

APPENDIX A

Decision of the ninth circuit court of appeals
affirming district court decision

USCA9 No. 18-16543

(February 19, 2019)

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 25 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE LUIS TAPIA-FIERRO,

Plaintiff-Appellant,

v.

WILLIAM BARR, Attorney General*;
KIRSTJEN NIELSEN, Secretary of the
United States Department of Homeland
Security,

Defendants-Appellees.

No. 18-16543

D.C. No. 2:17-cv-04005-JAT-ESW

MEMORANDUM**

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted February 19, 2019***

Before: FERNANDEZ, SILVERMAN, and WATFORD, Circuit Judges.

Immigration detainee Jose Luis Tapia-Fierro appeals pro se from the district

* William Barr has been substituted for his predecessor, Matthew G. Whitaker, as Attorney General under Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

court's judgment dismissing his action brought under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging constitutional claims arising from his unlawful removal in 2001. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Wilhelm v. Rotman*, 680 F.3d 1113, 1118 (9th Cir. 2012) (dismissal under 28 U.S.C. § 1915A); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1047 (9th Cir. 2008) (dismissal on the basis of the statute of limitations); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (dismissal under § 1915(e)(2)(B)(ii)). We affirm.

The district court properly dismissed Tapia-Fierro's action as time-barred because Tapia-Fierro filed this action more than two years after his claims accrued. *See* Ariz. Rev. Stat. § 12-542 (two-year statute of limitations for personal injury claims); *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991) (forum state's statute of limitations for personal injury claims applies in *Bivens* actions); *see also* *W. Ctr. for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000) (a *Bivens* claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the action).

AFFIRMED.

APPENDIX B*

Decision of the district court dismissing complaint

District Court No. 17-cv-04005-JAT-ESW

(July 11, 2018)

* Appendix B would be provided upon receiving it from district court for the Phoenix district of Arizona.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jose Luis Tapia Fierro,
10 Plaintiff,

11 v.

12 Jeff Sessions, et al.,
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14 Defendants.
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No. CV 17-04005-PHX-JAT (ESW)

ORDER

16 On October 30, 2017, Plaintiff Jose Luis Tapia Fierro, who is confined in the
17 Yuma County Detention Center, filed a pro se civil rights Complaint pursuant to *Bivens*
18 *v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
19 Subsequently, Plaintiff filed a First Amended Complaint. Plaintiff did not pay the filing
20 and administrative fees or file an Application to Proceed In Forma Pauperis. In a March
21 26, 2018 Order, the Court dismissed the First Amended Complaint with leave to amend
22 and gave Plaintiff 30 days to file a second amended complaint curing the deficiencies
23 identified in the Order and either pay the required fees or file an Application to Proceed
24 In Forma Pauperis.

25 On April 16, 2018, Plaintiff filed a Second Amended Complaint and an
26 Application to Proceed In Forma Pauperis. In a May 17, 2018 Order, the Court gave
27 Plaintiff 30 days to show cause why this action should not be dismissed as barred by the
28 statute of limitations.

1 On May 21, 2018, Plaintiff filed two Motions to Amend (Docs. 12, 13). On May
2 31, 2018, Plaintiff filed a Response to the Order to Show Cause (Doc. 14). The Court
3 will deny the Motions to Amend and dismiss the Second Amended Complaint and this
4 action.

5 **I. Motions to Amend**

6 In his Motions to Amend, Plaintiff asks the Court to accept his proposed
7 corrections, which are contained in the Motions to Amend. Local Rule of Civil
8 Procedure 15.1 requires a party moving to amend a complaint to file a copy of the
9 amended pleading and indicate in what respect it differs from the pleading it amends.
10 Plaintiff has not lodged a proposed third amended complaint with his motions. Instead,
11 Plaintiff's Motions include proposed amendments to certain counts. Accordingly, the
12 Court will deny Plaintiff's Motions to Amend.

13 **II. Plaintiff's Response**

14 In his Response, Plaintiff contends that his claims should not be dismissed as
15 barred by the statute of limitations because he has "complained (since 2002) of the
16 wrongful deportation proceedings, and what is now known, an erroneous removal and the
17 consequent and unconstitutional federal confinement." Plaintiff also states that he did not
18 file a lawsuit when he was released from custody in 2011 because "the federal
19 government 're-lodged' new and additional charges for deportation in 2010-2011."
20 Plaintiff also alleges that "there is a 'pending' removal proceeding against Plaintiff."
21 Plaintiff further alleges that it took him over a decade to have his 2001 removal order
22 overturned and that he could not have filed a lawsuit prior to having the 2001 removal
23 order overturned.

24 As discussed in the Court's May 17, 2018 Order to Show Cause, "a claim
25 generally accrues when the plaintiff 'knows or has reason to know of the injury which is
26 the basis of the action.'" *Cabrera v. City of Huntington Park*, 159 F.3d 374, 379 (9th Cir.
27 1998) (quoting *Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994)). In an
28 action pursuant to *Bivens*, the applicable statute of limitations is the forum state's statute

1 of limitations for personal injury actions. *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir.
 2 1991). The Arizona statute of limitations for personal injury actions is two years. *See*
 3 *Ariz. Rev. Stat. § 12-542(1)*.

4 Plaintiff knew, or should have known, that he had allegedly been wrongfully
 5 removed no later than 2011, when his 2001 removal order was overturned. That is,
 6 Plaintiff's claim that he was wrongfully detained between 2001 and 2011 accrued no later
 7 than 2011. But Plaintiff did not commence this lawsuit until 2017, well after the two-
 8 year statute of limitation had run. The mere allegation of currently pending new
 9 removal proceedings, which Plaintiff fails to provide any details about in his Second
 10 Amended Complaint or Response, does not toll the statute of limitations concerning his
 11 detention between 2001 and 2011.¹ Accordingly, the Court will dismiss the Second
 12 Amended Complaint and this action.

13 **IT IS ORDERED:**

14 (1) Plaintiff's Motions to Amend (Docs. 12, 13) are **denied**.

15 (2) Plaintiff's Second Amended Complaint (Doc. 14) and this action are
 16 **dismissed** as barred by the statute of limitations, and the Clerk of Court must enter
 17 judgment accordingly.

18 (3) The Clerk of Court must make an entry on the docket stating that the
 19 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

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 24 ¹ Moreover, it is unlikely that Plaintiff would be able proceed on a *Bivens* or
 25 Federal Tort Claims Act (FTCA) claim regarding ongoing immigration proceedings. *See*
 26 *Ziglar v. Abbasi*, ___ U.S. ___, 137 S. Ct. 1843 (June 19, 2017) (setting forth a two-step
 27 test to determine if a *Bivens* claim may proceed); *D'Alessandro v. Chertoff*, 2011 WL
 28 6148756, at *4 (W.D.N.Y. Dec. 12, 2011) (finding that under *Mirmehdi v. U.S.*, 662 F.3d
 1073 (9th Cir. Nov. 3, 2011), "wrongful immigration custody pending removal joins the
 list of rejected *Bivens* extensions"); *see also Lanzuza v. Love*, 2015 WL 1282132, at *8
 (W.D. Wash. Mar. 20, 2015) ("[a]lthough it appears the Ninth Circuit has not yet spoken
 on the issue of whether *Heck* [*v. Humphrey*, 512 U.S. 477 (1994)] applies in the civil
 immigration context, the Ninth Circuit has not limited its application of *Heck* to Section
 1983 claims and has applied *Heck*'s rule regarding accrual to FTCA claims as well").

1 (4) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
2 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal
3 of this decision would be taken in good faith and finds Plaintiff may appeal in forma
4 pauperis.

5 Dated this 11th day of July, 2018.

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10 **James A. Teilborg**
11 **Senior United States District Judge**
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APPENDIX C

Order of the ninth circuit court of appeals
denying petition for panel rehearing

USCA9 No. 18-16543

(May 29, 2019)

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAY 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE LUIS TAPIA-FIERRO,

Plaintiff-Appellant,

v.

WILLIAM BARR, Attorney General;
KEVIN McALEENAN, Acting Secretary of
the United States Department of Homeland
Security,

Defendants-Appellees.

No. 18-16543

D.C. No. 2:17-cv-04005-JAT-ESW
District of Arizona, Phoenix

ORDER

Before: FERNANDEZ, SILVERMAN, and WATFORD, Circuit Judges.

Tapia-Fierro's petition for panel rehearing (Docket Entry No. 16) is denied.

No further filings will be entertained in this closed case.

Appendix C

APPENDIX D

Memorandum of the ninth circuit court of appeals
reversing 8 USC §1326 sentence

USCA9 No. 03-10598

(September 16, 2005)

FILED

NOT FOR PUBLICATION

SEP 16 2005

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS TAPIA-FIERRO,

Defendant - Appellant.

No. 03-10598

D.C. No. CR-01-01115-FJM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Submitted September 12, 2005 **

Before: REINHARDT, RYMER and HAWKINS, Circuit Judges.

Jose Luis Tapia-Fierro appeals his 104-month sentence imposed following a remand of his sentence by this Court. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we remand the sentence.

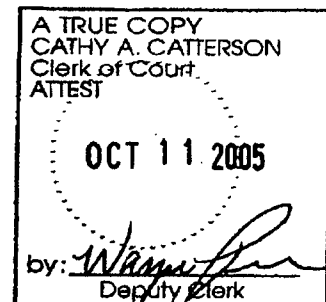
* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appendix D

Because appellant was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court for further proceedings consistent with *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). See *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1089-90 (9th Cir. 2005).

SENTENCE REMANDED.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS TAPIA-FIERRO,

Defendant - Appellant.

No. 03-10598

D.C. No. CR-01-01115-FJM

AMENDED JUDGMENT

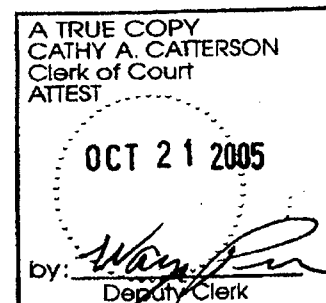
Appeal from the United States District Court for the District of Arizona
(Phoenix).

This cause came on to be heard on the Transcript of the Record from the
United States District Court for the District of Arizona (Phoenix) and was duly
submitted.

On consideration whereof, it is now here ordered and adjudged by this
Court, that the sentence of the said District Court in this cause be, and hereby is
REMANDED.

Filed and entered 09/16/05

Appendix D



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