

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION**

GERARDO SERRANO, on behalf of	§	
Himself and all others similarly	§	
situated,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil No. 2:17-CV-00048-AM-CW
	§	
U.S. CUSTOMS and BORDER	§	
PROTECTION, et al.,	§	
	§	
Defendants.	§	

**REPLY TO PLAINTIFF’S RESPONSE TO
MOTION TO DISMISS OF DEFENDANTS UNITED STATES OF AMERICA, UNITED
STATES CUSTOMS AND BORDER PROTECTION, AND KEVIN McALEENAN**

Defendants United States of America, U.S. Customs and Border Protection (“CBP”), and Kevin McAleenan, in his official capacity as Acting Commissioner of CBP, (collectively “Defendants”), filed a Motion to Dismiss (Dkt. # 49) asserting that Plaintiff Gerardo Serrano’s (“Plaintiff”) claims must be dismissed for lack of jurisdiction and/or for failure to state any claims upon which relief can be granted. As explained in Defendants’ Motion to Dismiss, Plaintiff’s Fourth and Fifth Amendment Due Process claims against the Defendants should be dismissed for lack of jurisdiction because they are moot and barred by sovereign immunity. (Dkt. # 49 at 4 – 6). Even if the Court had jurisdiction over his claims, Plaintiff has no claim for declaratory or injunctive relief because the United States did not violate his Constitutional rights. (Dkt. # 49 at 6 – 7). Plaintiff Responded on January 10, 2018 by clarifying that he was making a facial challenge to the constitutionality of the United States’ civil forfeiture laws, but only cited to cases that make as applied challenges to specific state and federal forfeiture provisions. (Dkt. # 55 at 15-16).

Additionally, Defendants draw the Court's attention to two particular issues raised by Plaintiff's Response.

A. MOOTNESS

The United States is immune from suit except to the extent it consents to be sued, and the terms of its consent defines the Court's jurisdiction over the suit. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). In its Motion to Dismiss, Defendant argued that with the return of his truck, there is no longer any case or controversy between the parties about ownership or possession of the underlying property. (Dkt. # 49 at 4) (citing *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) ("An 'actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'")). Plaintiff pointed out that in addition to the return of his truck, the United States is also in the process of returning the \$3,804.99 that he posted as bond. (Dkt. # 55, Exh. A). Moreover, the United States is in the process of returning Plaintiff's five bullets and his magazine. Plaintiff has, therefore, achieved what he desired by bringing his "individual claim for return of seized property under" Rule 41(g) and his legal claims are moot. (Dkt. # 1 at 3). Plaintiff is in possession of his truck and will soon be in possession of the \$3,804.99 bond and the ammunition that he attempted to smuggle into Mexico.

Plaintiff next argues that because of the "relation-back" doctrine, Plaintiff can continue to represent his class despite the return of his property and that he no longer has a case or controversy before this Court. (Dkt. # 55 at 9-12). As Plaintiff points out, "mootness of a named plaintiff's individual claims *after* class certification does not moot a class action." (*Id.* at 9 (emphasis in original; citation omitted). However, where Plaintiff's claims are mooted *before* the Court has an opportunity to certify the class, there is no longer a case or controversy. *See Satterwhite v. City of Greenville, Texas*, 578 F.2d 987 (5th Cir. 1978) (vacated on other grounds by 445 U.S. 940); *Swan v. Stoneman*, 635 F.2d 97, 102 n.6 (2d Cir. 1980) (as a general rule, a class action cannot be

maintained unless there is a named plaintiff with a live controversy both at the time complaint is filed and at the time the class is certified); *Hechenberger v. Western Elec. Co.*, 570 F.Supp. 820 (E.D. Mo. 1983) (when the claims of the named plaintiffs are moot before class certification, dismissal of the action is required if there is no case or controversy); *Valentine v. Secretary of Health & Human Servs.*, 542 F.Supp. 76 (N.D. Cal. 1982) (the mootness of plaintiff's individual claim in a purported class action based on a claim that plaintiff's supplemental-security-income benefits were terminated without a proper hearing and that the relevant regulations were unconstitutional required dismissal of the class action). Here, the Court has yet to certify a class and should not do so based on the reasons outlined in the Government's Response to Plaintiff's Motion for Class Certification. (Dkt. # 51). With the return of his property and the dismissal of his *Bivens* claim, Plaintiff no longer has a case or controversy before this Court.

B. PLAINTIFF IMPROPERLY RELIES UPON THE APA

Plaintiff claims that because he is seeking the return of his property and not damages, his claims are not barred under the Administrative Procedures Act, 5 U.S.C. § 702. (Dkt. # 55 at 12). Section 704 of the APA states, however, that when review is sought under the general review provisions of the APA, the "agency action" in question must be a "final agency action." According to § 704, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Here, there was never a final agency action with regard to the lawful seizure of Plaintiff's property. Furthermore, the statute of limitations for charging a violation of 22 U.S.C. § 401 is five years from the offense. Therefore, the United States Attorney's Office is well within the statutory time period to make a final agency decision on whether to charge Plaintiff with a crime. *See also Santana-Lim v. United States*, 444 Fed. Appx. 823 (5th Cir. 2011) (finding that the principle of automatic forfeiture applies to 19 U.S.C. § 1595a(d) and Plaintiff was not entitled to recover property or purchase amount even

though government failed to bring judicial or administrative forfeiture proceedings within the statute of limitations). Plaintiff, therefore, improperly relies upon the APA as a basis to rebut Defendants' assertion of sovereign immunity.

CONCLUSION

Defendants respectfully request that the Court grant its Motion (Dkt. # 49), and that it dismiss with prejudice all of Plaintiff's claims against them.

Dated: January 19, 2018

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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