
APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11787-J

In re:

STEVEN ANTHONY GRAHAM,

Petitioner.

On Petitions for Writ of Mandamus from the
United States District Court for the
Middle District of Florida

Before: TJOFLAT and HULL, Circuit Judges.

BY THE COURT:

Steven Graham, a federal prisoner proceeding *pro se*, moves this Court for reconsideration of our previous denial of his petition for a writ of mandamus arising out of his 28 U.S.C. § 2241 petition for a writ of habeas corpus and his civil complaint under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, and the Privacy Act, 5 U.S.C. § 522(a). In his mandamus petition, Graham asked us to direct the U.S. District Court for the Middle District of Florida to comply with a pretrial scheduling order in his FTCA case in ruling on a motion for summary judgment. He also asked us to direct the district court to compel the district court judge, magistrate judge, district court clerk, and assistant U.S. attorney to recuse themselves. Finally, Graham asked us to compel the district court to rule on his motion for a preliminary injunction in his habeas case without further delay.

We denied Graham's mandamus petition. We determined that, to the extent Graham sought relief as to his FTCA complaint, ~~mandamus~~ relief was not appropriate because he had the

adequate alternative remedy of appealing the dismissal of his FTCA action. Further, we noted that Graham had the adequate alternative remedy of moving the district court for the recusal of the district court judge, the magistrate judge, the court's clerk, and the assistant U.S. attorney. Finally, we noted that, to the extent Graham sought a ruling on his § 2241 petition, he had not established a clear and indisputable right to relief because his § 2241 petition was barred by our precedent and because he had the adequate alternative remedy of filing a 28 U.S.C. § 2255 motion.

Graham then filed his motion for reconsideration, at issue here. In his reconsideration motion, Graham argues that we erred by denying his mandamus petition without requiring a response from the government. He argues that Fed. R. App. P. 21(b)(1) requires us to obtain an answer from the government before ruling on a mandamus petition. He further argues that ruling on a mandamus petition without a government response is akin to ruling on the merits of a 28 U.S.C. § 2254 petition before ruling on a certificate of appealability ("COA").

A reconsideration motion is analogous to a petition for a panel rehearing, which must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). In the district court context, we have determined that "[a] motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (quotation omitted).

Mandamus is available "only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quotation omitted). The petitioner has the burden of showing that he has no other avenue of relief, and that his right to relief is clear

and indisputable. *Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989). Mandamus may be used to direct a district court to decide a pending case when there has been unreasonable delay in rendering a decision. *See Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (holding that a 14-month delay in ruling on a 28 U.S.C. § 2241 petition for no reason other than docket congestion was impermissible).

Petitions for writs of mandamus are actions that begin in the court of appeals. *See* Fed. R. App. P. 21(a); 28 U.S.C. § 1651. Under Rule 21(b)(1), we “may deny [a mandamus] petition without an answer.” Fed. R. App. P. 21(b)(1).

Habeas petitioners must obtain a COA to appeal the final order in a § 2254 proceeding. 28 U.S.C. § 2253(c)(1)(A). The issuance of a COA is a jurisdictional prerequisite to resolution of the merits of the appeal of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

Here, Graham has not shown any point of law or fact that we overlooked or misapprehended in previously denying his mandamus petition. While he argues that we were required to obtain a response from the government before ruling on his mandamus petition, Rule 21(b)(1) explicitly allows us to dispose of a mandamus petition without requiring a response. *See* Fed. R. App. P. 21(b)(1). Further, this situation is not like the COA requirement in § 2254 appeals because we have original jurisdiction over mandamus petitions and thus, once a mandamus petition is filed, we need not take any additional steps to gain jurisdiction over the petition. *See* Fed. R. App. P. 21(a); 28 U.S.C. § 1651.

Accordingly, Graham’s motion for reconsideration is hereby **DENIED**, as he has not shown any point of law or fact that we overlooked or misapprehended in previously denying his mandamus petition.

APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11787-J

IN RE:

STEVEN GRAHAM

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Florida

Before: TJOFLAT and HULL, Circuit Judges.

BY THE COURT:

Steven Graham, a federal prisoner proceeding *pro se*, petitions this Court for a writ of mandamus in connection with a habeas corpus petition, pursuant to 28 U.S.C. § 2241, and a civil complaint, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346 ("FTCA"), and the Privacy Act, 5 U.S.C. § 522(a), in the Middle District of Florida. In the instant mandamus petition, Graham asks this Court to direct the district court to comply with its pretrial scheduling order ("PTSO") in his FTCA case in making a ruling on his motion for summary judgment. He also asks for this Court to direct the district court to compel the district court judge, the magistrate judge, the district court clerk, and the assistant U.S. attorney to recuse themselves. Finally, Graham asks this Court to compel the district court to rule on his motion for summary judgment and motion for a preliminary injunction in his habeas case without further delay.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 24 2017

David J. Smith
Clerk

Mandamus is available “only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion.” *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quotation omitted). The petitioner has the burden of showing that he has no other avenue of relief, and that his right to relief is clear and indisputable. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989). Mandamus may be used to direct a district court to decide a pending case when there has been unreasonable delay in rendering a decision. *See Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (holding that a 14-month delay in ruling on a 28 U.S.C. § 2241 petition for no reason other than docket congestion was impermissible).

First, to the extent Graham seeks a favorable ruling on, or any other relief relating to, his FTCA complaint, mandamus relief is not appropriate. Graham had the adequate alternative remedy of pursuing an appeal of the district court’s dismissal of his FTCA action. *See* 28 U.S.C. § 1291. He cannot use mandamus as a substitute for an appeal. *See Jackson*, 130 F.3d at 1004.

Second, Graham did not exercise his adequate alternative remedy of moving in the district court for the recusal of the district court judge, the magistrate judge, the district court clerk, or the assistant U.S. attorney. Thus, mandamus is not appropriate with regard to Graham’s recusal claim. *See Mallard*, 490 U.S. at 309.

Finally, to the extent Graham’s third claim can be construed asking for a ruling on his underlying § 2241 petition without further delay, the district court has granted Graham’s motion for the voluntary dismissal of his petition. To the extent it can be construed as asking for a favorable ruling on his § 2241 petition, Graham had the adequate alternative remedy of challenging his sentence in a 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2255(a); *Mallard*, 490 U.S. at 309. Moreover, Graham has not established a clear and indisputable right to relief

because, under this Court's precedent, Graham cannot bring his sentencing challenge in a § 2241 petition. See *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1092-93 (11th Cir. 2017) (*en banc*) (holding that a federal prisoner may only seek relief under § 2241 in limited circumstances not cognizable under § 2255, such as (1) when raising claims challenging the execution of the sentence like the deprivation of good-time credits or parole determinations; (2) when the sentencing court is unavailable; or (3) when practical considerations, such as multiple sentencing courts, might prevent a petitioner from filing a motion to vacate). Accordingly, we **DENY** Graham's mandamus petition.

APPENDIX B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

STEVEN ANTHONY GRAHAM,

Plaintiff,

v.

Case No: 5:15-cv-390-Oc-10PRL

UNITED STATES OF AMERICA

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's Order entered on March 7, 2017, the defendant, United States of America's motion to dismiss is GRANTED and this case is DISMISSED.

SHERYL L. LOESCH, CLERK

s/L. Burget, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

STEVEN ANTHONY GRAHAM,

Plaintiff,

v.

Case No. 5:15-cv-390-Oc-10PRL

UNITED STATES OF AMERICA,

Defendant.

ORDER

Plaintiff, proceeding *pro se*, initiated this case by filing a Complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346 and the Privacy Act, 5 U.S.C. § 522(a), in the District Court of the District of Columbia. (Doc. 1). Thereafter, the case was transferred to this Court. (Doc. 4). On January 25, 2016, an Order terminating all individually named defendants was entered and the case proceeded as a FTCA claim against the United States of America only. (Doc. 17). Pending before the Court is the United States' Motion to Dismiss Plaintiff's Complaint. (Doc. 22). Plaintiff has filed a response. (Doc. 25). For the reasons discussed below, the motion to dismiss is due to be granted.

I. Plaintiff's Claims

The claims in Plaintiff's Complaint stem from his allegations that his detention is based on inaccurate and false information that is contained in his presentencing report (PSR) and that the prison staff coerced him to abandon his

informal administrative grievance he was using to challenge his PSR, harassed him by reassigning his housing unit, and refused to send his challenges to the United States Probation Office (USPO). (Doc. 1 at 3-4, 11-12). Plaintiff claims that his First, Fifth, and equal protection rights were violated and raises a claim of violations of the Privacy Act. For relief, Plaintiff seeks "declaratory and injunctive relief, compelling the Bureau of Prisons or the United States of America to obtain verification from the United States Probation Office, on whether the facts pertaining to Plaintiff's challenges to inaccurate information and the unlawful execution of his presentance [sic] report is correct or not" and "monetary damages in the amount of \$750,000,000 for the negligence of government officials," punitive damages, or any other relief the Plaintiff may be entitled. Id. at 13.

II. Factual Background¹

¹ Plaintiff notes that he has also filed a pending petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 "dealing with the same facts/issues involved in this action. See Doc. 1 at 2; Case No. 5:15-cv-142-Oc-10PRL (M.D. Fla.). The following is a summary of the procedural posture of the underlying criminal case that the PSR in question was used:

On October 16, 1996, a federal grand jury in the Northern District of Florida returned a one count indictment charging Plaintiff with conspiracy to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A)(ii), 841(1)(b)(1)(A)(iii) and 846. See United States v. Graham, Case No. 3:96-cr-080 (N.D. Fla.) at Cr. Doc. 1. On April 10, 1997, a jury returned a verdict of guilty on the sole count of the indictment. (Cr. Doc. 23). On August 27, 1997, the District Court sentenced Plaintiff to 420 months imprisonment. (Cr. Docs. 29, 30). The Court of Appeals for the Eleventh Circuit affirmed Plaintiff's conviction and sentence. (Cr. Doc. 60). Plaintiff filed his first motion to vacate under § 2255, which he amended, but then was dismissed. See Cr. Docs. 64, 68, 82-84. A certificate of appealability was denied. (Cr. Doc. 101). Plaintiff filed a second § 2255 on June 16, 2014, which was denied as successive. (Cr. Docs. 295-298). His requests for a certificate of appealability and motion for reconsideration were denied. (Cr. Docs. 306, 307). On May 11, 2015, Plaintiff filed his third § 2255 motion, which, along with a certificate of appealability, was denied. (Cr. Docs. 308, 309, 311, 318).

Plaintiff claims that on July 22, 2014, he approached Correctional Counselor Matthews and requested a BP-8 form so he could file a grievance to challenge information in his PSR. (Doc. 1 at 3). On July 24, 2014, Plaintiff returned the filled out form to his Counselor. Id. at 4. On July 28, 2014, Plaintiff states that he was called to the Counselor's office and his BP-8 form was returned to him without being processed. Id. The Counselor advised Plaintiff that the administrative grievance procedures were an improper way to challenge his PSR and that Plaintiff should address this issue with the Case Manager. Id. On July 30, 2014, Plaintiff went to the Case Manager's office with his BP-8 in his hand. Id. Plaintiff claims that the Case Manager coerced and pressured him to drop his BP-8. Id. The Case Manager allegedly told Plaintiff that he could not challenge the information in his PSR through the administrative grievance procedure, but that Plaintiff should allow the Case Manager to write a letter to the United States Probation Office (USPO). Id. at 4-5. Plaintiff claims that the Case Manager threatened to remove him from the housing unit if he didn't agree to that. Id. at 5.

On October 15, 2015, in consideration 18 U.S.C. § 3582(c)(2), effecting a reduction in the term of imprisonment previously imposed based on a guideline sentencing range that had subsequently been lowered, the Court reduced Plaintiff's sentence to 341 months. (Cr. Doc. 320). The Court also denied Plaintiff's "Emergency Motion to Stay Order Granting Motion for Sentence Reduction, and Request for a Temporary Restraining Order to Enjoin the United States Probation Office and the Bureau of Prisons from the Continued Use of Inaccurate and False Information in Presentence Report of Inmate Central File and Privacy Folder." (Cr. Docs. 322, 323).

Plaintiff filed this case on June 19, 2015. (Doc. 1).

Plaintiff claims that when he refused to drop his grievance, the Case Manager called the Counselor, Unit Manager, and another Case Manager to the office to help pressure, harass and coerce him into dropping this grievance. Id. Plaintiff claims that he eventually relented and agreed to let the Case Manager prepare the letter to USPO. Id. Plaintiff then claims he was tricked into going to a different office to sign a document agreeing to abandon his grievance. Id. Plaintiff states that after he refused to sign the document he told the Case Manager and the four other staff members that were in the office that he felt pressured and was confused. Id. at 6. Plaintiff claims that he was then told by the Counselor to pack up his stuff because he was being moved back to his previous housing unit. Id.

Plaintiff claims that within five minutes of being told to pack up he was called back to a counselor's office where the BP-8 was signed, noting that a letter will be sent to the USPO challenging the information in the PSR. Id. Plaintiff alleges he then asked for a BP-9 to formally address the PSR issue with the Warden, but was told that he was not going to get one and that it would not be accepted if he filed one. Id. As a result, Plaintiff alleges that his further attempts to exhaust his grievances were rejected as untimely. Id. at 6-8.

Plaintiff states on September 8, 2014, he filed an administrative tort claim (No. TRT-SER-2015-00172), claiming that BOP staff "coerced and harassed me to consent to abandon my administrative remedies, which I had filed regarding inaccurate information in my PSR and are depriving me of liberty without due process and my right to be free from a potentially unlawful detention and false

imprisonment, by intentionally delaying and/or refusing to fulfill their obligations under Program Statement 5800.11 and 28 C.F.R. §542.10.5.” Id. at 8. Plaintiff states on November 9, 2014, he sent a supplement to his tort claim. Id. at 8-9. On February 20, 2015, the tort claim was denied. Id. at 9-10.

Specifically, Plaintiff raises seven claims in his Complaint:

1. His detention is being executed based on “inaccurate and false information contained in [his] presentence report” in violation of Program Statement 5800.17,² the Privacy Act, and Sellers v. Bureau of Prisons, 959 F.2d 307 (D.C. Cir. 1992);

2. The BOP violated his due process rights by refusing to obtain verification from the United States Probation Office about the information contained in his presentence report;

3. Staff “coerced,” “harassed,” and “retaliated” against him for filing administrative grievances in violation of his First Amendment rights;

4. Staff “sexually harassed” him by removing him from his housing unit and “forcing him to live with ‘known homosexuals’” for exercising his First Amendment rights;

5. Staff violated his due process rights by “intentionally rejecting his administrative remedies,” and by failing to provide him with the rejection notices on time;

² Plaintiff raises the claim as a violation of Program Statement 5800.11; however that policy was rescinded on January 9, 2015, by Program Statement 5800.17. On April 3, 2015, a corrected copy was issued. See https://www.bop.gov/policy/progstat/5800_017.pdf.

6. Staff violated his procedural due process rights through deliberate indifference to his right to file administrative remedies and failed to follow directives of program statements and the Privacy Act resulting on a "continued detention of a potentially innocent man;" and

7. Staff conspired to violate his equal protection rights.

Id. at 11-12.

Defendant move to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P. First, Defendant seeks dismissal of four of the claims for failing to exhaust administrative remedies. Second, Defendant states Plaintiff's claim this his detention is based on inaccurate and false information is time-barred. Third, Plaintiff's claims of constitutional violations are impermissible under the FTCA. Fourth, Plaintiff's claim of violations of the Privacy Act are impermissible as to the United States and the BOP. See Doc. 22.

III. Applicable Law

A motion to dismiss pursuant to Rule 12(b)(1) provides for a dismissal of an action if the court lacks subject matter jurisdiction. When reviewing a motion to dismiss for lack of subject matter jurisdiction, the allegations of the complaint should be construed in a light most favorable to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Cole v. United States, 755 F.2d 873, 878 (11th Cir. 1985). Attacks on subject matter jurisdiction come in two forms. Carmichael v. Kellogg, Brown & Root Serv., Inc., 572 F.3d 1271, 1279 (11th Cir. 2009); Lawrence v. Dunbar, 919 F.2d 1525, 1528 (11th Cir. 1990). The first is a facial attack on the

complaint, which requires the court to see whether plaintiff has sufficiently alleged a basis of subject matter jurisdiction. Lawrence, 919 F.2d at 1529. In considering facial validity, the court must take the allegations in the complaint as true for purposes of the motion. Id. In contrast, a factual attack challenges the existence of subject matter jurisdiction, or the court's power to hear the case. Id. The court can look outside the pleadings in order to make its determination, and the court is free to weigh the evidence in order to determine whether it has jurisdiction. Id.; see also Bryant v. Rich, 530 F.3d 1368, 1376 (11th Cir. 2008) (stating “[w]here exhaustion – like jurisdiction, venue, and service of process – is treated as a matter in abatement and not an adjudication on the merits, it is proper for a judge to consider facts outside of the pleadings and resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop the record.”).

In passing on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court is mindful that “[d]ismissal of a claim on the basis of bare bones pleadings is a precarious disposition with a high mortality rate.” Int’l Erectors, Inc. v. Wilhoit Steel Erectors Rental Serv., 400 F.2d 465, 471 (5th Cir. 1968). Thus, for the purposes of a motion to dismiss, the Court must view the allegations of the complaint in the light most favorable to the plaintiff, consider all of the allegations of the complaint as true, and accept all reasonable inferences that might be drawn from such allegations. Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994); Scheuer, 416 U.S. at 236. Furthermore, the

Court must limit its consideration to the complaint and written instruments attached as exhibits. Fed. R. Civ. P. 10(c); GSW, Inc. v. Long County, Ga., 999 F.2d 1508, 1510 (11th Cir. 1993).

Once a claim has been stated adequately, it may be supported by showing any set of facts with the allegations of the complaints. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). However, "while notice pleading may not require that the pleader allege a 'specific fact' to cover each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Roe v. Aware Woman Center for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001).

The Court nonetheless will liberally construe Plaintiff's *pro se* pleadings. Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003).

IV. Analysis

a. Exhaustion of Administrative Remedies

The FTCA provides a limited waiver of the United States' sovereign immunity for tort claims. Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994). "It allows the government to be sued by certain parties under certain circumstances...." Id. A federal court may not exercise jurisdiction over a lawsuit brought pursuant to the FTCA unless a plaintiff has first exhausted his administrative remedies pursuant to 28 U.S.C. § 2675(a). See Dalrymple v. U.S., 460 F.3d 1318, 1324 (11th Cir. 2006); Suarez, 22 F.3d at 1065. Section 2675(a)

prohibits a plaintiff from bringing claims against the United States for money damages or personal injury caused by the negligent or wrongful acts of a government employee “unless the claimant shall have first presented the claim to the appropriate Federal agency and this claim shall have been finally denied by the agency....” 28 U.S.C. § 2675(a). “The administrative claim must be filed within two years from the time the claim accrues. If a claimant fails to timely file an administrative claim pursuant to the FTCA, his claim is forever barred.” Cruz v. U.S., 522 Fed. App'x. 635, 637 (11th Cir. 2013) (citations omitted).

The BOP offers inmates an avenue for seeking monetary compensation through the administrative claims procedures for acts or omissions of government officials which could subject the government to liability under the FTCA. In order to properly present the claim, a plaintiff must file an administrative claim that provides: (1) notice of the tort claim sufficient to enable the agency to investigate; and (2) a sum certain value of the claim. Burchfield v. United States, 168 F.3d 1252, 1255 (11th Cir. 1999) (citations omitted). General and conclusory allegations are not sufficient to meet the notice requirement if they are “so vague and lacking in detail that the agency cannot be expected to initiate any investigation at all.” Id. at 1257.

On September 8, 2014, Plaintiff filed an administrative tort claim. (Doc. 1-1 at 19-26). In the claim, Plaintiff alleged FCC-Coleman staff “coerced” and “harassed” him in an effort to convince him to abandon his administrative remedies, and as result of his refusal, staff “depriv[ed] [him] of liberity [sic] without

due process, and [his] right to be free from a potentially unlawful detention and false imprisonment” due to their intentional delay and/or refusing to fulfill their obligation to ensure the information contained in his presentence report was accurate. Id. at 19. On October 17, 2014, a letter from the BOP’s Southeast Regional Office noted that the claim was accepted for filing on September 17, 2014, and was assigned claim number TRT-SER-2015-00172. Id. at 17. On November 9, 2014, Plaintiff mailed a letter in response to the October 17, 2014 letter that included a more detailed explanation of his claims. Id. at 27-31.

Defendant seeks dismissal of the following claims as unexhausted: that staff sexually harassed him for exercising his First Amendment rights (Claim 4); that staff violated his due process rights by “intentionally rejecting his administrative remedies,” and by failing to provide him with the rejection notices on time (Claim 5); that staff were deliberately indifferent to his right to file administrative remedies and they failed to follow directives of program statements and the Privacy Act resulting on a “continued detention of a potentially innocent man” (Claim 6); and that staff conspired to violate Plaintiff’s equal protection rights (Claim 7). See Doc. 22 at 8.

A review of Plaintiff’s Complaint and attachments³ shows that while he did exhaust the claim that he was sexually harassed for exercising his First Amendment rights (Claim 4), he failed to exhaust Claims 5, 6 and 7. Because

³ See Doc. 1-1 at 19, 27-31.

Plaintiff has failed to exhaust his administrative remedies pursuant to 28 U.S.C. § 2675(a), the Court lacks jurisdiction as to Claims 5, 6, and 7, and those claims are due to be dismissed.

b. Statute of Limitations

A claim under the FTCA generally accrues at the time of injury. Diaz v. United States, 165 F.3d 1337, 1339 (11th Cir. 1999); United States v. Kubrick, 444 U.S. 111, 113 (1979) (a claim accrues “when the plaintiff knows both the existence and the cause of his injury.”). “The administrative claim must be filed within two years from the time the claim accrues. If a claimant fails to timely file an administrative claim pursuant to the FTCA, his claim is forever barred.” Cruz, 522 Fed. App’x. at 637 (citations omitted). Plaintiff’s claim that his “detention is being executed on inaccurate and false information contained in [his] presentence report” would have accrued no later than the date he became aware of the alleged errors in the PSR.

In his Complaint Plaintiff references his previous (and still pending) lawsuit Graham v. Bechtold, case no. 5:15-cv-142-Oc-10PRL. See Doc. 1 at 2-3. In that case, filed as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, Plaintiff claims, *inter alia*, that his “detention is being executed on inaccurate and false information contained in presentence report....” See Cv. Doc. 1 at 11 (Civil Docket 1). Plaintiff claims in his petition that:

through his trial counsel, [Plaintiff] filed written objections to the inaccurate and false portions of the PSR and the objections were received by the probation office on July 28, 1997. An addendum to the presentance [sic]

report was submitted to the trial court on July 31, 1997. The addendum stated that the objections remains unresolved prior to sentencing and . . . require court findings. The addendum further stated that "The probation officer stands by the drug weight as stated in the presentence report. This information is corroborated based upon information obtained from cooperating co-conspirators as well as other documentations outlined in the offense conduct section of this report.

Sentencing was held on August 12, 1997 and [plaintiff], through his counsel, stated that "I would like to append to the record a copy of my objections and corrections for purposes of any future appeal." As required by Fed. R. Crim. P. 32, the sentencing judge stated: "Let me just make the point, if you find it satisfactory, your objections are part of the presentence report and in that fashion becomes a matter of the record." The objections to the inaccurate and false information were "overruled on the basis of the present state of law as it exists, (in 1997) but preserved for the record....

Id. at 13.

It is clear that Plaintiff was aware of the alleged "inaccurate and false information contained in the presentence report" on or before August 12, 1997.⁴ Therefore, the claim accrued and the two year statute of limitations began to run on that date. The two year statute of limitations for filing an administrative claim pursuant to the FTCA based on the alleged inaccurate and false information in the PSR closed on or before August 12, 1999. Plaintiff's claim, filed September 8, 2014, was beyond the statute of limitations, and is therefore barred as untimely. Claim 1 is due to be dismissed.

c. **Constitutional Torts**

⁴ Plaintiff also attached a copy of the Objections and/or Corrections to Presentence Investigation Report filed in his criminal case to his Complaint and his Response to the Motion to Dismiss. See Doc. 1-1 at 70-73; Doc. 25 at 31-34. The Objections were prepared and signed by his trial counsel on July 25, 1997, prior to his sentencing hearing. Id.

Also attached to his Response is a copy of the transcript from the August 12, 1997 Sentencing where the Objections were presented, argued, and overruled. Id. at 36-55.

The FTCA authorizes “private tort actions against the United States ‘under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.’” United States v. Olson, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. § 1346(b)(1)); see also Turner ex rel. Turner v. United States, 514 F.3d 1194, 1203 (11th Cir. 2008) (“Under the FTCA, the United States is liable for tortious conduct ‘in the same manner and to the same extent as a private individual under like circumstances’ after applying the applicable law in the same jurisdiction.”) (quoting 28 U.S.C. § 2674). The Court of Appeals for the Eleventh Circuit has made it clear that federal constitutional torts are not within the scope of the FTCA. McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir. 1986); FDIC v. Meyer, 510 U.S. 471 (1994) (United States has not made itself available for liability under the FTCA for constitutional tort claims). As a result, the United States retains its sovereign immunity from federal constitutional torts. See McCollum, 794 F.2d at 608. “It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite to jurisdiction.” United States v. Marshall, 463 U.S. 206, 212 (1983); see also U.S. v. Mitchell, 445 U.S. 535, 538 (1980); Means v. U.S., 176 F.3d 1376, 1378 (1999).

Claims Two, Three and Four contain allegations of violations of Plaintiff’s constitutional rights.⁵ In Claim Two, Plaintiff alleges that his due process rights

⁵ Plaintiff also raised claims of constitutional tort violations in Claim 5 (due process), Claim 6 (procedural due process), and Claim 7 (equal protection). (Doc. 1 at 12). Those claims,

were violated when the BOP refused to obtain verification from the USPO about the information contained in his PSR. In Claims Three and Four, Plaintiff alleges that he was retaliated against for filing administrative remedies in violation of his First Amendment rights. Because these claims are based on Constitutional torts they are due to be dismissed for failure to state a claim under the FTCA.

d. **Sexual Harassment**

The FTCA only allows for torts committed by a federal employee "acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." Burlington Indus. V. Ellerth, 524 U.S. 742, 757 (1998) (citing various FTCA cases). Plaintiff has not demonstrated entitlement to relief on his sexual harassment claim as he has not pled any specific facts rendering his case an exception to the general rule that sexual harassment "is not conduct within the scope of employment." Id. Further, Plaintiff fails to state that he suffered any injury based on this alleged sexual harassment. See Doc. 1-1 at 30 ("So far, however, except for their homosexual tendencies, no one had made any inappropriate sexual advances towards me.") Plaintiff's claim of sexual harassment is due to be dismissed.

e. **Privacy Act**

discussed in section IV(a), supra, are due to be dismissed for failure to exhaust administrative remedies.

Although Plaintiff has expressly pleaded that he is bringing this action pursuant to the FTCA (Doc. 1 at 1-2), his Complaint also includes a claim for violation of the federal Privacy Act, 5 U.S.C. § 522a. (Doc. 1 at 11). The Privacy Act “contains a comprehensive and detailed set of requirements for the management of confidential records held by Executive Branch agencies. If an agency fails to comply with those requirements ‘in such a way as to have an adverse effect on an individual,’ the Act authorizes the individual to bring a civil action against the agency. § 552a(g)(1)(D). For violations found to be ‘intentional or willful,’ the United States is liable for ‘actual damages.’ § 552a(g)(4)(A).” Fed. Aviation Admin. v. Cooper, 132 S. Ct. 1441, 1446 (2012).

It is unclear whether Plaintiff is bringing his Privacy Act claim under the FTCA or as an independent federal claim. The Government has moved for dismissal of the claim on the ground that, as a federal claim, it cannot be the basis of a cause of action under the FTCA. (Doc. 22 at 12–13). To the extent that Plaintiff is, in fact, attempting to bring the claim under the FTCA, the Court agrees that he cannot do so. A claim is actionable under the FTCA only if the Government would be liable to the plaintiff as a “private person ... in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). The Supreme Court has “consistently held that § 1346(b)’s reference to ‘law of the place’ means the law of the State-the source of substantive liability under the FTCA.” Meyer, 510 U.S. at 478. A federal claim such as a claim for violation of the Privacy Act is not cognizable under the FTCA. See Meyer, 510 U.S. at 478

(holding that a constitutional tort claim is not cognizable under the FTCA). Therefore any claim against the United States relating to the Privacy Act is due to be dismissed.

To the extent that Plaintiff is alleging that the BOP's conduct was in violation of the Privacy Act, that claim also fails. The BOP has exempted its Inmate Central Record System from the accuracy provisions of the Privacy Act, 5 U.S.C. § 552a(e)(5). See Martinez v. Bureau of Prisons, 444 F.3d 620 (D.C. Cir. 2006); 28 C.F.R. § 16.97(j).

To the extent that Plaintiff is seeking an order "compelling the Bureau of Prisons or the United States of America to obtain verification from the United States Probation Office, on whether the facts pertaining to Plaintiff's challenges to inaccurate information and the unlawful execution of his presentance [sic] report is correct or not,"⁶ that claim is due to be dismissed as moot. The staff at FCC-Coleman did send a letter to the USPO noting that Plaintiff was challenging his PSR (attaching Plaintiff's "specific challenge explained in detail") in compliance with Program Statement 5800.17. See Doc. 22-1 at 21. The USPO sent a response to Plaintiff's challenge to his PSR. See Doc. 22-1 at 23.

V. Conclusion

⁶ See Doc. 1 at 13.

For the foregoing reasons, Defendant's Motion to Dismiss (Doc. 22) is GRANTED and this case is DISMISSED. The Clerk is directed to enter judgment accordingly, terminate any pending motions, and close the file.

IT IS SO ORDERED

DONE AND ORDERED at Ocala, Florida, this 7th day of March, 2017



UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

STEVEN ANTHONY GRAHAM,

Plaintiff,

v.

Case No: 5:15-cv-390-Oc-10PRL

UNITED STATES OF AMERICA

Defendant.

ORDER

This case is before the Court on Petitioner's "Motion for Expedited Ruling on Plaintiff's Pretrial Dispositive Motion" (Doc. 31). In the motion, Petitioner complains of the time that has passed since his Motion to Compel and/or Motion Summary Judgment (Doc. 26) was filed and requests that this Court grant his petition or expedite ruling. *Id.*

The Court endeavors to adjudicate all matters, including habeas corpus petitions, in a timely manner, as justice ordinarily requires and as the pending caseload allows. In addition to Petitioner's case, the Court has a heavy habeas docket, as well as a heavy civil and criminal caseload. Petitioner should note that district courts have broad discretion in managing their cases. *Chrysler Int'l Corp v. Chemaly*, 280 F.3d 1358 (11th Cir. 2002). Accordingly, the motion is **DENIED**. The Court notes, however, that it will consider the petition and the motion for summary judgment as expeditiously as possible and as the Court's calendar permits, as it does in every case.¹

¹ Also pending before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint. (Doc. 22)

DONE AND ORDERED at Ocala, Florida, this 9th day of January, 2017.

A handwritten signature in black ink, appearing to read "P. Lammens", written over a horizontal line.

PHILIP R. LAMMENS
United States Magistrate Judge

Copies to: Pro Se Parties, Counsel of Record

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