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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 KYLE JAMES,  
12 CDCR #AL-1830,

13 Plaintiff,

14 v.

15 UNITED STATES MARSHALS  
16 SERVICE AGENTS, et al.

17 Defendants.  
18  
19

Case No.: 17-cv-0414-WQH-BLM

**1) DISMISSING CIVIL ACTION  
FOR FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C. §  
1915A(b)(1)**

**AND**

**2) DENYING MOTION TO  
PROCEED IN FORMA PAUPERIS  
AS MOOT [ECF Doc. No. 9]**

20 Kyle James (“Plaintiff”), currently housed at the California Men’s Colony located  
21 in San Luis Obispo, California, and proceeding pro se, filed this action pursuant to 42  
22 U.S.C. § 1983 and the Federal Tort Claims Act (“FTCA”). (ECF No. 1). Plaintiff did not  
23 prepay the civil filing fees required by 28 U.S.C. § 1914(a) at the time of filing; instead he  
24 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
25 (ECF No. 9).

26 **I. Sua Sponte Screening Pursuant to 28 U.S.C. § 1915A(b)**

27 The Court may conduct a sua sponte review of Plaintiff’s pleading because he was  
28 “incarcerated or detained in any facility [and] is accused of, sentenced for, or adjudicated

1 delinquent for, violations of criminal law or the terms or conditions of parole, probation,  
2 pretrial release, or diversionary program” at the time he filed this action. *See* 28 U.S.C.  
3 § 1915A(a), (c).

4 Section 1915A, also enacted as part of PLRA, requires sua sponte dismissal of  
5 prisoner complaints, or any portions thereof, which are frivolous, malicious, or fail to state  
6 a claim upon which relief may be granted. 28 U.S.C. § 1915A(b); *Coleman v. Tollefson*,  
7 135 S. Ct. 1759, 1764 (2015); *Resnick v. Hayes*, 213 F.3d 443, 446-47 (9th Cir. 2000).  
8 “The purpose of § 1915A is to ‘ensure that the targets of frivolous or malicious suits need  
9 not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir.  
10 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir.  
11 2012)).

#### 12 **A. Previous action**

13 As an initial matter, the Court takes judicial notice that Plaintiff filed similar claims  
14 in an action filed in 2014. A court ““may take notice of proceedings in other courts, both  
15 within and without the federal judicial system, if those proceedings have a direct relation  
16 to matters at issue.”” *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting  
17 *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)).

18 Here, Plaintiff filed nearly identical claims against the same Defendants in *James v.*  
19 *Unnamed Defendants, et al.*, S.D. Cal. Civil Case No. 3:14-cv-02936-WQH-JMA (“*James*  
20 *I*”). In the First Amended Complaint filed in *James I*, Plaintiff claimed that United States  
21 Deputy Marshals “maliciously” slandered him “by lying to everyone I’ve ever known and  
22 associated with that I am a violent child rapist capable of murder.” (*James I*, ECF No. 3,  
23 at 3.) Plaintiff also alleged that a prosecutor with the United States Attorney’s Office  
24 “maliciously turned over jurisdiction” of his criminal matter involving a robbery to the San  
25 Diego County District Attorney’s Office in order to give Plaintiff a “life sentence” instead  
26 of the ten to fifteen years he would have faced under federal criminal sentencing. (*Id.* at  
27 4.)

28 In *James I*, the Court granted Plaintiff’s Motion to Proceed IFP but simultaneously

1 dismissed his amended complaint on the grounds that he had failed to state a claim upon  
2 which relief could be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).  
3 (*James I*, ECF No. 4 at 7-8.) Specifically, to the extent that Plaintiff alleged actions on the  
4 part of the defendants that influenced his ongoing criminal proceedings, the Court found  
5 that his claims amounted to “an attack on the validity of his underlying criminal  
6 proceeding, and as such, are not addressable under 42 U.S.C. § 1983, unless he alleges and  
7 can ultimately show that conviction has already been invalidated.” *Id.* at 4. Plaintiff’s  
8 claims were dismissed for failing to state a claim “without prejudice to Plaintiff’s right to  
9 file a new action if he succeeds in invalidating his conviction.” *Id.* at 5 (citing *Edwards v.*  
10 *Balisok*, 520 U.S. 641, 649 (1997)).

11 In addition, the Court found that Plaintiff’s claims, while brought pursuant to 42  
12 U.S.C. § 1983, in fact arose under *Bivens v. Six Unknown Named Agents of the Federal*  
13 *Bureau of Narcotics*, 403 U.S. 388 (1971). (*James I*, ECF No. 4 at 5-6). The Court  
14 dismissed some of the named defendants because they were federal agencies and *Bivens*  
15 does not authorize a suit against the government or its agencies for monetary relief. *Id.* at  
16 6 (citing *FDIC v. Meyer*, 510 U.S. 471, 486 (1994)).

17 Plaintiff was granted forty five (45) days to file an amended pleading in order to  
18 correct the deficiencies identified in the Court’s Order. *Id.* at 8. However, Plaintiff failed  
19 to do so and therefore, on April 22, 2015 the Court dismissed the entire action without  
20 prejudice for failing to comply with a Court Order and for the reasons set forth in the  
21 Court’s January 15, 2015 Order. (*James I*, ECF No. 8.) Judgment was entered the  
22 following day on April 23, 2015. (*James I*, ECF No. 9.)

## 23 **B. Current litigation**

24 Plaintiff filed this current action on February 24, 2017 (“*James II*”). (ECF No. 1.)  
25 Plaintiff purports to bring this action pursuant to “5 U.S.C. § 702, Federal Question  
26 Jurisdiction and 42 U.S.C. § 1983 and F.T.C.A and Pendent Jurisdiction 28 U.S.C. § 1367.”  
27 (*Id.* at 1.)

### 28 1. Factual allegations

1 Plaintiff claims that he was on federal probation in 2013 when he “absconded Dec  
2 2013 - March 17, 2014 with an active Federal warrant giving the United States Marshals  
3 Service (“USMS”) jurisdiction” over him. *Id.* Plaintiff claims that in March of 2014, the  
4 USMS “worked with the San Diego Sheriff’s Dep’t as part of the Regional Fugitive Task  
5 Force.” *Id.* at 2. Plaintiff claims that he was charged with crimes that were “unfounded  
6 and unsupported by evidence” and some of these charges were dismissed in September of  
7 2016 while Plaintiff was convicted of bank robbery. *Id.* Plaintiff alleges that five unnamed  
8 USMS Deputies, along with USMS Deputy Brown and USMS Deputy Laney “acted  
9 maliciously” and “slandered” Plaintiff in March of 2014. *Id.* at 7. Plaintiff claims that they  
10 lied to his “friends, family, and associates” by claiming that Plaintiff had “raped a little  
11 girl.” (*Id.*) As a result of these actions, Plaintiff alleges he was the “target for serious harm  
12 and injury to the point of death.” (*Id.*) Plaintiff also alleges that “due to the actions and  
13 misconduct of the ‘Marshals,’ people to this day think/believe that the lies the Marshals  
14 told are true putting the Plaintiff’s life at risk in the future.” (*Id.* at 7-8.)

15 2. *Bivens* and 42 U.S.C. § 1983

16 As the Court informed Plaintiff in the *James I* matter, because he is naming federal  
17 officials as Defendants, his claims of constitutional violations arise under *Bivens* rather  
18 than 42 U.S.C. § 1983. *Bivens* established that “compensable injury to a constitutionally  
19 protected interest [by federal officials alleged to have acted under color of federal law]  
20 could be vindicated by a suit for damages invoking the general federal question jurisdiction  
21 of the federal courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478,  
22 486 (1978); *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir.  
23 2000) (under *Bivens*, “federal courts have the inherent authority to award damages against  
24 federal officials to compensate plaintiffs for violations of their constitutional rights.”).

25 To state a claim under *Bivens*, Plaintiff must allege that a person acting under color  
26 of federal law deprived him of his constitutional rights. *See Serra v. Lappin*, 600 F.3d  
27 1191, 1200 (9th Cir. 2010). Thus, the Ninth Circuit considers “[a]ctions under § 1983 and  
28 those under *Bivens* [as] identical save for the replacement of a state actor under § 1983 by

1 a federal actor under Bivens.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991);  
2 *Hartman v. Moore*, 547 U.S. 250, 254, 254 n.2 (2006) (a suit brought pursuant to *Bivens* is  
3 the “federal analogue” to § 1983).

4 3. Eighth Amendment claims

5 Plaintiff claims that his “life is at risk in the future” due to the fact that the USMS  
6 Deputies have labeled him a child molester. (ECF No. 1 at 8). Plaintiff refers to this claim  
7 as a “deliberate indifference to safety claim” and thus, the Court will construe this claim as  
8 arising under the Eighth Amendment as Plaintiff is currently incarcerated. Plaintiff also  
9 purports to bring an Eighth Amendment “cruel and unusual punishment” claim based on  
10 the “malicious and sadistic actions of the U.S. Marshals in 2014 March lying telling my  
11 entire community that I was a child rapist.” *Id.* at 13. Plaintiff alleges that the statements  
12 by the Defendants “amounted to cruel and unusual punishment” and were “such a severe  
13 threat” that Plaintiff “ended up in prison for 38 years to life for 2 bank Robberies.” *Id.*  
14 Plaintiff contends that the threat created by Defendants’ statements “pushed [him] into  
15 robbing a bank because I felt I had no other option and that I had to . . . survive the ‘wildfire’  
16 the Marshals spread.” *Id.*

17 The Eighth Amendment prohibits cruel and unusual punishment of a person  
18 convicted of a crime. *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (citing U.S.  
19 Const. amend. VIII). “After incarceration, only the unnecessary and wanton infliction of  
20 pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”  
21 *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (citations omitted).

22 The Eighth Amendment requires that prison officials take reasonable measures to  
23 guarantee the safety and well-being of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832–  
24 33 (1994); *Johnson*, 217 F.3d at 731. To state an Eighth Amendment failure to protect  
25 claim, Plaintiff must allege facts sufficient to plausibly show that (1) he faced conditions  
26 posing a “substantial risk of serious harm” to his health or safety, and (2) the individual  
27 prison officials he seeks to hold liable were “deliberately indifferent” to those risks.  
28 *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). To

1 demonstrate deliberate indifference, Plaintiff must show that the defendant both knew of  
2 and disregarded a substantial risk of serious harm to his health and safety. *Farmer*, 511  
3 U.S. at 837. Thus, Plaintiff must allege “the official [was] both be aware of facts from  
4 which the inference could be drawn that a substantial risk of serious harm exist[ed], and  
5 [that] he . . . also dr[e]w that inference.” *Id.*

6 There are no facts from which the Court could conclude that Defendants acted with  
7 “deliberate indifference” to a serious risk of harm to Plaintiff. Plaintiff’s allegations are  
8 broad, vague, and fail to identify how any inmate he is currently incarcerated with is aware  
9 of the comments allegedly made by Defendants. Instead, Plaintiff claims defamation and  
10 injuries to his reputation with his friends, family, and community, which is not a federally  
11 protected right. *See Paul v. Davis*, 424 U.S. 785, 708-712 (1976) (a defamatory  
12 publication, however seriously it may have harmed someone’s reputation, did not deprive  
13 him of any liberty or property interest protected by the Due Process Clause). Further,  
14 Plaintiff fails to allege sufficient facts to establish that the alleged statements by Defendants  
15 made prior to Plaintiff’s conviction for robbery and current incarceration constitute cruel  
16 and unusual punishment prohibited by the Eighth Amendment. For these reasons, the  
17 Court finds Plaintiff’s Eighth Amendment claims must be dismissed for failing to state a  
18 claim pursuant to 28 U.S.C. § 1915A(b)(1).

19 4. FTCA claims

20 Plaintiff also purports to bring claims under the FTCA alleging defamation, slander,  
21 negligence and intentional infliction of mental or emotional distress. (ECF No. 1 at 9-12).  
22 The FTCA provides a remedy “for injury or loss of property or personal injury or death  
23 caused by the negligent or wrongful act or omission” of a federal employee. 28 U.S.C. §  
24 2672. However, the FTCA provides that the exclusive remedy for torts committed by  
25 federal employees is a suit against the United States. 28 U.S.C. § 2679(b)(1). While  
26 Plaintiff did name the United States as a Defendant, he also named the United States  
27 Marshal Service, which is an agency of the federal government. (ECF No. 1 at 1, 4.) The  
28 sole permissible Defendant in a claim under the FTCA is the United States and thus, the

1 Court DISMISSES any FTCA claims against the United States Marshals Service and  
2 individual defendants. *See* 28 U.S.C. §§ 1346(b), 2679(a); *Allen v. Veterans Admin.*, 749  
3 F.2d 1386, 1388 (9th Cir. 1984).

4 To the extent that Plaintiff seeks to pursue claims of defamation and slander against  
5 the United States under the FTCA, these claims must be dismissed. The FTCA does not  
6 waive sovereign immunity as to claims arising out of “libel, slander, misrepresentation,  
7 deceit and interference with contract rights.” 28 U.S.C. § 2680(h). The Court lacks subject  
8 matter jurisdiction to hear these claims and thus, these claims are DISMISSED without  
9 leave to amend as amendment would be futile.

10 Plaintiff also brings a negligence and an intentional infliction of emotional distress  
11 (“IIED”) claim arising from the same set of facts he attributes to his defamation and slander  
12 causes of action. (ECF No. 1 at 9-12). “In determining whether a claim ‘arises out of’ one  
13 of the enumerated torts, we look beyond a plaintiff’s classification of the cause of action  
14 to examine whether the conduct upon which the claim is based constitutes one of the torts  
15 listed in § 2680(h).” *Sabow v. U.S.*, 93 F.3d 1445, 1456 (9th Cir. 1996).

16 As to Plaintiff’s IIED claim, he alleges that Defendants lied “to the entire community  
17 convincing people I was a child rapist.” (ECF No. 1 at 9.) As for Plaintiff’s negligence  
18 claim, he claims that Defendants told “lies” that he had “allegedly raped a little girl” and  
19 they “convince[ed] the public that I was a ‘child rapist.’” *Id.* at 11. These facts upon which  
20 these claims are based arise from the same set of facts that Plaintiff seeks to pursue in his  
21 defamation and slander claims which are barred under the FTCA. *See* 28 U.S.C. § 2680(h).  
22 Accordingly, because Plaintiff’s negligence and IIED claims arise from the alleged  
23 defamation and slander claims, these claims are also barred by § 2680(h). *Thomas-Lazear*  
24 *v. Federal Bureau of Investigation*, 851 F.2d 1202, 1207 (9th Cir. 1988).

25 Thus, the Court DISMISSES all of Plaintiff’s claims brought pursuant to the FTCA  
26 for failing to state a claim upon which relief may be granted.

### 27 **III. Conclusion and Order**

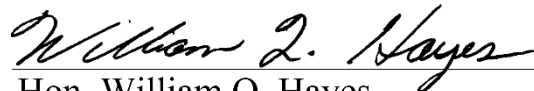
28 For the reasons explained, the Court:

1 (1) **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which relief  
2 may be granted pursuant to 28 U.S.C. § 1915A(b), and **GRANTS** him forty-five (45) days  
3 leave from the date of this Order in which to file an Amended Complaint which cures all  
4 the deficiencies of pleading noted. Plaintiff's Amended Complaint must be complete by  
5 itself without reference to his original pleading. Defendants not named and any claim not  
6 re-alleged in his Amended Complaint will be considered waived. *See* S.D. CAL. CIVLR  
7 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir.  
8 1989) (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693  
9 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are  
10 not re-alleged in an amended pleading may be “considered waived if not repled.”).

11 If Plaintiff fails to file an Amended Complaint within the time provided, the Court  
12 will enter a final Order dismissing this civil action based both on Plaintiff's failure to state  
13 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and  
14 1915A(b), and his failure to prosecute in compliance with a court order requiring  
15 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does  
16 not take advantage of the opportunity to fix his complaint, a district court may convert the  
17 dismissal of the complaint into dismissal of the entire action.”).

18 (2) **DENIES** Plaintiff's Motion to Proceed IFP (ECF Doc. No. 9) as moot and  
19 without prejudice to be re-opened if Plaintiff files an amended pleading.

20 Dated: August 8, 2017

  
21 Hon. William Q. Hayes  
22 United States District Court  
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