UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MACKIE SHIVERS,

Plaintiff,

v. Case No: 5:16-cv-276-Oc-10PRL

UNITED STATES OF AMERICA, DALE GRAFTON, T. ANTHONY, FNU SPURLOCK, FNU GAY and FNU BARKER,

Defendants.
_____/

OPINION AND ORDER

Plaintiff, a prisoner at the United States Penitentiary in Coleman, Florida, initiated this action on April 14, 2016 by filing a *pro se* civil rights complaint against Defendants United States of America, Dale Grafton, T. Anthony, FNU Spurlock. FNU Gay, and FNU Barker (Doc. 1). Plaintiff raised claims pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675, *et seq*. and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).[1] Plaintiff's amended complaint (Doc. 6) is the operative complaint in this action. This cause is before the Court on the following:

> Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (Doc. 22, filed September 26, 2016); and
>
> Plaintiff's Opposition to Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment (Doc. 31, filed February 6, 2017).

[1] In *Bivens*, the United States Supreme Court recognized a cause of action against a federal employee who, while acting under color of federal law, violates an individual's constitutional rights. *Griffin v. City of Opa–Locka*, 261 F.3d 1295, 1303 (11th Cir. 2001). The law to be applied in *Bivens* cases is generally the law that has developed under 42 U.S.C. § 1983. *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995).

For the reasons given in this Order, the defendants' motion to dismiss is granted. Sovereign immunity bars Plaintiff's claims against the United States. Plaintiff's *Bivens* claims are dismissed without prejudice pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies.

I. Pleadings

Amended Complaint

Plaintiff asserts that, in August of 2015, Defendants Grafton, Spurlock, Anthony, and Barker assigned Marvin Dodson to Plaintiff's cell at USP Coleman II (Doc. 6 at 7) even though they knew, or should have known, that Dobson was mentally unstable and had demonstrated violence towards his cellmates. *Id.* Plaintiff became concerned for his safety and expressed his concern to Defendant Gay. *Id.*

On September 3, 2015, Dodson attacked Plaintiff while he (Plaintiff) was sleeping (Doc. 6 at 7). Dodson stabbed Plaintiff with a pair of scissors in his right eye, and as a result, Plaintiff has lost vision in that eye. *Id.*

Plaintiff asserts that the defendants violated his right to due process and to be free from cruel and unusual punishment because they were deliberately indifferent to his concerns regarding housing (Doc. 6 at 8). He also asserts that Defendant United States of America was negligent for failing to ensure that Plaintiff was safely housed. *Id.* He seeks damages of $1,200,000 against each individual defendant and $400,000 against the United States of America. *Id.*

Defendant's Motion to Dismiss or, alternatively, for Summary Judgment

Defendants filed a motion in which they assert that Plaintiff's complaint must be dismissed because: (1) Plaintiff did not exhaust his administrative remedies on his *Bivens*

claims prior to filing his complaint; (2) the individual defendants have qualified immunity from Plaintiff's constitutional claims; and (3) Plaintiff's negligence claims against the United States are barred by sovereign immunity under the discretionary function exception to the FTCA (Doc. 22).[2]

The defendants attach numerous documents to their motion and base some of their arguments on the attached documents (Doc. 21-1; Doc. 21-2). Specifically, Defendants attach: Declaration and Certification of Records by Caixa Santos ("Santos Aff.") (Doc. 22-1 at 2-4); SENTRY Administrative Generalized Retrieval Full Screen Format of Remedy No. 840881-F1 (Doc. 22-1 at 7); Administrative Remedy Submission No. 840881-F1 (Doc. 22-1 at 9-13); SENTRY Administrative Remedy Generalized Retrieval Full Screen Format of Remedy No. 840881-R1 (Doc. 22-1 at 15); SENTRY Administrative Remedy Generalized Retrieval (Doc. 22-1 at 17-18); Declaration of Kenneth Hill (Doc. 2202 at 2-5); Dodson's Housing assignment (Doc. 22-2 at 11-13); Inmate Investigative Report (Doc. 22-2 at 15-18); and Bureau of Prisons Psychology Services Sexual Abuse Intervention Report (Doc. 22-2 at 20).

Plaintiff also filed numerous documents with his response to the defendants' motion (Doc. 31; Doc. 32; Doc. 33). He attaches: Affidavit of Mackie Shivers ("Shivers Aff.") (Doc. 32 at 1-4); Informal Resolution Form (Doc. 32 at 5); Denial of BP-8 complaint (Doc. 32 at 8); October 30, 2015 Request for Administrative Remedy (BP-9), Case Number 840881-FI (Doc. 32 at 10); November 2, 2015 Rejection of 840881-F1

[2] The defendants' motion appears to be directed towards Plaintiff's original complaint (Doc. 1). However, Plaintiff was directed to file (and did file) an amended complaint on the Court's standard civil rights complaint form (Doc. 4; Doc. 6). Plaintiff asserts that this Court should deny the defendants' motion on the ground that it is directed towards the wrong complaint (Doc. 31 at 7). A review of Plaintiff's original complaint shows that it is identical in substance to the amended complaint. Accordingly, the Court will construe the defendants' motion to dismiss as being directed towards Plaintiff's amended complaint.

Administrative Remedy Request (Doc. 32 at 12); November 19, 2015 Regional Administrative Remedy Appeal (BP-10) (Doc. 32 at 14); November 24, 2015 Rejection Notice Administrative Remedy (Doc. 32 at 16); December 18, 2015 Central Office Administrative Remedy Appeal (BP-11) (Doc. 32 at 18); and Affidavit of Gordon C. Reid ("Reid Aff.") (Doc. 33).

Generally, a district court must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint. Fed. R. Civ. P. 12(b); *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985). In the Eleventh Circuit, when a district court converts a Rule 12(b)(6) motion to dismiss into one for summary judgment by considering matters outside the pleadings, the judge must give all parties ten days' notice. *Donaldson v. Clark*, 819 F.2d 1551, 1555 (11th Cir. 1987). Because the claims in Plaintiff's complaint are subject to dismissal for failure to exhaust and for lack of jurisdiction, the Court declines to convert the defendants' motion into a motion for summary judgment. Accordingly, except for those related to exhaustion,[3] the attached documents (and arguments based upon those documents) will not be considered by the Court.

II. Standard of Review for Motions to Dismiss

When considering a motion to dismiss, this Court accepts as true all allegations in the complaint and construes them in the light most favorable to the plaintiff. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1262-63 (11th Cir. 2004). Further, this Court favors the plaintiff with all reasonable inferences from the allegations in the complaint.

[3] A district court may properly consider facts outside of the pleadings to resolve a factual issue regarding exhaustion where the factual dispute does not decide the merits and the parties have a sufficient opportunity to develop the record. *See Bryant v. Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008); *see also* discussion *infra* Part III(b).

Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990) ("On a motion to dismiss, the facts stated in [the] complaint and all reasonable inferences therefrom are taken as true."). However, the Supreme Court explains that:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and quotation marks omitted). Further, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court, referring to its earlier decision in *Bell Atlantic Corp. v. Twombly*, illustrated a two-pronged approach to motions to dismiss. First, a reviewing court must determine whether a Plaintiff's allegation is merely an unsupported legal conclusion that is not entitled to an assumption of truth. Next, the court must determine whether the complaint's factual allegations state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 679.

In the case of a *pro se* action, the Court should construe the complaint more liberally than it would pleadings drafted by lawyers. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Nevertheless, *pro se* litigants are not exempt from complying with the Federal Rules of Civil Procedure, including Rule 8(a)(2)'s pleading standard. *GJR Investments, Inc. v. Cnty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) ("Yet even in the case of *pro se* litigants this leniency does not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action[.]" (internal citations omitted)), *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 706 (11th Cir.

2010); *see also Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (stating that *pro se* litigants are "subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure").

III. Analysis

a. Plaintiff's FTCA claims against the United States are dismissed for lack of subject matter jurisdiction

Plaintiff asserts that Coleman prison officials were negligent for placing him in the same cell as Dodson after Plaintiff expressed reservations about the assignment. Accordingly, Plaintiff argues that the United States is liable for his injuries. Defendants argue that the discretionary function exception to the FTCA precludes this Court from considering this claim (Doc. 22 at 13). Plaintiff does not urge that the discretionary function exception does not apply under this factual scenario. Rather, he asserts that whether subject matter jurisdiction exists under the FTCA is a question of fact, and as a result, he (Plaintiff) must be allowed to conduct discovery before his FTCA claims are dismissed (Doc. 31 at 19). Plaintiff is mistaken. The question of whether the decisions of prison officials regarding Plaintiff's safety and housing fall within the discretionary function exception to the FTCA (thereby depriving the district court of subject matter jurisdiction) is a legal one. *See Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir. 1998) ("Whether the United States is entitled to application of the discretionary function exception to the FTCA is a question of law[.]"). Accordingly, this Court must determine whether the discretionary function exception bars Plaintiff's claims against the United States.

The United States is immune from suit unless it has consented to be sued, and its consent to be sued defines the terms and conditions upon which it may be sued. *United*

States v. Mitchell, 445 U.S. 535, 538 (1980). The FTCA provides that the United States may be held liable for money damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" in the same manner and to the same extent as a private person under like circumstances. 28 U.S.C. § 1346(b)(1); *Turner ex rel. Turner v. United States*, 514 F.3d 1194, 1200 (11th Cir. 2008). Thus, the "FTCA is a specific, congressional exception" to the United States' sovereign immunity. *Suarez v. United States*, 22 F.3d 1064, 1065 (11th Cir. 1994). As such, the waiver of sovereign immunity permitted under the FTCA "must be scrupulously observed, and not expanded, by the courts." *Id.*

While the FTCA waives the United States' sovereign immunity from suit in federal courts for the negligent actions of its employees, this waiver of sovereign immunity is subject to exceptions. *Cohen*, 151 F.3d at 1340. "The discretionary function exception . . . precludes government liability for '[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" *Id.* (quoting 28 U.S.C. § 2680(a)). "If the discretionary function exception applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction." *Id.; see also U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009) (stating that "[w]hen the discretionary function exception to the FTCA applies, no federal subject matter jurisdiction exists").

The discretionary function exception "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain

governmental activities from exposure to suit by private individuals.'" *Cohen*, 151 F.3d at 1340 (quoting *United States v. Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808 (1984)). This is so because to impose "liability on the government for its employees' discretionary acts 'would seriously handicap efficient governmental operations.'" *Id.* at 1340–41 (quoting *Varig Airlines*, 467 U.S. at 814). Thus, "even the negligent performance of a discretionary function does not subject the government to liability under the Federal Tort Claims Act." *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1194 (D.C. Cir. 1986).

In order for a claim to fall within the discretionary function exception to the FTCA, it must meet two requirements. First, the challenged action must involve an element of judgment or choice. The discretionary element does not exist where "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (internal quotation marks and citation omitted). In such event, the discretionary function exception does not apply because the employee has no rightful option but to adhere to the directive. *Id.* Next, if an element of choice or judgment *is* involved, the court must determine whether that choice or judgment is of the kind that the discretionary function exception was designed to shield. *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991)). The exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 323.

1. The prison officials' decisions regarding Plaintiff's safety and housing involved an element of judgment or choice

Title 18 U.S.C. § 4042(a) provides in pertinent part as follows:

> The Bureau of Prisons, under the direction of the Attorney General, shall—

> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

Id. Notably, the duty imposed by § 4042(a) is of a general nature, and broadly requires that the BOP provide for the safekeeping, protection, and "suitable quarters'' of federal inmates. BOP officials are given no guidance, and thus have discretion, in deciding how to accomplish these objectives. The Eleventh Circuit has determined that § 4042(a) does not specifically prescribe a course of action for prison officials to follow. *See Cohen*, 151 F.3d at 1342 ("[E]ven if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception."); *see also Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997) ("While it is true that this statute sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates."); *Montez ex rel. Estate of Hearlson v. United States*, 359 F. 3d 392, 396 (6th Cir. 2004) (adopting the reasoning in *Cohen* and *Calderon* to determine that BOP officials have discretion in determining how to keep inmates safe).

Likewise, two provisions in the Code of Federal Regulations also govern the actions of prison officials. One states that an inmate "may" be removed from the general population for safety reasons. 28 C.F.R. § 541.22(a). Another provides that BOP staff

"may consider . . . as protection cases" inmates who are in danger. 28 C.F.R. § 541.23(a). The use of the word "may" in these regulations, rather than "shall," demonstrates that their implementation is left to the discretion of BOP officials. *See Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 796 (8th Cir. 1998) (holding that "the use of the term 'may' in the regulations imports discretion"); *see also Dorris v. Absher*, 179 F.3d 420, 429 (6th Cir. 1999) ("The use of the term 'may' in a statute is generally construed as permissive rather than as mandatory."). Because these regulations contain no mandatory language, they do not impose a mandatory, nondiscretionary duty upon BOP officials. In sum, the relevant statute and regulations allowed BOP officials the discretion to exercise judgment when making decisions regarding Plaintiff's safety and housing arrangement.

2. The decisions regarding Plaintiff's safety and housing were the kind that the discretionary function were meant to shield

Under the Supreme Court's two-factor approach, we must next consider "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322–23 (quotation marks omitted). The Supreme Court has explicitly stated what a plaintiff must do to survive a motion to dismiss based upon the discretionary function exception:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

Id. at 324–25. Based on this, we must decide whether Plaintiff's complaint alleges facts sufficient to rebut the presumption that the decisions by the prison officials regarding Plaintiff's safety were "of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322–23 (quotation marks omitted) (the *Gaubert* presumption).

In the present case, only three allegations in the complaint directly focus on the bases for the prison officials' decisions regarding Plaintiff's safety. The complaint first alleges that Defendants Grafton, Spurlock, Anthony, and Barker "knew, or reasonably should have known, that Mr. Dodson was mentally unstable, and was presenting aggressive and violent tendencies toward other prisoners and in particular his cellmates." (Doc. 6 at 7). He asserts that the prisoner officials also knew, or reasonably should have known, that Mr. Dodson was delusional and that Plaintiff was very concerned for his safety and had previously expressed these sentiments to [Defendant] Gay, and other prison officials." *Id.* Finally, argues Plaintiff, "these prison officials, and each of them, assigned this violent and aggressive mentally unstable 26 year old to cell with this Plaintiff who, at the time, was 64 years old." *Id.* These allegations simply allege that the BOP officials were negligent in making a decision—to place Dodson in the same cell as Plaintiff—without addressing the nature of that decision, and therefore do not satisfy *Gaubert*'s requirement that a complaint "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324–25.

In conclusion, the relevant statute and regulations do not prescribe a mandatory course of conduct for prison officials to follow when making decisions regarding inmates'

safety or housing. Moreover, Plaintiff's complaint fails to rebut the *Gaubert* presumption that the decisions by prison officials regarding his safety were based upon BOP policy. Therefore, the discretionary function exception shields the United States from liability in this case, and Plaintiff's FTCA claim must be dismissed for lack of subject matter jurisdiction. *See Cohen*, 151 F.3d at 1338 (recognizing that the BOP's decisions concerning classification of prisoners and what institution to place them in involve an element of choice entitled to protection under the discretionary function exception to the FTCA); *Patel v. United States*, 398 F. App'x 22, 29 (5th Cir. 2010) ("decisions regarding the transfers and classifications of prisoners generally fall within the discretionary function exception"); *Calderon*, 123 F.3d at 951 ("It is clear that balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison involves considerations based upon public policy."); *Santa–Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003) (decisions about classifying inmates or assigning them to a particular unit or institution, or about allocation of correctional staff, fall within the discretionary function exception); *Ballester v. United States*, No. 1:01-cv-27120JOF, 2006 WL 3544813 (N.D. Ga. 2006) (BOP's decision to place plaintiff in cell with another inmate who subsequently assaulted him fell within discretionary function exception to FTCA); *Brown v. United States,* 569 F.Supp.2d 596, 600 (W.D. Va. 2008) ("the court agrees with the United States that a prison official's decision regarding whether to place an inmate in the general population falls within the discretionary function exception").

b. Plaintiff's *Bivens* claims are unexhausted

Defendants assert that Plaintiff's *Bivens* claims against the individual defendants are subject to dismissal because Plaintiff has not exhausted his administrative remedies. Title 42 U.S.C. § 1997e provides, in relevant part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). This exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, whether they allege excessive force or some other wrong, and whether they seek only monetary damages. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The exhaustion requirement applies to *Bivens* actions. *Alexander v. Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998) (holding that prisoner asserting *Bivens* claim must exhaust available administrative remedies).

Exhaustion of all available administrative remedies is a mandatory pre-condition to suit. *Booth v. Churner*, 532 U.S. 731, 739 (2001) ("The 'available' 'remed[y]' must be 'exhausted' before a complaint under § 1983 may be entertained.") (emphasis added); *see also Porter*, 534 U.S. at 524-25 ("Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."); *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) ("[T]he PLRA exhaustion requirement requires proper exhaustion."). Proper exhaustion "demands compliance with an agency's deadlines and other critical procedural rules [as a precondition to filing suit in federal court] because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."

Woodford, 548 U.S. at 90-91. A failure to exhaust administrative remedies is an affirmative defense that the defendant bears the burden of proving. *See Jones v. Bock*, 549 U.S. 199 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

In *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), the Eleventh Circuit outlined the procedure district courts should follow when presented with a motion to dismiss for failure to exhaust administrative remedies under the Prison Litigation Reform Act ("PLRA"). The *Bryant* court held that the defense of failure to exhaust should be treated as a matter in abatement. *Id*. at 1374. "This means that procedurally the defense is treated 'like a defense for lack of jurisdiction,' although it is not a jurisdictional matter." *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008) (quoting *Bryant*, 530 F.3d at 1374). Because exhaustion is a matter in abatement, "it should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment." *Bryant*, 530 F.3d at 1374-75 (citation and internal quotation omitted).

Deciding a motion to dismiss for failure to exhaust administrative remedies involves two steps. *Turner*, 541 F.3d at 1082. First, the court looks to the factual allegations in the defendants' motion, and those in the plaintiff's response. *Id*. If they conflict, the court accepts the plaintiff's version as true. "If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed." *Id*.; *see also Bryant*, 530 F.3d at 1373-74. If the complaint is not subject to dismissal at the first step, where the plaintiff's allegations are assumed to be true, "the court proceeds to make specific findings in order to resolve the disputed factual

issues related to exhaustion." *Turner*, 541 F.3d at 1082 (citing *Bryant*, 530 F.3d at 1373-74, 1376). Upon making findings on the disputed issues of fact, the court then decides whether, under those findings, the plaintiff has exhausted his available administrative remedies.

1. There is a disputed issue of fact as to whether Plaintiff exhausted his *Bivens* claims

The grievance procedure promulgated by the BOP (and which Plaintiff was required to follow) requires an inmate to: (1) file an informal grievance (BP-8); (2) file a formal written complaint with the institution by submitting a Request for Administrative Remedy (BP-9); (3) file an appeal to the Regional Director by submitting a Regional Administrative Remedy Appeal (BP-10); and (4) file an appeal to the General Counsel for the BOP by submitting a Central Office Administrative Remedy Appeal (BP-11). 28 C.F.R. § 542.10-542.15. Each of these steps is generally required to satisfy the exhaustion requirement. *Id.*

In the instant case, Defendants assert that Plaintiff submitted administrative remedies concerning the attack at the BP-9 and BP-10 levels (Doc. 22 at 6); ("Santos Aff" at ¶¶ 7, 8). Defendants claim that Plaintiff's BP-10 was rejected at the Regional Office and that "Plaintiff thereafter failed to submit his appeal to the BOP's Office of General Counsel". *Id.* In other words, Defendants urge that Plaintiff did not complete the administrative remedy process concerning Dobson's attack because he never filed an appeal at the BP-11 level. In support, Defendants attach the affidavit of Caixa Santos who attests that Plaintiff's appeal to the Regional Office (BP-10) was rejected on November 24, 2015 because Plaintiff sought monetary compensation. Santos Aff. at ¶ 8. Santos states that no BP-11 was ever filed, and attaches a copy of Plaintiff's SENTRY

report showing the final grievance filed regarding the incident to be the November 24, 2015 BP-10 (Doc. 22-1 at 13-18).

Plaintiff counters that he did file a BP-11 after his BP-10 was rejected and that "when he received no response at the final level, made several inquiries in regard thereto, to no avail." (Doc. 31 at 9). In support, he attaches his own sworn affidavit in which he attests that he mailed a BP-11 form to the Central Office on December 18, 2015 along with attached BP-8 and BP-9 forms (Shivers Aff. at ¶ 3). He asserts that a "true and correct copy of the documents described above" are attached to the affidavit. *Id.* at ¶ 4. He also attaches the affidavit of fellow inmate Gordon Reid who attests that he (Reid) typed Plaintiff's BP-11 form and reviewed "a copy of the form signed and dated December 18, 2015, on which day [Plaintiff] informed me that he had mailed to Central Office, 1st class postage, ppd., by giving in hand to the institutional mail officer." (Reid Aff. at ¶ 5).

Because there is a disputed issue of fact as to whether Plaintiff completed the exhaustion process, this issue cannot be resolved at the first step of the *Turner* analysis. Accordingly, the Court must make specific findings in order to resolve the disputed factual issues. *Turner*, 541 F.3d at 1082. Because the parties have had a sufficient opportunity to develop the factual record, this Court may resolve factual issues on this dispute. *See Turner*, 541 F.3d at 1082.

2. Plaintiff did not file a proper BP-11 form with the Central Office

After considering all the evidence submitted by both sides, this Court is persuaded by the affidavit of Caixa Santos, and the attachments thereto, that Plaintiff did not file a BP-11 form with the Central Office. Likewise, there is no record in SENTRY of Plaintiff's BP-11, even though SENTRY shows that Plaintiff filed BP-9 and BP-10 forms in this case

and numerous grievances in a prior case (Doc. 22-1 at 18). Plaintiff urges that he prepared a BP-11 form on December 18, 2015 and then mailed the form to the Central Office—as evidence to support this claim, he attaches a copy of the alleged form to his response (Doc. 32 at 18). However, the copy of the BP-11 form provided as proof is unsigned and would not have served to exhaust this claim, even if filed. *See* 28 C.F.R. § 542.15 (b)(3) ("The inmate shall date and sign the Appeal and mail it to . . . the National Inmate Appeals Administrator, Office of the General Counsel[.]"). Further, while Plaintiff makes a cursory assertion that he "made several inquiries to various prison officials" about the status of his BP-11, he does not describe the inquiries or provide the identities of the officials who were allegedly queried about his appeal. The attestation of fellow inmate Gordon C. Reid that he saw a copy of the "signed and dated December 18, 2015" BP-11 form (Doc. 33) is not credible, given that the alleged copy of the BP-11 attached to Plaintiff's affidavit is unsigned and could not be the document to which Reid refers.

Plaintiff has provided no credible evidence, other than his own statement, that BOP personnel lost his BP-11 appeal. The Court finds that Plaintiff's assertion is outweighed by other record evidence suggesting that such appeal was never filed, and if filed, was not done so properly. *See Trias v. Fla. Dep't of Corr.*, 587 F. App'x 531 (11th Cir. 2014) (on issue of exhaustion, district court entitled to find the affidavit of the FDOC records custodian more persuasive than Plaintiff's affidavit); *Bryant*, 530 F.3d at 1376-78 (recognizing that the district court may resolve a credibility issue when considering exhaustion and finding that the district court reasonably concluded that Plaintiff's allegation that he was denied access to grievance forms at the prison was not credible); *Wright v. Langford*, 562 F. App'x 769, 776 (11th Cir. 2014) (district court reasonably found

Plaintiff's purported ignorance of grievance procedure was not credible and alternatively dismissed claim because even had grievance been timely filed, it was defective).

The defendants have met their burden of proving that Plaintiff failed to exhaust his available administrative remedies. Accordingly, their motion to dismiss Plaintiff's *Bivens* claims is granted.

Conclusion

It is hereby **ORDERED and ADJUDGED:**

1. Defendant's motion to dismiss Plaintiff's Complaint (Doc. 22) is **GRANTED**. Sovereign immunity bars Plaintiff's claims against the United States.[4] Plaintiff's *Bivens* claims are dismissed under 42 U.S.C. § 1997e(a) for Plaintiff's failure to exhaust his administrative remedies.

2, With no remaining claims or defendants, the **Clerk of Court** is directed to terminate any remaining pending motions, enter judgment in favor of the defendants, and close this case.

DONE and **ORDERED** in Ocala, Florida on April 14, 2017.

UNITED STATES DISTRICT JUDGE

SA: OrlP-4
Copies to: Mackie Shivers
Counsel of Record

[4] Because all claims are dismissed, the Court will not consider Defendants' arguments that Plaintiff has not stated a deliberate indifference claim against the individual defendants and that the defendants are entitled to qualified immunity.