rodriguez, investigative agent,
12 L.A. County Sheriff's Dept.; (23) Jerry Ortiz, investigative agent, L.A. County
13 Sheriff's Dept.; (24) Chris Cline, investigative agent, DEA; (25) Grey Cunneis,
14 investigative agent, DEA; (26) Tom Cielecy, investigative agent, DEA; (27) DEA,
15 California Division; (28) FBI, California Division; (29) L.A. County Sheriff's
16 Dept.; (30) Debra Yang, United States Attorney; (31) Jacqueline Chooljian,
17 Assistant United States Attorney; (32) Janet Hudson, Assistant United States
18 Attorney; (33) Office of the United States Attorney; and (34) United States of
19 America. All individual Defendants are being sued in their individual and official
20 capacities. Plaintiff seeks damages, as well as injunctive and declaratory relief.

21 On June 7, 2011, the federal agency and employee defendants ("Federal
22 Defendants") filed a Motion to Dismiss the Complaint. (ECF No. 10.) On August
23 16, 2011, Plaintiff filed an Opposition to the Motion to Dismiss. (ECF No. 27.)
24 On August 29, 2011, Federal Defendants filed a Reply to Plaintiff's Opposition.
25 (ECF No. 30.)

26 On June 6, 2011, Heather Thomas and Cellco Partnership, dba Verizon
27 Wireless ("Verizon Defendants"), filed a Motion to Quash Plaintiff's Attempted
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1 Service of Process. (ECF No. 8.) Plaintiff's Opposition to the Motion to Dismiss
2 also addressed the issue of defective service. (ECF No. 27 at 7-12.)

3 **II.**

4 **PLAINTIFF'S ALLEGATIONS**

5 **A. Plaintiff's Claims.**

6 Plaintiff's claims arise out of the issuance of wiretap orders and the
7 interception of telephone conversations which were used to prosecute him for
8 federal drug and firearm violations in this District, case number EDCR 03-84-
9 VAP.¹

10 In Claim 1, Plaintiff alleges a statutory violation of the Wiretap Act (18
11 U.S.C. §§ 2510, et seq.) against Federal Defendants Sieder, Clemmer, Pang,
12 Cielecy, Labbe, and Hand, in addition to Defendants Verizon Wireless, Quezada,
13 and Duncan based on conduct that took place between February 26, 2003, and
14 March 28, 2003. (Compl. ¶¶ 45-49.)

15 In Claim 2, Plaintiff alleges additional statutory violations of the Wiretap
16 Act against Federal Defendants Cielecy, Hand, Labbe, Clemmer, and Sieder, in
17 addition to Defendant Duncan based on conduct that took place on May 8, 2003.
18 (Id. ¶¶ 50-51.)

19 In Claim 3, although unclear, Plaintiff appears to allege a statutory violation
20 of the Wiretap Act and civil conspiracy against Federal Defendants Labbe, Hand,
21 Sieder, Clemmer, and Cielecy, in addition to Defendants Duncan, Thomas, and
22 Verizon Wireless based on conduct that took place between April 4, 2003, and
23 April 16, 2003. (Id. ¶¶ 52-54.)

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26 ¹ On July 28, 2005, Plaintiff was convicted after a jury trial. (EDCR 03-84-
27 VAP ECF Nos. 1001, 1002.) On January 17, 2006, Defendant was sentenced to
28 life imprisonment in the custody of the Bureau of Prisons. (Id. ECF No. 1190.)
The Court takes judicial notice of its own records.

1 In Claim 4, Plaintiff alleges a statutory violation of the Wiretap Act and
2 civil conspiracy against Federal Defendants Labbe, Hand, Sieder, Clemmer,
3 Stinnett, Pang, Woodland, Matthews, Moussiaux, Cline, Conners, and Cielecy, in
4 addition to Defendants Starkey, Quezada, Duncan, Groenow, Thomas, Verizon
5 Wireless, Barpon, Tackaberry, Marquez, Maxwell, Valdez, Bosket, Rodriguez,
6 and Ortiz based on conduct that took place between April 4, 2003, and April 16,
7 2003. (Id. ¶¶ 55-57.)

8 In Claim 5, Plaintiff alleges statutory violations of the Wiretap Act, the Pen
9 Register Statutes (18 U.S.C. §§ 3121, et seq.), civil conspiracy, and fraud against
10 Federal Defendants Matthews, Labbe, Hand, and Sieder, in addition to Defendants
11 Thomas, Verizon Wireless, and Starkey based on conduct that took place between
12 April 4, 2003, and April 16, 2003. (Id. ¶¶ 58-67.)

13 In Claim 6, Plaintiff alleges statutory violations of the Wiretap Act, the Pen
14 Register Statutes, and civil conspiracy against Federal Defendants Labbe and
15 Hand, in addition to Defendants Duncan, Thomas, and Verizon Wireless based on
16 conduct that took place on or about January 24, 2003. (Id. ¶¶ 68-74.)

17 In Claim 7, Plaintiff alleges violations of the First and Fourth Amendment
18 pursuant to 42 U.S.C. § 1983 and civil conspiracy against Federal Defendants
19 Labbe, Hand, Clemmer, Sieder, Stinnett, Pang, Woodland, Matthews, Moussiaux,
20 Cline, Conners, and Cielecy, in addition to Defendants Duncan, Thomas, Verizon
21 Wireless, Barpon, Tackaberry, Marquez, Maxwell, Valdez, Bosket, Rodriguez,
22 and Ortiz. (Id. ¶¶ 75-77.)

23 In Claim 8, Plaintiff alleges a Fifth Amendment due process violation
24 pursuant to 42 U.S.C. § 1983 against Federal Defendants Yang, the United States
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1 Attorney's Office, the United States of America, Labbe, Hand, Sieder, Clemmer,
2 and Matthews, in addition to Defendant Duncan. (Id. ¶¶ 78-80.)²

3 In Claim 9, Plaintiff alleges perjury and the offering of false declarations in
4 violation of 18 U.S.C. § 1623 (a criminal statute³) against Federal Defendants
5 Labbe, Hand, Sieder, Clemmer, Stinnett, Pang, Woodland, Matthews, Moussiaux,
6 Cline, Conners, and Cielecy, in addition to Defendants Quezada, Thomas, Verizon
7 Wireless, Starkey, Duncan, Barpon, Tackaberry, Marquez, Maxwell, Valdez,
8 Bosket, Rodriguez, and Ortiz. (Id. ¶¶ 81-83.)

9 In Claim 10, Plaintiff alleges a vague conspiracy claim pursuant to 18
10 U.S.C. § 241 (a criminal statute⁴) against all defendants based on conduct that took
11 place between April 4, 2003, and April 16, 2003, and in July 2005. (Id. ¶¶ 84-86.)

12 In Claim 11, alleges a vague claim of deprivation of rights pursuant to 18
13 U.S.C. § 242 (a criminal statute⁵) against all defendants based on conduct that took
14 place between April 4, 2003, and April 16, 2003, and in July 2005. (Id. ¶¶ 87-89.)
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18 ² The Court notes that Plaintiff erroneously labeled paragraph 78 as
19 paragraph 76. In addition, Plaintiff has omitted a paragraph 79.

20 ³ There is no private right of action or basis for a civil suit based on
21 violations of criminal statutes. See Allen v. Gold Country Casino, 464 F.3d 1044,
22 1048 (9th Cir. 2006) (affirming dismissal of claims under 18 U.S.C. §§ 241 and
23 242 as criminal statutes not giving rise to civil liability); Peabody v. United States,
394 F.2d 175, 177 (9th Cir. 1968).

24 ⁴ There is no private right of action or basis for a civil suit based on
25 violations of criminal statutes. See Allen, 464 F.3d at 1048; Peabody, 394 F.2d at
26 177.

27 ⁵ There is no private right of action or basis for a civil suit based on
28 violations of criminal statutes. See Allen, 464 F.3d at 1048; Peabody, 394 F.2d at
177.

1 In Claim 12, Plaintiff alleges unlawful interception of telephone
2 conversations pursuant to 18 U.S.C. § 306, 902, 903, 3004⁶ against Federal
3 Defendants Labbe, Hand, Sieder, Clemmer, Stinnett, Pang, Woodland, Moussiaux,
4 Cline, and Conners, in addition to Defendants Quezada, Groenow, Thomas,
5 Verizon Wireless, Starkey, Duncan, Barpon, Tackaberry, Marquez, Maxwell,
6 Valdez, Bosket, Rodriguez, and Ortiz based on conduct that took place between
7 April 4, 2003, and April 16, 2003. (Id. ¶¶ 92-93.)

8 In Claim 13, Plaintiff alleges a violation of his common law right to privacy
9 against all Defendants. (Id. ¶ 94.)

10 In Claim 14, Plaintiff alleges a common law claim of abuse of process
11 against all Defendants. (Id. ¶¶ 95-96.)

12 In Claim 15, Plaintiff alleges a common law conspiracy against all
13 Defendants. (Id. ¶ 97.)

14 **B. Factual Background.**

15 The crux of Plaintiff’s allegations is that Defendants used wiretap orders
16 issued by a district judge of this Court to unlawfully intercept telephone
17 conversations not covered by the orders. Plaintiff further alleges that law
18 enforcement personnel provided faulty affidavits in seeking the wiretap orders,
19 disregarded the “rules en[]umerated in the Court Orders and Supervising
20 Attorney’s Memorandum,” failed to preserve wiretap data and destroyed evidence
21 of their wrongdoings, and offered misleading testimony at Plaintiff’s criminal trial
22 regarding the wiretaps and evidence thereof.

23 Before his criminal trial, Plaintiff filed two motions to suppress the wiretap
24 evidence, asserting similar arguments he raises in the current Complaint. After
25 hearings before the trial court, the motions were denied. United States v. Reed,

27 ⁶ Sections 306, 902, and 903 do not exist in the United States Code and
28 section 3004 is entitled “Decorum in the court room.”

1 575 F.3d 900, 907 (9th Cir. 2009). On appeal of his conviction, Plaintiff again
2 challenged the wiretap evidence, but his claims failed. The Ninth Circuit held as
3 follows: (1) the Government's wiretap application satisfied the necessity
4 requirement; (2) the district court did not err in finding that the Government had
5 not intercepted telephone calls on a line for which there was no court order; (3) the
6 Government was not required to seal call data content, and it timely sealed the
7 wiretap recordings under 18 U.S.C. § 2518(8); and (4) the Government did not
8 violate the statutory wiretap monitoring requirements of 18 U.S.C. § 2518(5). Id.
9 at 904-05, 908-19.

10 **C. Motion to Dismiss Pursuant to Rule 12 (b)(6).**

11 Federal Defendants move to dismiss the Complaint pursuant to Rules 4(m),
12 12(b)(1), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure on the
13 following grounds: (1) the Court lacks subject matter jurisdiction over any
14 constitutional tort claims against Federal Defendants because the United States has
15 not waived its sovereign immunity; (2) the Court lacks subject matter jurisdiction
16 over any claims under the Federal Tort Claims Act because Plaintiff failed to
17 exhaust administrative remedies; (3) the United States of America is the only
18 proper defendant under the Federal Tort Claims Act; (4) Plaintiff's Bivens claims
19 against the federal prosecutors are barred by prosecutorial immunity; (5) Plaintiff
20 has not properly pled a Bivens claim; (6) Federal Defendants are entitled to
21 qualified immunity against Plaintiff's Bivens claims; (7) the entire action is Heck-
22 barred;⁷ and (8) Plaintiff has not properly effected service of the Complaint on any
23 federal defendant. (ECF No. 10 at 1-2.)⁸

25 ⁷ Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383
26 (1994).

27 ⁸ Federal Defendants also listed the statute of limitations under the Federal

28 (continued...)

1 Defendants Heather Thomas and Verizon Wireless have also move to quash
2 Plaintiff’s attempted service of process. (ECF No. 8.)

3 **III.**

4 **STANDARD OF REVIEW**

5 Complaints such as Plaintiff’s are subject to the court’s sua sponte review
6 under provisions of the Prison Litigation Reform Act of 1995 (“PLRA”). See 28
7 U.S.C. § 1915A(a). The court shall dismiss such a complaint, at any time, if the
8 court finds that it (1) is frivolous or malicious, (2) fails to state a claim on which
9 relief may be granted, or (3) seeks monetary relief from a defendant immune from
10 such relief. See Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000) (en
11 banc); 28 U.S.C. § 1915A(b) (prisoner complaints against government
12 defendants).⁹

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⁸(...continued)

15 Tort Claims Act as a grounds for dismissal but does not include argument to this
16 effect in the motion. As a result, it is unclear whether Federal Defendants
17 intended to raise this ground in the motion to dismiss. Thus, the Court does not
18 consider this issue.

19 ⁹ Initial screening of complaints is covered by overlapping provisions of the
20 PLRA. Lopez, 203 F.3d at 1126-27 & n.7. Screening of complaints by plaintiffs
21 (prisoner or non-prisoner) who seek to proceed in forma pauperis is governed by
22 28 U.S.C. § 1915(e)(2). Lopez, 203 F.3d at 1126-27 & n.7; Calhoun v. Stahl, 254
23 F.3d 845, 845 (9th Cir. 2001) (per curiam) (§ 1915 applies to all applicants for in
24 forma pauperis status, prisoner or non-prisoner). Under 28 U.S.C. § 1915A, courts
25 are directed to review, as soon as practicable, “a complaint in a civil action in
26 which a prisoner seeks redress from a governmental entity or officer or employee
27 of a governmental entity.” 28 U.S.C. § 1915A(a). Thus, § 1915A screening
28 applies to prisoner complaints even if the filing fee has been paid in full. See, e.g.,
Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007) (§ 1915 governs proceedings in
forma pauperis and § 1915A applies to civil complaints by prisoners against
governmental defendants regardless of whether the prisoner has paid a filing fee);

(continued...)

1 PLRA review for failure to state a claim applies the same standard applied
2 in reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6) of
3 the Federal Rules of Civil Procedure. See Barren v. Harrington, 152 F.3d 1193,
4 1194 (9th Cir. 1998). A Rule 12(b)(6) motion tests the formal sufficiency of a
5 statement of claim for relief. A complaint may be dismissed as a matter of law for
6 failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or
7 (2) insufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica
8 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff's allegations of
9 material fact must be taken as true and construed in the light most favorable to the
10 plaintiff. See Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). Since
11 Plaintiff is appearing pro se, the Court must construe the allegations of the
12 complaint liberally and must afford Plaintiff the benefit of any doubt. See Karim-
13 Panahi v. L.A. Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988).

14 Under Rule 8(a)(2) of the Federal Rule of Civil Procedure, a complaint must
15 contain a "short and plain statement of the claim showing that the pleader is
16 entitled to relief." The Supreme Court has explained the pleading requirements of
17 Rule 8(a)(2) and the requirements for surviving a Rule 12(b)(6) motion to dismiss.
18 See Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009);
19 Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per
20

21 _____
22 ⁹(...continued)

23 Muhammad v. Ortiz, No. F 04-5534-AWI-WMW-P, 2006 WL 845640, at *11 &
24 n.2 (E.D. Cal. March 30, 2006) (§ 1915A screening applies even if prisoner
25 plaintiff paid full filing fee); Hernandez v. Terhune, No. C 00-0848-WHA(PR),
26 2000 WL 1847645, at *1 (N.D. Cal. Dec.12, 2000) (Second, Fifth, Sixth, Seventh,
27 and Tenth Circuits have all found that § 1915A applied "even if the prisoner is not
28 proceeding in forma pauperis"). A third provision governs screening of prisoner
complaints about prison conditions not restricted to in forma pauperis actions. See
42 U.S.C. § 1997e(c); Lopez, 203 F.3d at 1126 n.7.

1 curiam); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d
2 929 (2007); Moss v. U.S. Secret Service, 572 F.3d 962 (9th Cir. 2009).

3 With respect to a plaintiff’s pleading burden, the Supreme Court held that
4 while a complaint does not need detailed factual allegations, “a plaintiff’s
5 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
6 than labels and conclusions, and a formulaic recitation of the elements of a cause
7 of action will not do. Factual allegations must be enough to raise a right to relief
8 above the speculative level on the assumption that all the allegations in the
9 complaint are true (even if doubtful in fact).” Bell Atl., 550 U.S. at 553-56
10 (citations and footnote omitted), abrogating Conley v. Gibson, 355 U.S. 41, 45-46,
11 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (dismissal under Rule 12(b)(6) is appropriate
12 “only if it is clear that no relief could be granted under any set of facts that could
13 be proved consistent with the allegations.”); see also Iqbal, 129 S. Ct. at 1949;
14 Erickson, 551 U.S. at 93; Moss, 572 F.3d at 968.

15 In order to comply with the requirements of Rule 8(a)(2) and survive a
16 motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient
17 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
18 face.’” Iqbal, 129 S. Ct. at 1949 (quoting Bell Atl., 550 U.S. at 570). “A claim
19 has facial plausibility when the plaintiff pleads factual content that allows the
20 court to draw the reasonable inference that the defendant is liable for the
21 misconduct alleged.” Id. (citing Bell Atl., 550 U.S. at 556). This plausibility
22 standard is not a probability requirement, but does ask for more than mere
23 possibility; if a complaint pleads facts “merely consistent with” a theory of
24 liability, it falls short of “the line between possibility and plausibility.” Id.
25 (quoting Bell Atl., 550 U.S. at 557).

26 The Supreme Court has set out a two-pronged approach for reviewing a
27 possible failure to state a claim. Id. at 1949-50; see also Moss, 572 F.3d at 969-
28 70. First, the reviewing court may identify those statements in a complaint that are

1 actually conclusions, even if presented as factual allegations. Id. Such conclusory
2 statements (unlike proper factual allegations) are not entitled to a presumption of
3 truth. Id. In this context it is the conclusory nature of the statements (rather than
4 any fanciful or nonsensical nature) “that disentitles them to the presumption of
5 truth.” Id. at 1951. Second, the reviewing court presumes the truth of any
6 remaining “well-pleaded factual allegations,” and determines whether these factual
7 allegations and reasonable inferences from them plausibly support a claim for
8 relief. Id. at 1950; see also Moss, 572 F.3d at 969-70.

9 The Court is not concerned at this stage with “whether a plaintiff will
10 ultimately prevail” but with whether he is entitled to offer evidence to support his
11 claims. See Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 960 (9th Cir.
12 2009) (citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d
13 90 (1974)). However, a complaint consisting of unintelligible, narrative ramblings
14 fails to state a claim for relief. See McHenry v. Renne, 84 F.3d 1172, 1176-79
15 (9th Cir. 1996); see also Awala v. Roberts, No. 07-0179 JSW (PR), 2007 WL
16 174404, at *1 (N.D. Cal. Jan. 22, 2007); Fed. R. Civ. P. 8(a)(1), (2), (d)(1).

17 Although the scope of review generally is limited to the contents of the
18 complaint, the Court may also consider exhibits submitted with the complaint, Hal
19 Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th
20 Cir. 1990), and “take judicial notice of matters of public record outside the
21 pleadings,” Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).
22 Exhibits that contradict the allegations of a complaint may fatally undermine those
23 allegations. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001),
24 amended by 275 F.3d 1187 (2001) (a plaintiff can “plead himself out of a claim by
25 including . . . details contrary to his claims.”).

26 If the court finds that a complaint should be dismissed for failure to state a
27 claim, the court may dismiss with or without leave to amend. Lopez, 203 F.3d at
28 1126-30. Leave to amend should be granted if it appears that defects can be

1 corrected, especially if the plaintiff is pro se. Id. at 1130-31; see also Cato v.
2 United States, 70 F.3d 1103, 1106 (9th Cir. 1995). If, however, after careful
3 consideration, it is clear that a complaint cannot be cured by amendment, the court
4 may dismiss without leave to amend. Cato, 70 F.3d at 1107-11.

5 **IV.**

6 **DISCUSSION**

7 **A. The Complaint Is Subject to Dismissal for Failure to State a *Bivens***
8 **Claim Against Federal Defendants in Their Official Capacities.**

9 In Claims 7 and 8, Plaintiff alleges violations of the First, Fourth, and Fifth
10 Amendments against Federal Defendants Labbe, Hand, Clemmer, Sieder, Stinnett,
11 Pang, Woodland, Matthews, Moussiaux, Cline, Conners, Yang, Chooljian,
12 Hudson, the United States Attorney's Office, and the United States of America.
13 (Compl. ¶¶ 75-80.) All Defendants are being sued in their individual and official
14 capacities. (Id. ¶¶ 6-40.) Plaintiff seeks damages, as well as injunctive and
15 declaratory relief.

16 The United States, its agencies, and its employees in their official capacities
17 are absolutely immune from suit on constitutional claims for damages. See, e.g.,
18 Pereira v. U.S. Postal Service, 964 F.2d 873, 876-77 (9th Cir. 1992); Daly-Murphy
19 v. Winston, 837 F.2d 348, 355-56 (9th Cir. 1987); see also FDIC v. Meyer, 510
20 U.S. 471, 486-87, 114 S. Ct. 966, 127 L. Ed. 2d 308 (1994). Bivens does not
21 permit suits against the government or its agencies for monetary relief. Cato v.
22 United States, 70 F.3d 1103, 1110-11 (9th Cir. 1995). Thus, to the extent Plaintiff
23 is seeking damages against Federal Defendants in their official capacities, the
24 Complaint is subject to dismissal as to Claims 7 and 8 for failure to state a claim
25 for relief.

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1 **B. The Complaint Is Subject to Dismissal based on Prosecutorial**
2 **Immunity.**

3 In Claim 8, Plaintiff alleges a violation of the Fifth Amendment against
4 Federal Defendants Yang, Chooljian, Hudson, the United States Attorney’s Office,
5 and the United States of America based on their involvement in Plaintiff’s
6 criminal prosecution. (Compl. ¶¶ 75-80.)

7 Prosecutorial immunity protects eligible government officials who perform
8 functions “intimately associated with the judicial phase of the criminal process.”
9 Imbler v. Pachtman, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976);
10 see also Buckley v. Fitzsimmons, 509 U.S. 259, 269-70, 113 S. Ct. 2606, 125 L.
11 Ed. 2d 209 (1993). “Such immunity applies even if it leaves the genuinely
12 wronged [plaintiff] without civil redress against a prosecutor whose malicious or
13 dishonest action deprives him of liberty.” Ashelman v. Pope, 793 F.2d 1072, 1075
14 (9th Cir. 1986) (internal quotations omitted). A prosecutor is protected by
15 absolute immunity for any actions “if the prosecutor acts within the scope of his or
16 her authority and in a quasi-judicial capacity.” Ybarra v. Reno Thunderbird
17 Mobile Home Vill., 723 F.2d 675, 678 (9th Cir. 1984).

18 Because Defendants’ actions related to the criminal prosecution of Plaintiff,
19 they were acting within the scope of their authority and in a quasi-judicial
20 capacity. As a result, they are shielded from liability on Plaintiff’s constitutional
21 claims based on prosecutorial immunity. Thus, the Complaint is subject to
22 dismissal as to Claim 8 for failure to state a claim for relief.

23 **C. The Complaint Is Subject to Dismissal Pursuant to *Heck v. Humphrey*.**

24 In Claims 7 and 8, Plaintiff alleges violations of the First, Fourth, and Fifth
25 Amendments against Federal Defendants Labbe, Hand, Clemmer, Sieder, Stinnett,
26 Pang, Woodland, Matthews, Moussiaux, Cline, Conners, Yang, Chooljian,
27 Hudson, the United States Attorney’s Office, and the United States of America.
28 (Compl. ¶¶ 75-80.) Claims 7 and 8 also allege the same constitutional violations

1 against County Defendants Duncan, Thomas, Barpon, Tackaberry, Marquez,
2 Maxwell, Valdez, Bosket, Rodriguez, and Ortiz. (Id. ¶¶ 75-77.) Plaintiff seeks
3 damages, as well as injunctive and declaratory relief.

4 In Heck, the Supreme Court held that, “in order to recover damages for an
5 allegedly unlawful conviction or imprisonment, or for other harm caused by
6 actions whose unlawfulness would render a conviction or sentence invalid, a §
7 1983 plaintiff must prove that the conviction or sentence has been reversed on
8 direct appeal, expunged by executive order, declared invalid by a state tribunal
9 authorized to make such determination, or called into question by a federal court’s
10 issuance of a writ of habeas corpus.”¹⁰ Heck, 512 U.S. at 486-87.

11 Under Heck, if a judgment in favor of a plaintiff on his civil rights damages
12 claims necessarily will imply the invalidity of his conviction or sentence, the
13 complaint must be dismissed unless the plaintiff can demonstrate that the
14 conviction or sentence has already been invalidated. See id. at 487. The Ninth
15 Circuit has held that Heck also applies to a § 1983 claim for illegal search and
16 seizure, and that such a § 1983 claim “alleging illegal search and seizure of
17 evidence upon which criminal charges are based does not accrue until the criminal
18 charges have been dismissed or the conviction has been overturned.” Harvey v.
19 Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) overruled on other grounds by
20 Wallace v. Kato, 549 U.S. 384, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007), as
21 stated in Kucharski v. Leveille, 526 F. Supp. 2d 768, 774 (E.D. Mich. 2007). .

22 Here, Claims 7 and 8 are premised on Plaintiff’s allegations that law
23 enforcement unlawfully obtained wiretap evidence that was used to criminally
24 prosecute him. Plaintiff appealed his conviction, raising the very same arguments
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26
27 ¹⁰ Although Heck dealt with state prisoners seeking damages pursuant to 42
28 U.S.C. § 1983, the Heck doctrine applies equally to Bivens actions. Martin v.
Sias, 88 F.3d 774, 775 (9th Cir. 1996).

1 about the wiretap evidence at issue here but was unsuccessful. Reed, 575 F.3d at
2 908-19. Further, on January 21, 2011, Plaintiff filed a Motion to Vacate, Set
3 Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (EDCR 03-84-VAP,
4 ECF No. 1592; EDCV11-145-VAP, ECF No. 1.) On March 15, 2012, an Order
5 and Judgment were entered denying the motion and dismissing the action with
6 prejudice. (EDCR 03-84-VAP, ECF Nos. 1686, 1687; EDCV11-145-VAP, ECF
7 Nos. 25, 26.) Since a judgment in Plaintiff’s favor “necessarily will imply the
8 invalidity of his conviction or sentence” and that conviction has not been
9 “reversed on direct appeal, expunged by executive order, declared invalid by a
10 state tribunal authorized to make such determination, or called into question by a
11 federal court’s issuance of a writ of habeas corpus,” the Court finds that Plaintiff’s
12 constitutional claims are Heck-barred. Thus, the Complaint is subject to dismissal
13 as to Claims 7 and 8 for failure to state a claim for relief.

14 **D. The Complaint Is Subject to Dismissal Based on Witness Immunity.**

15 In Claim 9, Plaintiff alleges perjury and the offering of false declarations in
16 violation of 18 U.S.C. § 1623 against Federal Defendants Labbe, Hand, Sieder,
17 Clemmer, Stinnett, Pang, Starkey, Moussiaux, Cline, Connors, and Cielecy.
18 (Compl. ¶ 81.)

19 As set forth above, 18 U.S.C. § 1623 is a criminal statute. However, there is
20 no private right of action or basis for a civil suit based on violations of criminal
21 statutes. See Allen, 464 F.3d at 1048; Peabody, 394 F.2d at 177. As a result,
22 Plaintiff fails to state a claim for relief.

23 Moreover, “[w]itnesses, including police witnesses, are immune from
24 liability for their testimony in earlier proceedings even if they committed perjury.”
25 Paine v. City of Lompoc, 265 F.3d 975, 981 (9th Cir. 2001) (citing Briscoe v.
26 LaHue, 460 U.S. 325, 345, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)). Witness
27 immunity also extends to conspiracies to commit perjury. Id. at 981 (citing
28 Franklin v. Terr, 201 F.3d 1098, 1101 (9th Cir. 2000)); see also Burns v. Cnty. of

1 King, 883 F.2d 819, 821 (9th Cir. 1989) (witnesses are absolutely immune from
2 suits for damages under 42 U.S.C. § 1983 for testimony given at trial, or for
3 testimony given during adversarial pretrial proceedings); Demoran v. Witt, 781
4 F.2d 155, 157-58 (9th Cir. 1986). Thus, to the extent Plaintiff is attempting to
5 state a constitutional claim against Federal Defendants based on testimony before
6 the grand jury or at trial, Plaintiff fails to state claim for relief.

7 Based on the foregoing, the Court finds that the Complaint is subject to
8 dismissal as to Claim 9 for failure to state a claim for relief.

9 **E. The Complaint Is Subject to Dismissal for Failure to State a Claim for a**
10 **Violation Under the Federal Wiretap Act.**

11 In Claims 1 through 6, Plaintiff alleges statutory violations of the Wiretap
12 Act (18 U.S.C. §§ 2510, et seq.) against Federal Defendants Sieder, Clemmer,
13 Pang, Cielecy, Labbe, Hand, Stinnett, Woodland, Matthews, Moussiaux, Cline,
14 Conners, Defendants Verizon Wireless and Thomas, and County Defendants
15 Starkey, Quezada, Duncan, Groenow, Barpon, Tackaberry, Marquez, Maxwell,
16 Valdez, Bosket, Rodriguez, and Ortiz. (Compl. ¶¶ 45-74.)

17 The relevant portion of the Wiretap Act, 18 U.S.C. § 2520, provides in
18 pertinent part that:

19 In general.--Except as provided in section 2511(2)(a)(ii), any person
20 whose wire, oral, or electronic communication is intercepted, disclosed,
21 or intentionally used in violation of this chapter may in a civil action
22 recover from the person or entity, other than the United States, which
23 engaged in that violation such relief as may be appropriate.

24 18 U.S.C. § 2520(a).

25 However, it is “a complete defense against any civil or criminal action”
26 brought under this chapter or any other law if the defendant had a good faith
27 reliance on: (1) a court warrant or order, a grand jury subpoena, a legislative
28 authorization, or a statutory authorization; (2) a request of an investigative or law

1 enforcement officer under section 2518(7) of this title; or (3) a good faith
2 determination that section 2511(3) or 2511(2)(i) of this title permitted the conduct
3 complained of. 18 U.S.C. § 2520(d).

4 As set forth above, before his criminal trial, Plaintiff filed two motions to
5 suppress the wiretap evidence, asserting similar arguments he raises in the current
6 Complaint. After hearings before the trial court, the motions were denied. Reed,
7 575 F.3d at 907. On appeal, Plaintiff again challenged the wiretap evidence, but
8 his claims failed. The Ninth Circuit found as follows: (1) the wiretap application
9 satisfied the necessity requirement; (2) the district court did not err in finding that
10 the Government had not intercepted telephone calls on a line for which there was
11 no court order; (3) the Government was not required to seal call data content, and
12 it timely sealed the wiretap recordings under 18 U.S.C. § 2518(8); and (4) the
13 Government did not violate the statutory wiretap monitoring requirements of 18
14 U.S.C. § 2518(5). Id. at 904-05, 908-19. Accordingly, it appears that 18 U.S.C. §
15 2520(d) would provide Federal Defendants a complete defense to Plaintiff claims
16 based on alleged violations of the Wiretap Act. Thus, the Court finds that the
17 Complaint is subject to dismissal as to Claims 1 through 6 for failure to state a
18 claim for relief.

19 **F. The Complaint Is Subject to Dismissal for Failure to State a Claim for a**
20 **Violation of Criminal Statutes.**

21 In Claims 10 through 12, Plaintiff alleges violations of 18 U.S.C. §§ 241,
22 242, 306, 902, 903, 3004 against all Defendants based on conduct that took place
23 between April 4, 2003, and April 16, 2003. (Compl. ¶¶ 84-93.)

24 As set forth above, 18 U.S.C. §§ 241 and 242 are criminal statutes.
25 However, there is no private right of action or basis for a civil suit based on
26 violations of criminal statutes. See Allen, 464 F.3d at 1048; Peabody, 394 F.2d at
27 177. Further, 18 U.S.C. §§ 306, 902, and 903 do not exist in the United States
28 Code, and § 3004 is entitled “Decorum in the court room” and has nothing to do

1 with any of the allegations contained in the Complaint. Thus, the Court finds that
2 the Complaint is subject to dismissal as to Claims 10 through 12 for failure to state
3 a claim for relief.

4 **G. The Complaint Is Subject to Dismissal for Failure to State FTCA**
5 **Claims Against Any Individual Federal Defendants.**

6 In Claims 13 through 15, Plaintiff alleges a violation of his common law
7 right to privacy, abuse of process, and civil conspiracy against all Defendants.
8 (Compl. ¶¶ 94-97.)

9 Although unclear, it appears that Plaintiff is attempting to allege common
10 law tort claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80
11 (“FTCA”). However, the United States is the only proper defendant in cases
12 alleging tortious conduct by a United States agency or employee in the scope of
13 his employment. FDIC v. Craft, 157 F.3d 697, 706 (9th Cir. 1998); Kennedy v.
14 U.S. Postal Serv., 145 F.3d 1077, 1078 (9th Cir. 1998). The FTCA provides the
15 “exclusive remedy for tortious conduct by the United States, and it only allows
16 claims against the United States . . . an agency itself [or a federal employee]
17 cannot be sued under the FTCA.” Craft, 157 F.3d at 706 (citations omitted); see
18 also United States v. Smith, 499 U.S. 160, 163, 111 S. Ct. 1180, 113 L. Ed. 2d 134
19 (1991) (the FTCA “establishes . . . absolute immunity for Government employees
20 . . . by making an FTCA action against the Government the exclusive remedy for
21 torts committed by Government employees in the scope of their employment.”).
22 Thus, to the extent Plaintiff is seeking damages against Federal agency and
23 individual Federal Defendants for tortious conduct, the Court finds that the
24 Complaint is subject to dismissal as to Claims 13 through 15 for failure to state a
25 claim for relief.

26 **H. Qualified Immunity.**

27 Federal Defendants have also raised the issue of qualified immunity in their
28 motion to dismiss. (Mot. to Dismiss at 10-13.) However, qualified immunity is a

1 fact specific inquiry. See Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150
2 L. Ed. 2d 272 (2001). The Court finds that such a fact intensive determination is
3 inappropriate at this stage of the proceedings. See Groten v. California, 251 F.3d
4 844, 851 (9th Cir. 2001) (“[A] Rule 12(b)(6) dismissal is not appropriate unless
5 we can determine, based on the complaint itself, that qualified immunity
6 applies.”); Jensen v. City of Oxnard, 145 F.3d 1078, 1085-87 (9th Cir.1998)).
7 Thus, the Court declines to address the merits of this issue.

8 V.

9 **ORDER**

10 Based on the foregoing, the Court dismisses the Complaint with leave to
11 amend. Cato, 70 F.3d at 1105-06. The Court further denies the pending Motion to
12 Dismiss (ECF No. 10) and Motion to Quash (ECF No. 8) as moot. While it is
13 highly doubtful that Plaintiff will be able to cure the deficiencies discussed above,
14 the Court will nevertheless allow him the opportunity to do so.

15 If Plaintiff still wishes to pursue this action, he shall have thirty (30) days
16 from the date of this Order within which to file a First Amended Complaint
17 (“FAC”), attempting to cure the defects in the Complaint. The FAC shall be
18 complete in itself and must remedy the deficiencies discussed. Plaintiff may not
19 use “et al.” in the caption but must name each defendant against whom claims are
20 stated. Furthermore, Plaintiff must use the blank Central District Civil Rights
21 Complaint form accompanying this order, must sign and date the form, must
22 completely and accurately fill out the form, and must use the space provided in the
23 form to set forth all of the claims that he wishes to assert in his FAC. The FAC
24 shall not refer to the prior Complaint.

25 Failure to comply with these requirements may result in the dismissal of this
26 action for failure to prosecute and/or failure to comply with a court order. Failure
27 to remedy the deficiencies discussed may also result in a recommendation that the
28 action be dismissed.

1 The Clerk is directed to provide Plaintiff with a blank Central District civil
2 rights complaint form.

3
4 **IT IS SO ORDERED.**

5 DATED: October 22, 2012



HONORABLE OSWALD PARADA
United States Magistrate Judge

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**INSTRUCTIONS FOR FILING A CIVIL RIGHTS COMPLAINT BY A PRISONER -
GENERAL INSTRUCTIONS**

This package includes the following documents:

4 copies - complaint form

4 copies - declaration to proceed without prepayment of filing fees

In order for your complaint to be filed, you must submit the original and two copies of **both** the complaint and declaration to the Clerk. The remaining copy of each is for you to keep for your records. Your complaint must be typewritten or legibly handwritten in ink. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you must use the reverse side of the form or an additional blank page. You must file a separate complaint for each claim unless they are all related to the same incident or issue. You are required to allege facts; not legal arguments or authorities.

FILING FEES

Payment of filing fee required

In accordance with 1996 amendments to the in forma pauperis statute, 28 U.S.C. § 1915, as a prisoner you will be obligated to pay the full filing fee of \$350 for a civil action regardless of your in forma pauperis status and the disposition of the case. If you have the money to pay the filing fee, you should submit a cashier's check, certified bank check, business or corporate check, government issued check, or money order drawn on a major American bank or the United States Postal Service, payable to the *Clerk of Court* and mail it with your complaint to the address listed on the reverse side of these instructions. The Clerk's Office will also accept credit cards (Mastercard/Visa, Discover, American Express) for filing fees and miscellaneous fees. Credit card payments may be made at all payment windows where receipts are issued.

Request to pay filing fee in monthly installments

If you do not have the money to pay the full filing fee, you must complete the Request to Proceed Without Prepayment of Filing Fees with Declaration in Support. The Declaration must be returned to the Court with your complaint. **NOTE: You must have a prison or jail official complete the Certification Section on the Declaration and attach to the Declaration a certified copy of your prison or jail trust account statement for the six months immediately preceding the filing of the complaint. If you submit an incomplete Declaration or do not submit a prison or jail trust account statement with the Declaration, your request to proceed without prepayment of the filing fees may be denied.**

Initial partial filing fee assessment

If your request to proceed without prepayment of filing fees is granted, the Court will assess an initial partial filing fee at the time your action is filed. The initial partial filing fee will be equal to 20% of the average monthly deposits to your prison or jail account for the six months immediately preceding the filing of the action, or 20% of the average monthly balance in your prison or jail account for that same six month period, whichever is greater. The Court will order the agency that has custody of you to take that initial partial filing fee out of your prison or jail account as soon as funds are available and forward the money to the Clerk of Court.

Collection of balance of filing fee

After the initial partial filing fee has been paid, you will owe the balance of the filing fee. Until the amount of the filing fee is paid in full, each month you will owe 20% of your preceding month's income toward the balance. The agency that has custody of you will collect that money and send payments to the Clerk of Court any time the amount in your account exceeds \$10.00.

DISMISSAL OF THE COMPLAINT

Regardless of whether some or all of the filing fee has been paid, the Court is required to screen your complaint and to dismiss the complaint if: 1) your allegation of poverty is untrue; 2) the action is frivolous or malicious; 3) your complaint does not state a claim on which relief can be granted; or 4) you sue a defendant for money damages and that defendant is immune from liability for money damages.

If you file more than three actions or appeals while you are a prisoner which are dismissed as frivolous or malicious or for failure to state a claim which relief can be granted, you will be prohibited from bringing any other actions in forma pauperis unless you are in imminent danger of serious physical injury. **NOTE: You are required under penalties of perjury to provide accurate information regarding previous filings. Failure to provide this information may result in the immediate dismissal of your complaint.**

JURISDICTION

To determine whether jurisdiction and venue are proper in this Court:

- **AGAINST FEDERAL DEFENDANTS**, please refer to 28 U.S.C. § 1391(e) and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971);
- **AGAINST NON-FEDERAL DEFENDANTS**, please refer to 28 U.S.C. § 1391(b) for claims brought pursuant to 42 U.S.C. § 1983.

SERVICE OF THE COMPLAINT

If your request to proceed without prepayment of the filing fees is approved, the Court will determine whether the United States Marshal should serve the defendant(s) on your behalf.

INQUIRIES AND COPYING REQUESTS

Because of the large volume of cases filed by prisoners in this Court and limited court resources, the Court and Clerk's Office will not answer inquiries concerning the status of your case or provide copies of documents, except at a charge of fifty cents (\$0.50) per page. You must therefore keep copies of all documents submitted to the court for your own records.

TO MAIL THE COMPLAINT

Mail the original and the two copies of the following completed documents to the address below: complaint and declaration to proceed without prepayment of filing fees (if applicable):

United States District Court
Central District of California
312 North Spring Street, Room G-8
Los Angeles, California 90012

ATTENTION: PRO SE CLERK

Telephone: (213) 894-7984

FULL NAME

COMMITTED NAME (if different)

FULL ADDRESS INCLUDING NAME OF INSTITUTION

PRISON NUMBER (if applicable)

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CASE NUMBER CV10-8315-SVW(OP)

To be supplied by the Clerk

FIRST AMENDED

v.

PLAINTIFF,

DEFENDANT(S).

CIVIL RIGHTS COMPLAINT

PURSUANT TO *(Check one)*

42 U.S.C. § 1983

Bivens v. Six Unknown Agents 403 U.S. 388 (1971)

A. PREVIOUS LAWSUITS

1. Have you brought any other lawsuits in a federal court while a prisoner: Yes No
2. If your answer to "1." is yes, how many? _____

Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on an attached piece of paper using the same outline.)

- a. Parties to this previous lawsuit:
 Plaintiff _____

 Defendants _____

- b. Court _____

- c. Docket or case number _____
- d. Name of judge to whom case was assigned _____
- e. Disposition (For example: Was the case dismissed? If so, what was the basis for dismissal? Was it appealed? Is it still pending?) _____
- f. Issues raised: _____

- g. Approximate date of filing lawsuit: _____
- h. Approximate date of disposition _____

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. Is there a grievance procedure available at the institution where the events relating to your current complaint occurred? Yes No
2. Have you filed a grievance concerning the facts relating to your current complaint? Yes No

If your answer is no, explain why not _____

3. Is the grievance procedure completed? Yes No

If your answer is no, explain why not _____

4. Please attach copies of papers related to the grievance procedure.

C. JURISDICTION

This complaint alleges that the civil rights of plaintiff _____
 (print plaintiff's name)

who presently resides at _____
 (mailing address or place of confinement)

were violated by the actions of the defendant(s) named below, which actions were directed against plaintiff at

 (institution/city where violation occurred)

on (date or dates) _____, _____, _____
(Claim I) (Claim II) (Claim III)

NOTE: You need not name more than one defendant or allege more than one claim. If you are naming more than five (5) defendants, make a copy of this page to provide the information for additional defendants.

1. Defendant _____ resides or works at
(full name of first defendant)

(full address of first defendant)

(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): individual official capacity.

Explain how this defendant was acting under color of law:

2. Defendant _____ resides or works at
(full name of first defendant)

(full address of first defendant)

(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): individual official capacity.

Explain how this defendant was acting under color of law:

3. Defendant _____ resides or works at
(full name of first defendant)

(full address of first defendant)

(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): individual official capacity.

Explain how this defendant was acting under color of law:

4. Defendant _____ resides or works at
(full name of first defendant)

(full address of first defendant)

(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): individual official capacity.

Explain how this defendant was acting under color of law:

5. Defendant _____ resides or works at
(full name of first defendant)

(full address of first defendant)

(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): individual official capacity.

Explain how this defendant was acting under color of law:
