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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Tony Nixon,

Plaintiff,

v.

William Stiness, et al.,

Defendants.

No. CV-15-0277-TUC-CKJ

ORDER

Plaintiff brought this civil rights action in the Superior Court of Santa Cruz County, Arizona, and on June 26, 2015, it was removed by the United States.¹ (Doc. 1.) The Complaint is confusing; it appears to seek money damages as a result of alleged unlawful actions involving his arrest and prosecution related to the criminal case *United States v. Tony Nixon*, CR-14-00668-TUC-DCB.² (Doc. 1-4 at 38, Attach. (CR-14-00668, Doc. 63, “Motion to Suppress Material Witness Statements”).) In that criminal case, Plaintiff was convicted of transporting illegal aliens for profit. Plaintiff alleges in the Complaint that on March 10, 2014, he drove to Arivaca, Arizona to pick up a young man

¹ A Notice of Substitution was filed substituting the United States of America as Defendant in place of the individual Defendants. (Doc. 3). John S. Leonardo is the United States Attorney, District of Arizona, and Defendant Brian R. Decker is the Assistant United States Attorney (AUSA) who handled Plaintiff’s criminal case on behalf of the United States. The other individual Defendants are Border Patrol Agents.

² The Complaint was not screened to determine if it states a claim. *See* 28 U.S.C. § 1915A.

1 at the request of a family member. The young man allegedly asked Plaintiff to pick up his
2 “two friends” and Plaintiff was stopped by Border Patrol agents. Plaintiff alleges that an
3 agent drove Plaintiff’s vehicle to the border patrol checkpoint and Plaintiff was told he
4 was under arrest. The document attached to the Complaint is a Motion to Suppress
5 Material Witness Statements in the criminal case. (CR-14-00668, Doc. 63.)

6 The Government filed a Motion to Dismiss on June 29, 2015.³ (Doc. 4.) Plaintiff
7 filed a “Motion Against Defendant’s Motion to Dismiss Claim” construed as a Response
8 (Doc. 14), Defendant filed a Reply in Support of United States’ Motion to Dismiss (Doc.
9 15), Plaintiff filed another “Motion Against Defendant’s Motion to Dismiss Claim,”
10 construed as a Supplemental Response (Doc. 16) and Defendant United States filed a
11 Surreply (Doc. 22). This case was referred to Magistrate Judge Charles R. Pyle. (Doc.
12 12.)

13 On February 11, 2016, the Magistrate Judge heard oral argument on Defendant’s
14 Motion to Dismiss. (Doc. 35). On February 16, 2016, the Magistrate Judge issued a
15 Report and Recommendation (R & R) recommending that the Motion be granted. (Doc.
16 37.) The R & R gave the parties 10 days to file written objections. (Id. at 9.) On
17 February 23, 2016, Plaintiff filed a “Motion for Another Conference Hearing on
18 Understand and Clarification of Static Conference Hearing on Evident.”⁴ (Doc. 38.) On
19 March 1, 2016, Plaintiff filed a Motion to Amend the Complaint. (Doc. 39.)

20 The Court has reviewed the Complaint, the Motion to Dismiss (Doc. 4), Plaintiff’s
21 “Motion Against Defendant’s Motion to Dismiss Claim” construed as a Response (Doc.
22 14), Defendant’s Reply in Support of United States’ Motion to Dismiss (Doc. 15),
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24 ³ A notice advising Plaintiff of his obligation to respond to the Motion to Dismiss
25 was provided. (Doc. 5.)

26 ⁴ For the reasons discussed herein, the Court will deny the request for the hearing.
27 Moreover, even if the Court were to construe the Motion as Plaintiff’s objections to the R
28 & R, Plaintiff does not provide any additional facts to support his arguments or indicate
which facts contained in the R & R are incorrect.

1 Plaintiff's second "Motion Against Defendant's Motion to Dismiss Claim," construed as
2 a Supplemental Response (Doc. 16), and Defendant's Surreply (Doc. 22), the R & R,
3 Plaintiff's "Motion for Another Conference Hearing on Understand and Clarification of
4 Static Conference Hearing on Evident." (Doc. 38.), and Defendant's response (Doc. 40).

5 The Court will adopt the R & R, grant the Motion to Dismiss, deny the Motion to
6 Amend the Complaint, and terminate the action.

7 **II. Legal Standard**

8 The Court reviews de novo the objected-to portions of the R & R. 28 U.S.C.
9 § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for clear error the unobjected-to
10 portions of the R & R. *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir.
11 1999); *see also, Conley v. Crabtree*, 14 F.Supp.2d 1203, 1204 (D. Or. 1998).

12 **III. Discussion**

13 Defendant United States asserts three grounds for dismissal of the Complaint:
14 (1) Plaintiff has not demonstrated a waiver of sovereign immunity and Plaintiff has not
15 alleged or shown that he exhausted administrative remedies as required by the Federal
16 Tort Claims Act ("FTCA"), 28 U.S.C. § 2675(a); (2) all of Plaintiff's claims are barred
17 by *Heck v. Humphrey*, 512 U.S. 477 (1994); and (3) U.S. Attorney Leonardo and AUSA
18 Decker are entitled to absolute prosecutorial immunity; thus, the claims asserted against
19 them in their individual capacity are barred.

20 The R & R finds that Plaintiff failed to exhaust his administrative remedies before
21 filing his lawsuit, that the claims are barred by *Heck*, and that Defendants Leonardo and
22 Decker are entitled to absolute immunity. (Doc. 37.) In his motion, Plaintiff seeks
23 clarification whether he filed his civil law suits⁵ before filing his administrative claim
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25 ⁵ Plaintiff has other cases pending in this Court: *Nixon v. Francis*, 15 CV-0247-
26 JGZ (CRP), and *Nixon v. Mccqueen*, 15 CV-0417-BGM. Hearings before the Magistrate
27 Judge on November 19, 2015 and February 11, 2016, in the instant case were combined
28 with hearings in *Nixon v. Francis*, 15 CV-0247-JGZ (CRP). (*See* 15-0277-CKJ-CRP,
Docs. 20, 35; 15 CV-0247-JGZ (CRP), Docs. 35, 50.) Both of those cases involve claims
arising from the events leading to Plaintiff's conviction in the criminal case.

1 form and appears to argue that even if filed in the wrong order, it was filed within the
2 time frame and the cases can be accepted or refiled. (Doc. 38 at 2.) He notes that he has
3 been found guilty in his criminal case and there is an appeal pending. (*Id.* at 2-3.) He
4 asks if he can file the civil lawsuits without waiting for the overturning of the criminal
5 cases. He argues that Brian Decker and Plaintiff’s former attorney Tyler D. Francis
6 “cannot use immunity they was not acting within the law.” (*Id.* at 3-4.) Plaintiff asserts
7 that Decker was required to contact Plaintiff’s former attorney Francis when Decker took
8 a new statement from the material witnesses. According to Plaintiff, Decker cannot get
9 immunity from a violation of federal law and the Border Patrol agents cannot get
10 immunity.

11 **A. FTCA and exhaustion of administrative remedies**

12 The R & R ruled against Plaintiff on this defense because the administrative claim
13 forms Plaintiff submitted are dated August 30, 2015 which is after the lawsuit was filed
14 and a prematurely filed FTCA “lawsuit cannot become timely by the passage of time
15 after the complaint is filed.” *Price v. United States*, 69 F.3d 46, 54 (5th Cir. 1995); *Davis*
16 *v. United States*, 944 F. Supp. 2d 36, 39-40 (D.D.C. 2013).

17 In his objections, Plaintiff seeks clarification whether he filed his civil lawsuits
18 before filing administrative claim forms and appears to argue that even if filed in the
19 wrong order, it was filed within the time frame and the cases can be accepted or refiled.
20 (Doc. 38 at 2.)

21 The Court finds that the Magistrate Judge correctly ruled that Plaintiff cannot cure
22 the untimely filing of the administrative claim form for purposes of this lawsuit; that is,
23 this lawsuit must be dismissed because Plaintiff did not exhaust his administrative
24 remedies before the lawsuit was commenced. But as the Magistrate Judge observed, “the
25 action may be refiled if and when the plaintiff can fully satisfy the FTCA’s exhaustion
26 requirement.” (Doc. 37 at 6, citing *Cureton v. United States Marshal Service*, 322 F.
27 Supp. 2d 23, 27 (D.D.C. 2004); *Robinson v. United States*, 2014 WL 2940454 (M.D. Pa.
28 June 30, 2014).)

1 **B. *Heck* bar**

2 The R & R notes that the Complaint appears to assert unlawful arrest and
3 prosecution. As noted a “Motion to Suppress Material Witness Statements” is attached to
4 the Complaint and shows the case caption as *United States v. Tony Nixon*, CR-14-00668.⁶
5 (Doc. 1-4 at 38). As the R & R observes, the docket in this criminal case shows that
6 Plaintiff was indicted on April 9, 2014 on charges of transporting illegal aliens for profit,
7 that he was found guilty of the charges after a bench trial on February 26, 2015, and that
8 on September 14, 2015, he was sentenced to 18 months in prison. (*See* CR-14-00668-
9 TUC-DCB, Doc. 27, 113, 158.) Plaintiff filed a notice of appeal on September 15, 2015.
10 (*See id.* Doc. 159.) AUSA Decker was the prosecutor in the case.

11 The R & R finds that the Complaint is premature because the conviction has not
12 been reversed, expunged, or otherwise invalidated. (Doc. 37 at 7, citing *Heck*, 512 U.S.
13 at 487-88). The rationale of *Heck* has been extended to cases brought under the FTCA or
14 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *See Erlin v. United States*,
15 364 F.3d 1127, 1133 (9th Cir. 2004) (FTCA); *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.
16 1996) (*Bivens*). Plaintiff does not object, and the Court finds no clear error.

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19 ⁶ The transcript of the final day of the bench trial shows that the evidence was
20 undisputed that Plaintiff was stopped near the border driving his own car with three
21 passengers, two of whom were undocumented persons. The conviction demonstrates
22 probable cause for the arrest. (CR-14-00668, Doc. 140); *see Cabrera v. City of*
23 *Huntington Park*, 159 F3d 374 (9th Cir. 1998). As noted, the Motion to Suppress related
24 to material witness statements in the criminal case. (*Id.* Doc. 63.) Magistrate Judge
25 Leslie A. Bowman issued a Report and Recommendation on November 10, 2014
26 recommending that the Court deny the Motion to Suppress. (CR-14-00668, Doc. 81.)
27 On January 15, 2016, Judge Jorgenson adopted the Report and Recommendation and
28 denied the Motion to Suppress. (*Id.* Doc. 95.) Later, the Court granted a *motion in limine*
to admit the material witness video depositions, and the material witness depositions are
included in the government’s witness list. (Docs. 110, 114.) Witness Andrade-Queveda
testified by video deposition the first day of trial. (Doc. 138 at 86.) Thus, success on
Plaintiff’s § 1983 claims would necessarily invalidate the conviction. *See Heck*, 512 U.S.
at 486.

1 Plaintiff notes that he has been found guilty in his criminal cases and there is an
2 appeal pending. He asks if he can file the civil lawsuit cases without waiting for the
3 overturning of the criminal cases. As the Magistrate Judge said in the R & R, to the
4 extent that Plaintiff seeks damages for actions undertaken by government officials that
5 allegedly resulted in his unlawful arrest, imprisonment, prosecution and conviction, no
6 cause of action for damages has yet accrued based on *Heck*. The FTCA claims do not
7 accrue until Plaintiff has successfully challenged his conviction in a direct or collateral
8 attack. *See Erlin*, 364 F.3d at 1130-34. In other words, Plaintiff does not yet have claims
9 for unlawful arrest and prosecution, and if he files his lawsuit before his criminal
10 conviction is invalidated, the new civil lawsuit is likely to be dismissed as barred by
11 *Heck*.

12 C. Immunity of Leonardo and Decker

13 The R & R notes that the Complaint mentions AUSA Decker and United States
14 Attorney Leonardo regarding Plaintiff's request for money damages without asserting
15 any specific allegation against them or conduct by them. (Doc. 4- 1, Compl. at 33). The
16 "Motion to Suppress Material Witness Statements" attached to the Complaint related to
17 *United States v. Tony Nixon*, Case No. CR-14-00668 and refers to AUSA Decker's
18 actions in interviewing witnesses for trial. The R & R concludes that "[t]o the extent that
19 Plaintiff has asserted any claim regarding actions taken by U.S. Attorney Leonardo and
20 AUSA Decker, the claims arise out of their actions in indicting and prosecuting
21 Plaintiff's criminal case. Such actions are 'intimately associated with the judicial phase of
22 the criminal process'" and any claims asserted against them in the Complaint are barred
23 by absolute immunity. (Doc. 37 at 8, citing *Imbler v. Pachtman*, 424 U.S. 409, 430
24 (1976).)

25 In his Motion, Plaintiff argues that Brian Decker and former attorney Tyler D.
26 Francis⁷ "cannot use immunity they was not acting within the law." He attaches to his
27 objections the transcript from the Motion to Suppress.

28 ⁷ Tyler Francis is not a Defendant in the instant lawsuit; he is a Defendant in *Nixon*

1 First, the Magistrate Judge's recommendation on the immunity issue does not
2 relate to either the Border Patrol agents or Francis, who is not a defendant in this case.
3 Plaintiff does not like the application of the doctrine of absolute immunity but that is not
4 a ground for an objection. The Magistrate Judge observed that Plaintiff's criminal case is
5 on appeal and there has been no determination that the prosecutor acted unlawfully. The
6 Court finds no error.

7 **IV. Motion to Amend the Complaint**

8 The Court has reviewed the proposed First Amended Complaint (FAC). It is
9 rambling and asserts the same claims arising out of the arrest and prosecution of the same
10 criminal case and names the same Defendants as in the original complaint. The Court has
11 found that the claims are barred by *Heck* until the conviction is reversed, expunged, or
12 otherwise invalidated. The Motion is denied and leave to amend is futile because
13 Plaintiff cannot show at this time that his conviction is reversed, expunged, or otherwise
14 invalidated.

15 **IT IS ORDERED:**

16 (1) Plaintiff's "Motion for Another Conference Hearing on Understand and
17 Clarification of Static Conference Hearing on Evident" (Doc. 38) is denied.

18 (2) The R & R (Doc 37) is adopted.

19 (3) Defendant's Motion to Dismiss (Doc. 4) is granted.

20 (4) Plaintiff's Motion to Amend the Complaint (Doc. 39) is denied.

21 (5) The action is terminated with prejudice as to the claims against Leonardo
22 and Decker discussed in the R & R and without prejudice on all other claims. The Clerk
23 of Court must enter judgment accordingly.

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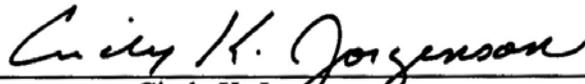
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v. Francis, 15 CV-0247-JGZ (CRP).

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(6) The Clerk of Court is directed to accept no further filings in this matter except in connection with an appeal.

Dated this 9th day of March, 2016.



Cindy K. Jorgenson
United States District Judge