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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 David Thomas Rhodes,

9 Plaintiff,

10 v.

11 Ricardo E. Chavez, et al.,

12 Defendants.

No. CV-12-01971-PHX-DGC

**ORDER**

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15 Defendants have filed a motion to dismiss. Doc. 19. They argue that Plaintiff  
16 David Rhodes' complaint is barred by the statute of limitations and fails to state a claim,  
17 and that the Court lacks personal jurisdiction over Defendants Johnson and Watts. The  
18 motion is fully briefed and no party has requested oral argument. For the reasons set  
19 forth below, the Court will grant the motion.

20 **I. Background.**

21 Plaintiff David Rhodes received early release from an 11-year sentence on  
22 October 24, 1990, with 1,681 days remaining. Doc. 18 ¶ 8. On July 30, 1991, the United  
23 States Parole Commission ("USPC") issued a warrant for Plaintiff's arrest based on  
24 violation of his early release terms due to newly filed federal drug charges. *Id.* ¶ 9.  
25 United States Marshals eventually arrested Plaintiff pursuant to the new charges and the  
26 USPC warrant. On October 31, 1991, the USPC issued a Notice of Action placing the  
27 USPC warrant on detainer pending disposition of the new charges. *Id.* ¶ 11. The United  
28 States District Court for the District of Wyoming sentenced Plaintiff to 20 years for the

1 new drug charges on August 12, 1993. The court granted Plaintiff credit for time served  
2 since his arrest on September 23, 1991, through the day before the sentencing, which  
3 yielded a projected release date of February 25, 2009. *Id.* ¶ 13.

4 On May 2, 1996, the USPC issued a Notice of Action stating that Plaintiff would  
5 receive credit on his release violation from the date of the original arrest. Doc. 18 ¶ 17.  
6 A new sentence computation was completed for the release violation term of 1,681 days,  
7 giving Plaintiff credit for time served back to the September 23, 1991 arrest. Credit for  
8 the time served was erroneously removed, however, from the 20-year drug sentence that  
9 had been imposed by the District Court, and Plaintiff’s release date for the drug offense  
10 was changed to March 2, 2011. *Id.* Plaintiff sought administrative remedies and filed  
11 habeas petitions seeking credit for the prior custody time against the 20-year drug  
12 sentence, but his efforts were unsuccessful. Doc. 18 ¶¶ 21-23. He was released from the  
13 Federal Correctional Institution in Phoenix on September 20, 2010. Doc. 29 at 5. He  
14 filed this *Bivens* action on September 17, 2012.

15 **II. Statute of Limitations.**

16 Federal law determines when a *Bivens* claim accrues, but the law of the forum  
17 state determines the statute of limitations for such a claim. *See Pesnell v. Arsenault*, 543  
18 F.3d 1038, 1043 (9th Cir. 2008) (quoting *Papa v. United States*, 281 F.3d 1004, 1009 (9th  
19 Cir. 2002)). A *Bivens* claim accrues “when the plaintiff knows or has reason to know of  
20 the injury.” *Safouane v. Hassett*, 514 Fed.App’x 691, 692 (9th Cir. 2013) (quoting *W.*  
21 *Ctr. For Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000)). The forum  
22 state’s personal injury statute of limitations applies to *Bivens* claims. *See Van Strum v.*  
23 *Lawn*, 940 F.2d 406, 410 (9th Cir. 1991). Tolling provisions for *Bivens* claims are also  
24 borrowed from the forum state. *See Pesnell*, 542 F.3d at 1043 (quoting *Papa*. 281 F.3d at  
25 1009).

26 In Arizona, the statute of limitations for personal injury claims is two years.  
27 A.R.S. § 12-542. Defendants argue that the limitations period expired before Plaintiff  
28 filed his complaint because “[a]ll actions of the individual defendants alleged in the

1 [c]omplaint occurred on or before November 24, 2009.” Doc. 19 at 3. Because Plaintiff  
2 knew of his injuries in November 2009, the government argues, the limitations period for  
3 the *Bivens* action expired in November 2011.

4 The government is correct. Although Arizona has a tolling statute which suspends  
5 the running of the statute of limitations in favor of persons with certain disabilities,  
6 imprisonment is not listed as a qualifying disability. A.R.S. § 12-502. Indeed, “[t]he  
7 current version of [A.R.S. § 12-502] omits reference to imprisonment altogether and no  
8 longer recognizes imprisonment as a legal disability. Plaintiff has cited no authority, and  
9 the court is unaware of any, construing the current version of § 12-502 to toll claims  
10 based on a plaintiff’s imprisonment.” *West v. City of Mesa*, 2012 WL 2977309, \*3 (D.  
11 Ariz. July 20, 2012). Because Plaintiff filed his complaint on September 17, 2012, more  
12 than two years after he became aware of his injuries, the complaint is time-barred.

13 Plaintiff asserts that his *Bivens* action did not accrue until June 25, 2012, when the  
14 Supreme Court denied certiorari on his petition for a writ habeas corpus. Doc. 28 at 2.  
15 Plaintiff argues that “[n]o *Bivens* lawsuit could have been filed earlier during the period  
16 that the habeas petition was being litigated because . . . a *Bivens* action cannot be filed to  
17 challenge the correctness or duration of a prison sentence by a prisoner.” *Id.* Plaintiff’s  
18 argument appears to arise from a misreading of *Heck v. Humphrey*, 512 U.S. 477 (1994).  
19 *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction or  
20 imprisonment, or for other harm caused by actions whose unlawfulness would render a  
21 conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or  
22 sentence has been reversed on direct appeal, expunged by executive order, declared  
23 invalid by a state tribunal authorized to make such determination, or called into question  
24 by a federal court’s issuance of a writ of habeas corpus[.]” *Id.* at 486-87. “*Heck*’s  
25 requirements apply equally to suits brought under *Bivens*.” *Jones v. Shields*, 107  
26 Fed.App’x 725, 726 (9th Cir. 2004).

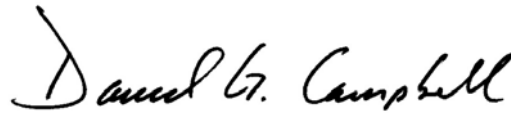
27 Plaintiff’s reliance on *Heck* is misplaced. Plaintiff’s claim does not challenge the  
28 validity of his convictions for the drug charge or the early release violation, nor does it

1 challenge the 20-year sentence imposed in the drug case or the 1,681 days he received for  
2 the early release violation. Plaintiff instead claims that an error occurred when the credit  
3 for time served given as part of the 20-year sentence was mistakenly dropped in a  
4 subsequent administrative calculation. Because success on this charge would not “imply  
5 the invalidity of his conviction or sentence,” it is not barred by *Heck*. 512 U.S. at 486.  
6 As a result, *Heck* did not prevent Plaintiff from bringing this *Bivens* claim during the  
7 pendency of his habeas corpus petition. His claim therefore accrued in November of  
8 2009 and is barred by the applicable two-year statute of limitations.

9 **IT IS ORDERED:**

- 10 1. The motion to dismiss (Doc. 19) is **granted**.
- 11 2. Defendants’ motion for summary judgment (Doc. 35) is found to be **moot**.
- 12 3. The Clerk shall terminate this action.

13 Dated this 25th day of October, 2013.

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David G. Campbell  
United States District Judge