APPENDIX - A

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13318-C

LESTER J. SMITH,

Plaintiff-Appellant,

versus

GREG DOZIER,
SHARON LEWIS,
M.D.,
COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
DR DAVID EKWUNIFE,
AUGUSTA UNIVERSITY,
f.k.a. GRU,
DR BURKE, et al.,

Defendants-Appellees,

TURNER, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Georgia

Before: MARCUS, WILLIAM PRYOR and GRANT, Circuit Judges.

BY THE COURT:

Lester Smith, in the district court, filed a notice of appeal, which the district court construed as a motion to proceed on appeal *in forma pauperis*. The district court denied *in forma pauperis* status and did not assess the $505.00 appellate filing fee, as is required under the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915.

Smith has consented to pay the $505.00 filing fee, using the partial payment plan described under § 1915(b). Thus, the only remaining issue is whether the appeal is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). This Court now finds that the appeal is frivolous, DENIES leave to proceed, and DISMISSES the appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LESTER J. SMITH,

Plaintiff,

VS.

GREG DOZIER, *et al.*,

Defendants.

5 : 17-CV-298 (TES)

ORDER and RECOMMENDATION

Plaintiff filed this action pursuant to 42 U.S.C. § 1983 in July 2017.[1] By Order dated December 26, 2017, the Court allowed Plaintiff's Eighth Amendment claims, Americans with Disabilities Act ("ADA") claims, and Rehabilitation Act ("RA") claims to proceed. (Doc. 8). Pending are miscellaneous motions filed by Plaintiff, Plaintiff's motions seeking to amend and supplement his Complaint, Plaintiff's motion for injunctive relief, and Defendants' motions to dismiss. (Docs. 20, 28, 37, 38, 39, 40, 46, 47, 50, 62, 71, 89).

ORDER

Motions to amend/supplement

In a series of motions, Plaintiff seeks to amend and/or supplement his claims. (Docs. 37, 38, 63). In motions filed on March 12, 2018, Plaintiff seeks to amend and/or supplement his claims, but he does not attach a proposed amendment or supplement. (Docs. 37, 38). These motions are **DENIED**. *See U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006)

[1] Plaintiff's Complaint was docketed on August 4, 2017. (Doc. 1). Plaintiff's signature appears at the end of the body of the Complaint dated October 20, 2016. (Doc. 1, p. 53). However, earlier in the Complaint and in a memorandum attached to the Complaint, Plaintiff's signature appears dated July 27, 2017, indicating that Plaintiff submitted the Complaint and memorandum to prison authorities for mailing no earlier than July 27, 2017, and the Complaint was thus effectively filed on this date. (Doc. 1, p. 3; Doc. 1-1, p. 5).

(requiring the substance or an attachment of the proposed amendment); *Bookman v. Burks Companies*, 2009 WL 10665533, *15 (N.D.Ga. 2009) (without attached proposed amended complaint, court could not evaluate plaintiff's claims).

In a proposed amended complaint filed on April 5, 2018, Plaintiff again sets out his claims. (Doc. 63). Plaintiff states that he filed this proposed amended complaint in response to the Court's notification Order regarding Defendants' March 2018 Motion to Dismiss. (Docs. 30, 63). The Court can discern no new claims of substance in this proposed amendment, only a recitation of the same claims with additional factual discussion. Accordingly, Plaintiff's proposed amended complaint, considered by the Court to be a motion to amend, is **GRANTED**, and Plaintiff's Complaint is deemed amended by Document 63. No further response is required by Defendants to this Amended Complaint.

Miscellaneous motions

Plaintiff's Motion for Stamp Filed Copy of Complaint is **DENIED**, and the Clerk has already responded to Plaintiff's request for a free copy of his 53-page original Complaint. (Docs. 19, 20). Plaintiff's motions seeking expedited review or rulings on pending motions are **DENIED**. (Docs. 50, 89). Plaintiff's Motion to Admonish the Clerk regarding the service of documents is **DENIED**. (Doc. 62). The docket reveals that the Clerk is promptly and properly serving Plaintiff with Court documents.

Plaintiff's Motion for Discovery is **DENIED**. (Doc. 40). The stay of discovery granted by the Court is still in place. (Docs. 30, 74). Finally, Plaintiff's Motion to Appoint Counsel is **DENIED**. (Doc. 39). Generally speaking, no right to counsel exists in §1983 actions. *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985); *Hardwick v. Ault*, 517 F.2d 295, 298 (5th Cir. 1975);

Mekdeci v. Merrel Nat'l. Lab., 711 F.2d 1510, 1522 n.19 (11th Cir. 1983). Appointment of counsel is a privilege that is justified only by exceptional circumstances. *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982); *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982); *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982).

In deciding whether legal counsel should be provided, the Court typically considers, among other factors, the merits of the Plaintiff's claim and the complexity of the issues presented. *See Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989). Applying the standards set forth in *Holt*, it appears that at the present time, the essential facts and legal doctrines in this case are ascertainable by the Plaintiff without the assistance of court-appointed legal counsel and that the existence of exceptional circumstances has not been shown by the Plaintiff. The Court on its own motion will consider assisting Plaintiff in securing legal counsel if and when it becomes apparent that legal assistance is required.

RECOMMENDATION

Motions to dismiss

Two (2) motions to dismiss have been filed on behalf of six (6) of the remaining eight (8) Defendants in this case. (Docs. 28, 71). A motion to dismiss can be granted only if Plaintiff's Complaint, with all factual allegations accepted as true, fails to "raise a right to relief above the speculative level". *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 545 (2007).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556, 570).

Defendants contend initially that Plaintiff's claims brought pursuant to § 1983, the ADA, and the RA are time-barred, as the dates associated with Plaintiff's claims place the claims outside of the applicable two-year statute of limitations. *Reynolds v. Murray*, 170 F. App'x. 49, 50 (11th Cir. 2006) (section 1983 action filed in Georgia is governed by Georgia's personal injury statutory limitation period of two years); *Hunt v. Georgia Dept. of Community Affairs*, 2010 WL 5437214 (N.D.Ga. 2010) (statute of limitations application to claims under the ADA and the RA, governed by the most analogous state statute of limitations, in Georgia is two years).

Plaintiff executed his original Complaint on July 27, 2017, and therein sets forth a timetable dating back to 2013 for the alieged lack of treatment for his hepatitis, or HCV condition, by Defendants. (Doc. 1). Defendants maintain that the acts or omissions alleged against them all occurred outside the two-year limitations period, or prior to July 27, 2015. *Lovett v. Ray*, 327 F.3d 1181, 1182-82 (11th Cir. 2003) (complaint filed more than two years after events underlying § 1983 claim was untimely); *Curtis v. Gordon Police Dep't.*, 2005 WL 3262960 (M.D.Ga. 2005) (two-year statute of limitations applies to § 1983 claims in Georgia; complaint filed after the two-year period is time-barred).

The events outlined in Plaintiff's complaints predate the two-year statute of limitations governing his § 1983 claims. The latest relevant date mentioned by Plaintiff in his Complaint is June 2015, when certain organizations allegedly removed interferon as a treatment for HCV. Under the continuing violation doctrine, "a plaintiff [is permitted] to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period. When the violation alleged involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the unlawful conduct ceases." *Robinson v. U.S.*, 327 F. A'ppx 816, 818

(11th Cir. 2007). "The critical distinction in continuing violation analysis . . . is whether the plaintiff [] complain[s] of the present consequence of a one time violation, which does not extend the limitations period, or the continuation of that violation into the present, which does." *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003).

However, the Eleventh Circuit has "limited the application of the continuing violation doctrine to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred. 'If an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine.'" *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006), *quoting Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001). Herein, the origin of Plaintiff's § 1983 claims is the alleged denial of proper treatment for his HCV condition beginning with the alleged change in drug protocols for the disease in 2013. Plaintiff maintains in his Complaint that he began demanding the new treatment for HCV in December 2013. Thus, Plaintiff's injury occurred in 2013, when he would have been able to determine that a violation had occurred. *See Price v. Owens*, 634 F. Supp. 2d 1349, 1354-55 (N.D.Ga. 2009) (continuing violation doctrine did not apply to prisoner's claims regarding the application of prison grooming policy, as prisoner was aware of alleged violation more than two (2) years prior to filing of § 1983 claim).

As noted by the Defendants, Plaintiff's own allegations establish that the alleged denials were or should have been apparent to Plaintiff in December 2013. Thus, the continuing violation doctrine does not apply to Plaintiff's claims, and Plaintiff's § 1983, ADA, and RA claims are time-barred. It is thus recommended that Defendants' motions to dismiss be **GRANTED**.

Motions for injunctive relief

In two (2) motions, Plaintiff seeks injunctive relief in the form of orders to Defendants regarding Plaintiff's legal mail and treatment for his HCV condition. (Docs. 46, 47). A review of the Plaintiff's motions reveals an inadequate basis for the issuance of injunctive orders. In order to obtain injunctive or declaratory relief, the Plaintiff must prove that: (1) there is a substantial likelihood that he will prevail on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985); *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 909 F.2d 480, 483 (11th Cir. 1990). Injunctive relief will not issue unless the conduct at issue is imminent and no other relief or compensation is available. *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). "In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." *McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1306 (11th Cir. 1998).

Plaintiff has not established that he is entitled to injunctive relief in regard to his requests, i.e., that there is a substantial likelihood of success on the merits or resulting irreparable harm, or that no other relief is available to address his alleged injuries. Accordingly, it is the recommendation of the undersigned that Plaintiff's motions seeking injunctive relief be **DENIED.**

State law claims

To the extent that Plaintiff states in his amended Complaint that he is also bringing state law claims against the Defendants based on their alleged failure to provide proper medical care, it is the recommendation of the undersigned that the Court decline to exercise supplemental

jurisdiction over these claims and that the claims be **DISMISSED** without prejudice. *See Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088-89 (11th Cir. 2004) (court may decline to exercise supplemental jurisdiction over state law claims, and the decision rests within the court's discretion); *Cotton v. Ben Hill County*, 208 F. Supp. 3d 1353, 1364 (M.D.Ga. 2016) (court declines to exercise supplemental jurisdiction over state law claims after dismissing federal claims).

Conclusion

Accordingly, it is the recommendation of the undersigned that Defendants' motions to dismiss be **GRANTED** and that Plaintiff's § 1983, ADA, and RA claims be **DISMISSED** as untimely. (Docs. 28, 71). It is further recommended that Plaintiff's state law claims be **DISMISSED** without prejudice, and that Plaintiff's motions seeking injunctive relief be **DENIED**. (Docs. 46, 47). If these recommendations are adopted, Plaintiff's claims against all remaining Defendants will be dismissed, and Plaintiff's Complaint will be dismissed.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to the Recommendations herein, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge shall make a de novo determination as to those portions of the Recommendations to which objection is made; all other portions of the Recommendations may be reviewed by the District Judge for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was

informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO ORDERED and RECOMMENDED, this 5th day of July, 2018.

s/ ***THOMAS Q. LANGSTAFF***
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

LESTER J. SMITH, *Plaintiff,* **v.** **GREG DOZIER, SHARON LEWIS, HOMER BRYSON, DAVID EKWUNIFE, AUGUSTA UNIVERSITY, CHARLES BURKE, and BROOME,** *Defendants.*	**CIVIL ACTION NO.** **5:17-cv-00298-TES-TQL**

ORDER ADOPTING
UNITED STATES MAGISTRATE JUDGE'S RECOMMENDATION

Before the Court for consideration is the United States Magistrate Judge's Recommendation [Doc. 104] that the Motion to Dismiss [Doc. 28] filed by Defendants Greg Dozier, Homer Bryson, Dr. Sharon Lewis, Dr. David Ekwunife and Augusta University be granted. The United States Magistrate Judge further recommends that the Motion to Dismiss [Doc. 71] filed by Defendant Dr. Charles Burke be granted as well. Plaintiff filed a timely Objection[1] [Doc. 106] to the Recommendation [Doc. 104]. Therefore, the Court must "make a *de novo* determination of those portions of the . . . recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C).

[1] Plaintiff also filed a Supplemental Objection [Doc. 107] to the Recommendation [Doc. 104].

Plaintiff bases his § 1983 claims on a denial of proper treatment for his HCV condition. *See* [Doc. 63, at 5]. As to the Recommendation [Doc. 104], Plaintiff first objects to the Magistrate Judge's finding that his claims are time-barred and do not qualify for the continuing violation doctrine. *See* [Doc. 106, at 1]. Second, Plaintiff objects to the Recommendation [Doc. 104] denying Plaintiff's request of injunctive relief for treatment of his "Hepatitis-C (HCV for 'hep-c virus[']) " illness based on the United States Magistrate Judge's finding that Plaintiff "did not meet the requisites prior to the [Recommendation] ruling." [Doc. 63, at 2]; *see also* [Doc. 106, at 5]. Specifically, Plaintiff states that "the only issue would be number 1 of the four requisites" discussed in *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985) and contends that the "requisites" are "the purpose of said injunction." [Doc. 106, at 5]; *see also* [Doc. 104, at 6]. Third, Plaintiff objects to the United States Magistrate Judge's Recommendation [Doc. 104] that the Court decline to exercise its supplemental jurisdiction over Plaintiff's state law claims. *See* [Doc. 106, at 6]. After review of the Recommendation [Doc. 104], Plaintiff's Objection [Doc. 106], and Plaintiff's Supplemental Objection [Doc. 107], the Court finds that the objections raised by Plaintiff fail to overcome the findings and conclusions of the United States Magistrate Judge for the following reasons:

1. Objection that Plaintiff's Claims Do Not Qualify for the Continuing Violation Doctrine

The Amended Complaint [Doc. 63] in this case, dates "June 29, 2015," as the latest point of time in which the American Association for the Study of Liver Diseases

("AASLD") and the Infectious Diseases Society of America ("IDSA") made certain recommendations of change in drug protocols for people with HCV. [Doc. 63, at 4; n.2]. Though, in Plaintiff's original Complaint [Doc. 1], he mentions that "[i]n October 2013, the FDA announced a new 'breakthrough cure' direct acting antiviral (DAA) drugs to cure all levels of HCV." [Doc. 1, at 8]. Curiously, however, Plaintiff contends that he was "not aware of any change of the HCV mandate of treatment, until 2015 or so." [Doc. 106, at 1].

Normally, an amended complaint supersedes former pleadings, which are "abandoned" and "become a legal nullity." Fed. R. Civ. P. 10(c); *Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016). Eleventh Circuit law "do[es] not permit a district court to consider, on a motion to dismiss, exhibits attached to an earlier complaint that a plaintiff has expressly disavowed or rejected as untrue in a subsequent amended complaint." *Hoefling*, 811 F.3d at 1277. In the instant matter, however, Plaintiff does not appear to disavow the attachments, or anything for that matter, to his original Complaint [Doc. 1]. In fact, Plaintiff expressly states that "[He] will refer back to his initial complaint that the AASLD/IDSA standard of HCV care, is mandatory for all M.D.'s without having to reiterate that fact." [Doc. 63, at 4].

The same paragraph in the original Complaint [Doc. 1] that mentions the requirement that "all physicians [and] M.D.'s [] abide by this new Community Standard of Professional Medical Care Standard for HCV treatment, with the new cure medicines

only" also mentions the "October 2013" date. [Doc. 1, at 8-9]; *see also* [Doc. 1, at 20] ("Plaintiff having requested treatment with the new FDA drugs since December 2013, confirmed in 2014, and established by the AASLD, IDSA as the Community Standard of Professional Medical Case in January 2014."). Thus, as the United States Magistrate Judge correctly found, Plaintiff's injury clearly occurred in 2013, not 2015. *See* [Doc. 104, at 5].

Plaintiff's Objection [Doc. 106] argues that "[t]he Magistrate [Judge] [relying on the 2013 date,] errored [sic] in its finding that the continuing violation doctrine is not applicable to plaintiff." [Doc. 106, at 2]. He further argues that "[i]t is impossible per the laws verbatim, that this doctrine is not applicable to plaintiff." [*Id.* at 3]. It is obvious that Plaintiff bases this contention on the alleged fact that prison officials "did not at any time cease their unlawful acts of denying plaintiff treatment to his serious medical need." [*Id.*]

However, as the Recommendation [Doc. 104] suggests, the Eleventh Circuit has "limited the application of the continuing violation doctrine to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred." *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006). In other words, "[i]f an event or series events should have alerted a reasonable person to act to assert his . . . rights at the time of the violation, [he] cannot later rely on the continuing violation doctrine." *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1222 (11th

Cir. 2001). In his Supplemental Objection [Doc. 107],[2] Plaintiff states, supposedly in an effort to overcome the Eleventh Circuit's limitation of the continuing violation doctrine, that he was "not a 'prudent Plaintiff' aware of a right being violated" and "was still under the impression of the old HCV treatment in effect, and not superseded." [Doc. 107, at 1]. Reasonableness is an objective standard and the Court does not assess whether Plaintiff subjectively believes that he is not a reasonably prudent plaintiff. Alternatively, the Court consides whether a hypothetical reasonably prudent plaintiff would be able to determine that a violation occurred.[3]

As discussed above, Plaintiff's first awareness of *some* drug protocol change occurred in 2013. Given that Plaintiff himself stated in his original Complaint [Doc. 1] that he has requested treatment *"with the new FDA drugs since December 2013,"* it is clear he was aware of an alleged denial of medical care that comported with the community

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[2] Plaintiff also points to another civil action commenced by Plaintiff in 2012, *Smith v. Humphrey, et al. See* [Doc. 107, at 2]. In that case, the Court adopted the United States Magistrate Judge's recommendation to grant summary judgment in favor of defendants on the general grounds that Smith refused medical treatment for his Hepatitis-C illness. *See generally* Report and Recommendation, *Smith v. Humphrey, et al.*, No. 5:12-cv-00015-MTT-CHW (M.D. Ga Feb. 7, 2014), [Doc. 196].

[3] In his Supplemental Objection [Doc. 107], Plaintiff

> reiterates his argument in his initial objections. Federal law permits a plaintiff to recover for the whole course of conduct, even if it started outside the limitations period. *Heard v. Sheahan*, 253 F.3d at 318; *Taylor v. Meirick*, 712 F.2d 1112, 1118-19 (7th Cir. 1983); *see also, Ingalls v. Florio*, 968 F.Supp. 193, 200-01 (D.N.J. 1997).

[Doc. 107, at 3]. After review, these cases present many distinguishing factors from Plaintiff's case. While Plaintiff's citation to *Taylor v. Meirick*, supports his contention that "the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with," he fails to cite to any Eleventh Circuit authority to suggest that the limitation placed on the continuing violation doctrine is no longer valid law. 712 F.2d 1112, 1118 (7th Cir. 1983); *see also Hamilton*, 453 F.3d at 1335, *supra.*

standard in 2013. Now, however, Plaintiff contends in his Amended Complaint [Doc. 63], that he "did not have [f]actual knowledge until 2015, of the change in drugs for HCV." [Doc. 106, at 3]. He undoubtedly admits in his Objection [Doc. 106] that he "may have heard by way of a rumor in 2013, but not of a [sic] actual fact" and as a result his "uncertainty in 2013 is of no essence." [*Id.*]. In addition to this argument, Plaintiff avers in his Response [Doc. 82], that the requested 2013 standards of medical care, were "not the new Community Standard of Medical Care for HCV." [Doc. 82, at 2]. It seems that by making this argument Plaintiff is attempting to scramble the dates contained in his pleadings in hopes to fall within the limitations period.

Regardless of whether Plaintiff learned of the drug change by way of "rumor" in 2013, or by "fact" in 2015, his claims are still time-barred because, taking Plaintiff's statements his original Complaint [Doc. 1] and Amended Complaint [Doc. 63] as true, he unequivocally requested treatment with new FDA drugs in December 2013. *See* [Doc. 1, at 20]; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). If Plaintiff requested treatment with new drugs since 2013, and as of the date of his original Complaint [Doc. 1], July 27, 2017,[4] had "not received any treatment after multiple requests," Plaintiff

[4] The Recommendation [Doc. 104] of the United States Magistrate Judge clarifies that Plaintiff effectively filed his Complaint [Doc. 1] on July 27, 2017, the date of Plaintiff's signature and the date he submitted the Complaint and memorandum to prison authorities for mailing. *See* [Doc. 104, at 1; n.1].

would have been alerted to act to assert his rights due to the alleged violation. *Hipp*, 252 F.3d at 1222, *supra*.

Plaintiff's attempts to skirt the apparent statute of limitations issue in this case are defeated by his own original Complaint [Doc. 1], and its express incorporation by reference into the Amended Complaint [Doc. 63]. *See* [Doc. 63, at 4]. Even if the Court ignored any reference (which it cannot and does not) to the October 2013 date discussed above, Plaintiff's claims are still time-barred because the latest date certain in the Amended Complaint [Doc. 63], in which Plaintiff was "sure" of a change in drug protocol, is "June 29, 2015." *See* [Doc. 63, at 4; n.2]; *see also* [Doc. 106, at 3]. Using June 29, 2015, as the operative date, Plaintiff had until June 30, 2017, to file a complaint. He failed to do so, and Plaintiff's actual filing date of July 27, 2017, is too late.

If June 29, 2015, was the operative date in this case, its presence may cloud the continuing violation issue. However, the Court simply cannot overlook Plaintiff's own admissions in his original Complaint [Doc. 1] that he requested some variation of new drugs "since December 2013." [Doc. 1, at 20]. It is true that courts are obligated to hold "a [*pro se*] complaint, however inartfully pled, to a less stringent standard than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)). This obligation, however, does not, as Plaintiff would hope, permit courts to construe pleadings to omit certain materials that would allow a plaintiff to prevail in his case. Plaintiff sat on his rights at the time of the alleged violation

and further failed to exercise those rights within the confines of the Eleventh Circuit's constriction on the continuing violation doctrine. *See Hipp*, 252 F.3d at 1222, *supra.*

Therefore, Plaintiff's first objection fails to overcome the findings and conclusions of the United States Magistrate Judge and the Court **ADOPTS** the Recommendation [Doc. 104] as to Defendants' Motions to Dismiss [Docs. 28 and 71] and **MAKES IT THE ORDER OF THE COURT.** Accordingly, the Court **GRANTS** the Motion to Dismiss [Doc. 28] filed by Defendants Greg Dozier, Homer Bryson, Dr. Sharon Lewis, Dr. David Ekwunife and Augusta University and as well as the Motion to Dismiss [Doc. 71] filed by Defendant Dr. Charles Burke.

2. Objection to the Recommendation Denying Plaintiff's Injunctive Relief for Treatment of His HCV Illness

Plaintiff's second objection finds issue with the United States Magistrate Judge's application of the four requisites enumerated in *Zardi-Quintana v. Richard*, 768 F.2d 1213 (11th Cir. 1990). *See* [Doc. 106, at 5]. Specifically, Plaintiff states that "the only issue would be number 1 of the four requisites." [*Id.*]. However, Plaintiff fails to actually make any relevant argument on the issue of whether Plaintiff could prove "a substantial likelihood that he will prevail on the merits." *Zardi-Quintana*, 768 F.2d at 1216. Instead, Plaintiff merely reiterates the arguments contained in his first objection. *See* [Doc. 106, at 5] ("And that is only with regard of the O&R finding of it's [sic] agreement to be time-barred.").

It is clear that the Magistrate Judge recommended that Plaintiff's claim for injunctive relief be denied on the grounds that Plaintiff failed to meet his burden to show

that his claims have a substantial likelihood of success on the merits. *See Canal Authority of Florida v. Callaway*, 489 F.2d 567, 573 (11th Cir. 1974). Defendants aptly point out in their Response to Plaintiff's Amended Preliminary Injunction Motion [Doc. 70] that beyond Plaintiff's own contentions—that his medical condition warrants different treatment than what he is currently receiving—there is no admissible evidence to reflect that same conclusion. Therefore, given this lack of admissible evidence, Plaintiff cannot meet the second requisite for injunctive relief regarding irreparable injury (i.e. that Plaintiff's HCV has progressed to the stage where it threatens an irreparable impact on his health). *See Zardi-Quintana*, 768 F.2d at 1216; *see also* [Doc. 70, at 6].

In an attempt to persuade the Court to the contrary, Plaintiff cites to *Abu-Jamal v. Wetzel, et al.*, No. 3:16-CV-2000, 2017 WL 34700 (M.D. Pa. Jan. 3, 2017), a recent District Court case from the Third Circuit granting hepatitis C-positive state prisoner's injunctive relief even in the absence of advanced symptoms. Aside from *Abu-Jamal* and one other District Court case (also from Pennsylvania), Plaintiff cites no authority from the Eleventh Circuit holding that omission of treatment for HCV under prioritization protocols[5] creates a viable claim for Eighth Amendment purposes. *See Abu-Jamal*, No. 3:16-CV-2000, 2017 WL 34700, at *15 (M.D. Pa. Jan. 3, 2017); *see also Abel v. Lappin*, 661 F.Supp.2d 1361,

[5] *Abu-Jamal v. Wetzel*, describes Prioritization Protocol as a means to "identify those with the most serious liver disease and to treat them first, and then, as they're treated, move down the list to the lower priorities, from high priority to lower priority. . . . The purpose of this Hepatitis C Protocol is to prioritize candidates for anti-viral treatment." No. 3:16-CV-2000, 2017 WL 34700, at *5 (M.D. Pa. Jan. 3, 2017) (internal citations omitted).

1372-73 (S.D. Ga 2009). Moreover, aside from Plaintiff's assertion that he "requested treatment with the new FDA drugs since December 2013" there is nothing in the record to allow the Court to even begin to evaluate a threat of irreparable impact. *See Zardi-Quintana*, 768 F.2d at 1216.

Furthermore, to the extent Plaintiff disagrees with his physicians and sincerely believes that he is in dire need of the new drug protocol, the Court, without more, cannot permit the use of the legal process to override the medical judgment of those treating physicians. To that effect, "a simple difference in medical opinion between the prison's medical staff and the inmate as to the latter's diagnosis or course of treatment" does not support a claim of deliberate indifference. *Wilson v. Smith*, 567 F. App'x 676, 678 (11th Cir. 2014) (quoting) *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir.1991). Moreover, matters of medical judgment do not constitute deliberate indifference. *Estelle*, 429 U.S. at 107. Therefore, Plaintiff's objections fail to provide a basis upon which the Court could reject the Recommendation [Doc. 104] from the United States Magistrate Judge.[6]

Throughout the remaining paragraphs of Plaintiff's Objection [Doc. 106], he takes issue with the length of time between his filing of the Amended Preliminary Injunction

[6] The Court notes that the record shows Plaintiff's current place of incarceration is Telfair State Prison, while the named Defendants in this case are from Georgia Regents University, LLC. It is well-settled that "[a]bsent class certification, an inmate's claim for injunctive and declaratory relief in a section 1983 action fails to present a case or controversy once the inmate has been transferred." *Jones v. Culliver*, No. 09-0835-CG-M, 2010 WL 3339453, at *1 (S.D. Ala. Aug. 2, 2010) (citing *Spears v. Thigpen*, 846 F. 2d. 1327, 1328 (11th Cir. 1988)) (holding inmate's claims against medical treatment providers to be moot due to his transfer to another prison).

Motion [Doc. 47] and the Magistrate Judge's Recommendation to deny such relief. *See* [Doc. 106, at 5-6]. Plaintiff contends that the United States Magistrate Judge's failure to "expedite[] review" on the requested injunctive relief "[s]ome, over three months later [] is an abuse of discretion." [*Id.*]. However, such contention is without merit and will not cause the Court to "overrule the Magistrate [Judge's] O&R" as Plaintiff suggests.

For the above-stated reasons, the Court finds that Plaintiff's second objection also fails to overcome the findings and conclusions contained in the United States Magistrate Judge's Recommendation [Doc. 104]. Therefore, the Court **ADOPTS** the United States Magistrate Judge's Recommendation [Doc. 104] as to Plaintiff's Amended Preliminary Injunction Motion [Doc. 47] **AND MAKES IT THE ORDER OF THE COURT.** Accordingly, the Court **DENIES** Plaintiff's Amended Preliminary Injunction Motion [Doc. 47] as well as Plaintiff's Motion Ordering Defendant Dozier and His Agents at Telfair State Prison to Cease Tampering and Impeding with Plaintiff's Legal Mail[7] [Doc. 46]. In light of the Court's adoption of the United States Magistrate Judge's Recommendation [Doc. 104], Plaintiff's Motion to Appoint Medical Expert Witness [Doc. 102] is **DENIED as moot.**

[7] Plaintiff's Objection [Doc. 106] did not rebut the United States Magistrate Judge's Recommendation to deny this motion, and as such does not have to be considered pursuant to 28 U.S.C. § 636(b)(1)(C).

3. Plaintiff's Objection to the Recommendation that the Court Decline to Exercise Its Supplemental Jurisdiction Over Plaintiff's State Law Claims

Given that Plaintiff's federal claims brought against Defendants pursuant to 42 U.S.C. § 1983, the Americans with Disabilities Act, and the Rehabilitation Act are time-barred and therefore dismissed, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims brought against Defendants based on their alleged failure to provide proper medical care. Accordingly, the Court **DISMISSES** Plaintiff's state law claims **without prejudice**.

In the Supplemental Objection [Doc. 107], Plaintiff objects to the United States Magistrate Judge's denial of his Motion to Appoint Counsel [Doc. 39]. *See* [Doc. 107, at 4]. The Court construes this objection as a Renewed Motion to Appoint Counsel, and given the Court's ruling in this Order, **DENIES** said motion. Therefore, Plaintiff's Complaint [Doc. 1] and Amended Complaint [Doc. 63] and all claims asserted therein against the remaining Defendants are dismissed.

CONCLUSION

Having made a *de novo* determination of Plaintiff's Objection [Doc. 106] and Supplemental Objection [Doc. 107], the Court **ADOPTS** the United States Magistrate Judge's Recommendation [Doc. 104] and **MAKES IT THE ORDER OF THE COURT**.

Thus, the Court **GRANTS** Defendants' Motions to Dismiss [Docs. 28 and 71]. Further, the Court **DENIES** Plaintiff's Amended Preliminary Injunction Motion [Doc. 47] and his Motion Ordering Defendant Dozier and His Agents at Telfair State Prison to

Cease Tampering and Impeding with Plaintiff's Legal Mail [Doc. 46]. Lastly, in light of the Court's adoption of the United States Magistrate Judge's Recommendation [Doc. 104], Plaintiff's Motion to Appoint Medical Expert Witness [Doc. 102] is **DENIED as moot.**

SO ORDERED, this 24th day of July, 2018.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

1/14/19

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13318-C

LESTER J. SMITH,

Plaintiff-Appellant,

versus

GREG DOZIER,
SHARON LEWIS,
M.D.,
COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
DR DAVID EKWUNIFE,
AUGUSTA UNIVERSITY,
f.k.a. GRU,
DR BURKE, et al.,

Defendants-Appellees,

TURNER, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Georgia

Before: MARCUS, WILLIAM PRYOR and GRANT, Circuit Judges.

BY THE COURT:

Lester Smith has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's November 8, 2018, order denying his motion for leave to proceed and dismissing his appeal as frivolous. Upon review, Smith's motion for reconsideration is DENIED because he offered no meritorious arguments to warrant relief.