

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 ROBERT LEE CHILDRESS, JR.,  
12 Reg. No. 25851-039,

13 Plaintiff,

14 vs.

15  
16 KRAIG PALMER; J. KYLE  
17 SCROGGINS, Jr.; UNKNOWN  
18 ESCONDIDO POLICE OFFICERS,

19  
20 Defendants.

Case No.: 3:18-cv-00514-CAB-BLM

**ORDER:**

**1) GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION TO LIFT STAY,  
CORRECT CAPTION AND  
REQUEST FOR U.S. MARSHAL  
SERVICE [ECF No. 4]; and**

**2) DISMISSING FIRST AMENDED  
COMPLAINT**

21  
22  
23 **I. Procedural History**

24 On March 8, 2018, Robert Lee Childress, Jr. ("Plaintiff"), a federal detainee  
25 currently housed at the Metropolitan Correctional Center ("MCC") in San Diego,  
26 California, and proceeding pro se, filed a civil rights complaint pursuant to *Bivens v. Six*  
27 *Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (ECF  
28 No. 1). Plaintiff claimed Defendant Kraig Palmer, a Federal Bureau of Investigation

1 Agent, violated his Fourth and Fifth Amendment rights by conducting “an illegal search  
2 and seizure.” Compl. at 3-4. Plaintiff sought injunctive relief in the form of the  
3 prevention of disposing of the property seized and a return of the property seized to him,  
4 along with monetary damages. *See id.* at 8. In addition, Plaintiff filed a Motion to  
5 Proceed IFP (ECF No. 2).

6 The Court granted Plaintiff’s Motion to Proceed IFP but determined that a stay of  
7 the matter should be issued as Plaintiff has ongoing criminal proceedings which appear to  
8 involve the same issues raised in this action.<sup>1</sup> Specifically, the Court found that Plaintiff  
9 “may bring a *Bivens* action against FBI Agent Palmer” because he had alleged facts that  
10 Defendant Palmer violated his constitutional rights by “searching and seizing property  
11 without a warrant.” (ECF No. 3 at 5.) However, the Court also found that Plaintiff  
12 “Fourth Amendment claims against Defendant Palmer could be barred by *Heck*<sup>2</sup> to the  
13 extent they may ‘necessarily imply the invalidity’ of his criminal judgment - should he  
14 ultimately be convicted for the crimes for which he is currently awaiting trial.” (*Id.* at 6.)  
15 Thus, the Court issued a stay of this action pursuant to *Wallace v. Kato*, 549 U.S. 384,  
16 393 (2007) (“[i]t is within the power of the district court, and in accord with common  
17 practice, to stay the civil action until the criminal case or the likelihood of a criminal case  
18 is ended.”)

19 On July 11, 2018, Plaintiff filed a “Motion to Lift Stay, Correct Caption and for  
20 U.S. Marshal Service,” along with a First Amended Complaint (“FAC”). (ECF Nos. 4,  
21 5.) In his FAC, Plaintiff has added J. Kyle Scroggins, Jr. and Unknown Escondido Police  
22 Officers as Defendants.

---

23  
24  
25 <sup>1</sup> The Court may “take notice of proceedings in other courts, both within and without the  
26 federal judicial system, if those proceedings have a direct relation to matters at issue.”  
27 *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*,  
285 F.3d 801, 803 n.2 (9th Cir. 2002)). Therefore, the Court takes judicial notice of *United*  
*States v. Childress*, S.D. Cal. Criminal Case No. 3:16-cr-02556-GPC.

<sup>2</sup> *See Heck v. Humphrey*, 512 U.S. 477 (1994).

1 **I. Motion to Lift Stay, Correct Caption, and for U.S. Marshal Service**

2 A. Motion to Lift Stay

3 Plaintiff argues that the “stay must be lifted.” (ECF No. 4 at 5.) In his original  
4 Complaint, Plaintiff alleged Defendant Palmer violated his Fourth and Fifth Amendment  
5 rights by “searching and seizing property without a warrant.” (*Id.*) As stated above, the  
6 basis for the stay was due to the Fourth Amendment claim because it could “necessarily  
7 imply the invalidity” of his criminal judgment if Plaintiff is convicted following the  
8 pending criminal proceeding. (ECF No. 3 at 6.) Plaintiff now indicates that he is no  
9 longer bringing a claim alleging violation of his Fourth Amendment rights in his FAC  
10 and thus, the need for a stay no longer exists.

11 The Court will GRANT Plaintiff’s motion to lift the stay but must also conduct the  
12 required sua sponte screening of his FAC pursuant to 28 U.S.C. § 1915(e) & § 1915A.  
13 Plaintiff’s request to remove his Bureau of Prisons (“BOP”) identification number from  
14 the docket, along with his request for U.S. Marshal service of his FAC, is DENIED.

15 **II. Sua Sponte Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

16 A. Standard of Review

17 Because Plaintiff is a prisoner and is proceeding IFP, his FAC requires a pre-  
18 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
19 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
20 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
21 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
22 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
23 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
24 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
25 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
26 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

27 “The standard for determining whether a plaintiff has failed to state a claim upon  
28 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of

1 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
2 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
3 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
4 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
5 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,  
6 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
7 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

8 Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
9 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
10 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for  
11 relief [is] . . . a context-specific task that requires the reviewing court to draw on its  
12 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or  
13 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
14 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
15 (9th Cir. 2009).

16 B. *Bivens*

17 Plaintiff has brought his claims pursuant to *Bivens v. Six Unknown Named Agents*  
18 *of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). “In *Bivens*, the Supreme Court  
19 ‘recognized for the first time an implied right of action for damages against federal  
20 officers alleged to have violated a citizen’s constitutional rights.’” *Vega v. United States*,  
21 881 F.3d 1146, 1152 (9th Cir. 2018) (quoting *Hernandez v. Mesa*, \_\_ U.S. \_\_, 137 S. Ct.  
22 2003, 2006 (2017) (citation omitted)). “In the limited settings where *Bivens* does apply,  
23 the implied cause of action is the ‘federal analog to suits brought against state officials  
24 under Rev. Stat. § 1979, 42 U.S.C. § 1983.’” *Iqbal*, 556 U.S. at 675-76 (quoting *Hartman*  
25 *v. Moore*, 547 U.S. 250, 254 n.2 (2006)).

26 ///

27 ///

28 ///

1           1.     Fifth Amendment due process claim

2           Plaintiff alleges Defendant Palmer violated his Fifth Amendment due process  
3 rights when he allegedly “seized” several of Plaintiff’s vehicles and currency. (FAC at  
4 5.) Since *Bivens* was decided, the Supreme Court has “only expanded this ‘implied cause  
5 of action’ twice.” *Ziglar v. Abbasi*, \_\_ U.S. \_\_, 137 S.Ct. 1843, 1854 (2017). The  
6 Supreme Court did expand *Bivens* to include a claim brought under the Fifth Amendment  
7 due process claim for gender discrimination. *See Davis v. Passman*, 442 U.S. 228  
8 (1979). However, the claim brought by Plaintiff before this Court does not include  
9 allegations of gender discrimination.

10           In *Abbasi*, the Supreme Court held that when seeking to expand *Bivens*, the “first  
11 question a court must ask in a case like this one is whether the claim arises in a new  
12 *Bivens* context, *i.e.*, whether the case is different in a meaningful way from previous  
13 *Bivens* cases decided by the Court.” *Vega*, 881 F.3d at 1153 (citing *Abbasi*, 137 S.Ct. at  
14 1864). As stated above, the Supreme Court has not expanded *Bivens* to include a Fifth  
15 Amendment claim based on procedural due process arising from a deprivation of  
16 property. Therefore, Plaintiff’s claims present a “new context” under *Abbasi*.

17           The Supreme Court has also created a “two-step analysis for determining  
18 congressional intent as to the appropriateness of a *Bivens* remedy.” *Western Radio*  
19 *Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1120 (9th Cir. 2009) (citing *Wilkie v.*  
20 *Robbins*, 551 U.S. 537, 550 (2007)). First, a court must determine “whether any  
21 alternative, existing process for protecting the interest amounts to a convincing reason for  
22 the Judicial Branch to refrain from providing a new and freestanding remedy in  
23 damages.” *Wilkie*, 551 U.S. at 550.

24           Here, Plaintiff has at least two available remedies and one of these remedies he has  
25 already pursued. As stated above, the Court has taken judicial notice of *United States v.*  
26 *Childress*, S.D. Cal. Criminal Case No. 3:16-cr-02556-GPC. This is Plaintiff’s criminal  
27 ongoing matter. In his criminal proceeding, Plaintiff has filed a “Motion to Return  
28 Property” which seeks the return of property that is identical to the property referenced in

1 the action currently before this Court. *Id.*, ECF No. 94. In this motion filed in his  
2 criminal proceeding, Plaintiff argues that the property was seized “based on warrants  
3 believed to be in bad faith and based on false information.” (*Id.* at 1.) Plaintiff’s Motion  
4 was denied on March 9, 2018. (*Id.*, ECF No. 106.) Plaintiff filed his Complaint in this  
5 action on March 8, 2018. (ECF No. 1.) Based on these facts, the Court finds that  
6 Plaintiff has demonstrated that he has an “alternative remedial structure” which he, in  
7 fact, pursued. *Abbasi*, 137 S.Ct. 1858.

8 In addition, Plaintiff could also potentially have a remedy under the Federal Tort  
9 Claims Act (“FTCA”). The FTCA provides a remedy “for injury or loss of property or  
10 personal injury or death caused by the negligent or wrongful act or omission” of a federal  
11 employee. 28 U.S.C. § 2672. However, the FTCA provides that the exclusive remedy for  
12 torts committed by federal employees is a suit against the United States. 28 U.S.C.  
13 § 2679(b)(1).

14 The Court finds, for all the above stated reasons, that there is no rational to imply a  
15 *Bivens* action based on the claims presented by Plaintiff. Accordingly, Plaintiff’s Fifth  
16 Amendment due process claims are DISMISSED for failing to state a claim upon which  
17 relief may be granted.

## 18 2. Fourth Amendment claims

19 In his FAC, Plaintiff does allege a Fourth Amendment search and seizure claim  
20 based on events that occurred at the time of his arrest. (*See* FAC at 7.) Plaintiff also adds  
21 “Unknown Escondido Police Officers” as Defendants. (*Id.* at 1, 7.) However, Plaintiff  
22 states in his “Motion to Lift Stay” that he is “removing the “illegal search and seizure”  
23 claim from his FAC. (*See* Pl.’s Mot., ECF No. 4 at 6.)

24 The Fourth Amendment prohibits “unreasonable searches and seizures,” and  
25 “reasonableness is always the touchstone of Fourth Amendment analysis.” *Birchfield v.*  
26 *North Dakota*, 136 S. Ct. 2160, 2186 (2016). Reasonableness is generally assessed by  
27 carefully weighing “the nature and quality of the intrusion on the individual’s Fourth  
28 Amendment interests against the importance of the governmental interests alleged to

1 justify the intrusion.” *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation  
2 marks omitted); *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546 (2017); *Zion*  
3 *v. Cty of Orange*, 874 F.3d 1072, 1075 (9th Cir. 2017) (citing *Graham v. Connor*, 490  
4 U.S. 368, 388 (1989)).

5 In his FAC, Plaintiff alleges that he had “exited a property” where he had been  
6 staying but was “not welcomed” at this property when he was arrested by Defendant  
7 Palmer. (FAC at 7.) He claims Defendants Palmer, Scroggins, and Unknown Escondido  
8 Police Officers then “stormed the residence over Plaintiff’s objection without a warrant.”  
9 (*Id.*) Plaintiff appears to object to a search of a home where he did not reside. The  
10 Supreme Court has held that overnight guests have a reasonable expectation of privacy in  
11 the residence of their host. *See Minnesota v. Olson*, 495 U.S. 91, 93 (1990). However,  
12 Plaintiff freely admits that he was “not welcomed” in the residence where he claims the  
13 search took place. (FAC at 7.) In *Olson*, however, the Supreme Court defined a  
14 houseguest as someone who is in the home “with the permission of his host, who is  
15 willing to share his house and privacy with his guest.” *Olson*, 495 U.S. at 99. Here,  
16 Plaintiff admits that he did not have permission of the person who is in control of the  
17 property to stay in that home. Therefore, Plaintiff had no “reasonable expectation of  
18 privacy” in a residence that he was neither the occupant of home nor the guest of the  
19 person ultimately in control of the residence.

20 Therefore, the Court finds that Plaintiff has failed to state a Fourth Amendment  
21 claim upon which relief may be granted.

### 22 **III. Conclusion and Order**

23 For the reasons discussed, the Court:

24 1) **DENIES** in part, and **GRANTS** in part, Plaintiff’s Motion to Lift Stay. The  
25 Court will lift the stay issued on April 26, 2018;

26 2) **DISMISSES** Plaintiff’s Amended Complaint [ECF No. 5] without further  
27 leave to amend for failure to state a claim upon which § 1983 relief can be granted  
28 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1);

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3) **CERTIFIES** that an IFP appeal would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3), and

4) **DIRECTS** the Clerk of Court to enter a new final judgment of dismissal and to close the file.

**IT IS SO ORDERED.**

Dated: September 7, 2018



---

Hon. Cathy Ann Bencivengo  
United States District Judge