

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK E. ALDERMAN,

Plaintiff,

v.

JAMES E. DONALD, in his capacity
as Commissioner of the Georgia
Department of Corrections; HILTON
HALL, in his capacity as Warden,
Georgia Diagnostic and Classification
Prison; DOES 1-50, UNKNOWN
EXECUTIONERS, in their capacities
as employees and/or agents of the
Georgia Department of Corrections,

Defendants.

CIVIL ACTION FILE

NO. 1:07-CV-1474-BBM

ORDER

This matter involving the alleged unconstitutionality of Georgia's death penalty protocol is before the court on the Pre-Answer Motion to Dismiss [Doc. No. 2] filed by Defendants, as well as the Emergency Motion to Compel Discovery [Doc. No. 4], Request for Oral Argument on Emergency Motion to Compel Discovery [Doc. No. 7], and the Request for Oral Argument on Defendants' Pre-Answer Motion to Dismiss and Plaintiff's Opposition to Same [Doc. No. 9], filed by Plaintiff.

I. Factual and Procedural Background

Plaintiff Jack E. Alderman was originally convicted in Chatham County in 1974 for the murder of his wife and sentenced to death. In the ensuing thirty-three

years, Mr. Alderman has received a second trial, exhausted his direct appeals, filed writs of habeas corpus in both the state and federal courts, and currently has a petition for certiorari pending in the United States Supreme Court, see Alderman v. Terry, 468 F.3d 775 (11th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3622 (U.S. May 7, 2007) (No. 06-1478). He is now before this court as a Plaintiff alleging under 42 U.S.C. § 1983 that his execution by lethal injection will constitute a violation of various rights guaranteed by the United States Constitution.

On June 22, 2007, Mr. Alderman filed this suit challenging the lethal injection procedures that will be used to execute him.¹ In lieu of filing an answer to the Complaint, Defendants filed a Pre-Answer Motion to Dismiss [Doc. No. 2] on July 16, 2007. The next day, Plaintiff filed an Emergency Motion to Compel Discovery [Doc. No. 4], requesting that discovery be initiated immediately because of the special circumstances of this case. Finding oral argument unnecessary as to either Motion, and further that scheduling an oral argument would likely delay resolution

¹Prior to this action, Mr. Alderman filed a similar suit on April 20, 2007, against the same Defendants. See Alderman v. Donald, et al., No. 1:07-CV-896 (N.D. Ga. April 20, 2007) (Martin, J.) ("Alderman I"). Based on a suggestion by this court, he voluntarily dismissed that suit just over two months later, in light of significant questions regarding whether he had exhausted his administrative remedies, or whether he was even required to do so. The clerk filed an Entry of Dismissal in that suit on June 28, 2007. Although the earlier filing has no direct bearing on the present action, it is relevant in considering the equities of this case, in that Defendants, prior to the commencement of this action, were already aware of the likely issues and the discovery to be requested.

of the issues now pending before the court, Plaintiff's Request for Oral Argument on Defendants' Pre-Answer Motion to Dismiss [Doc. No. 9] and Plaintiff's Request for Oral Argument on Emergency Motion to Compel Discovery [Doc. No. 7] are DENIED, and the court considers the substantive motions below.

II. Pre-Answer Motion to Dismiss²

Defendants moved to dismiss this action on two grounds: one, because Plaintiff allegedly failed to file within the applicable statute of limitations, and two, because Plaintiff has allegedly failed to state a claim for relief. The court addresses each argument in turn.

A. Statute of Limitations

Relying primarily on the Sixth Circuit case of Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007),³ Defendants argue that Plaintiff failed to file this action within the

²The court realizes that Defendants have not been given an opportunity to file a reply brief in support of their Motion to Dismiss, but after a careful review of the relevant case law (including a substantial amount of its own independent research), as well as the liberal notice pleading standards on motions to dismiss, the court feels that such a reply brief would not be helpful. In any event, Defendants will certainly have additional chances to show the court why they deserve judgment in their favor at later stages of these proceedings.

³Defendants also rely on Nooner v. Norris, No. 06-2748, 2007 U.S. App. LEXIS 16173, at *5 (8th Cir. July 9, 2007), but that decision was not made in the context of determining the accrual date of a § 1983 claim, but rather addressed the question of whether a stay of execution was appropriate in light of Plaintiff's long delay in filing his § 1983 action. The court never held that an accrual date was when a direct appeal ends or when a new method of execution is adopted; rather, it merely cited Cooey and a handful of other cases for the proposition that "[o]nce a state inmate's sentence of death has become final on direct

applicable two-year statute of limitations of O.C.G.A. § 9-3-33. In Cooey, a divided Sixth Circuit panel held that the cause of action for a § 1983 constitutional challenge to Ohio's lethal injection protocol accrued at either (1) the conclusion of direct appeals, or (2) in circumstances where the method of execution did not exist at the conclusion of a direct appeal, when the method of execution was adopted. See Cooey, 479 F.3d at 422. In so ruling, the appellate panel cited a recent United States Supreme Court decision. Id. at 416. In Wallace v. Kato, 127 S.Ct. 1091, 1095 (2007), the Supreme Court stated that "it is the standard rule that accrual occurs when the plaintiff has complete and present cause of action," or in other words, "when the plaintiff can file suit and obtain relief." 127 S.Ct. at 1094 (internal quotations omitted). Finding that the Plaintiff in Cooey had a complete and present cause of action at an early enough time that he was now outside the applicable Ohio statute of limitations period, it denied him relief on that ground. Id. at 422.

However, the court does not agree that the Cooey rationale should control the present action. First, though persuasive precedent, it is non-binding. Dismissal would be appropriate on this ground only if the decision were from this Circuit.

review in the state's courts, there is no impediment to filing a § 1983 action challenging the constitutionality of a state's lethal injection protocol." Nooner, 2007 U.S. App. LEXIS 16173, at *7 (footnote and citations omitted). In other words, and as will be discussed, the Nooner court was discussing when a § 1983 suit becomes ripe, not necessarily when it accrues for statute of limitation purposes. See Jones v. Allen, 483 F. Supp. 2d 1142, 1148-49 (M.D. Ala. 2007).

Second, the decision was not unanimous. The decision in Cooey was split two to one, as the dissent argued that the § 1983 action accrues when *habeas* review, rather than the direct appeal process, is at an end. See id. at 428-29 (Gilman, J., dissenting). Moreover, the court sought a rehearing en banc that, although denied, was noteworthy in that six judges dissented from that denial. See Cooey v. Strickland, No. 05-4057, 2007 U.S. App. LEXIS 12623 (6th Cir. June 1, 2007) (denying petition for rehearing en banc). These facts suggest that the Cooey rationale is not so well settled that the court should simply adopt it without further analysis.

Third, though the Eleventh Circuit Court of Appeals has yet to rule on this question, two district courts from this Circuit in similar factual circumstances have both disagreed with the Cooey rationale. See Jones v. Allen, 483 F. Supp. 2d 1142 (M.D. Ala. 2007) ("Jones I"), aff'd on other grounds, Jones v. Allen, 485 F.3d 635, 638 n.1 (11th Cir. 2007) ("Jones II"); Grayson v. Allen, No. 2:06-CV-1032-WKW, 2007 U.S. Dist. LEXIS 37063, at *15-16 (M.D. Ala. May 21, 2007) (adopting the Jones I analysis regarding accrual of the statute of limitations in its entirety); see also Cooey v. Strickland, No. 05-4057, 2007 U.S. App. LEXIS 12623, at *7-8 (6th Cir. June 1, 2007) (Gilman, J., dissenting from denial of rehearing en banc, and citing with approval the Jones I opinion as further "support [for his] view that the panel opinion . . . was wrongly decided").

In the well-reasoned Jones I case, Judge Thompson analyzed the Cooley majority in detail, as well as the nature of a § 1983 action complaining of a constitutional injury that is to occur in the future. He found the Cooley court's reliance on the Supreme Court's language in Wallace regarding when accrual occurs "misplaced," finding that the Wallace case, like most § 1983 cases, concerned "an unconstitutionally tortious act that *had already occurred*." Jones I, 483 F. Supp. 2d at 1147. In contrast, in cases where a plaintiff is seeking a § 1983 injunction "to prevent an unconstitutionally tortious act from occurring in the future, such a claim cannot be barred by the statute of limitations because the tortious act has not yet occurred and the tort is not yet complete." Id. at 1148 (footnotes omitted). In other words, that the Jones I plaintiff could have brought his suit earlier only meant that it was ripe earlier, not that his claim had already accrued for statute of limitations purposes.⁴ Judge Thompson also noted that the equitable concerns that Defendants

⁴As such, Defendants' citation of Neville v. Johnson, 440 F.3d 221 (5th Cir. 2006) (*per curiam*), makes the same mistake. As explained by the Jones I court, the Sixth Circuit in Cooley also cited Neville for the proposition that

it is not too early to mount a method-of-execution challenge once a conviction has become final upon completion of direct review. But this merely proves that method-of-execution claims are ripe for adjudication at such time. Whether they *must* be brought within two years of such time is a different question. To be sure, once a claim has accrued it is necessarily ripe; but the converse, that once a claim is ripe it has necessarily accrued for statute-of-limitations purposes, need not follow.

Jones I, 483 F. Supp. 2d at 1149.

apparently have – that Mr. Alderman waited an unreasonably long time or slept on his rights, and the state’s interest in timely executions – may be vindicated when or if Mr. Alderman requests a stay of execution, but should not be considered until that time.⁵ He concludes:

In sum, because the execution itself is the event Jones claims would violate his constitutional rights, it defies logic, and is contrary to the common law of torts, to conclude that the statute of limitations has already run on a suit to prevent an unconstitutional act that has not yet occurred.

Jones I, 483 F. Supp. 2d at 1149. The court agrees with the analysis of the Jones I opinion, adopts its rationale regarding accrual of the statute of limitations in full,⁶ and accordingly DENIES Defendants’ Pre-Answer Motion to Dismiss on that basis.

B. Failure to State a Claim

Defendants also move the court to dismiss Plaintiff’s actions because he has allegedly failed to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). To survive a motion to dismiss, a complaint need

⁵Even the policy reason behind statutes of limitations – i.e., “to keep stale litigation out of the courts,” United States v. Western Pac. R.R. Co., 352 U.S. 59, 72 (1956) – would not be served where, as here, the plaintiff’s injury has yet to occur. See Jones I, 483 F. Supp. 2d at 1150 (observing that the notion “that the statute of limitations [should] take effect as we move closer in time to the complained-of act” makes little sense “[i]n light of the historical and policy reasons behind statutes of limitations”).

⁶This is the same action taken by the Grayson court. See Grayson, 2007 U.S. Dist. LEXIS 37063, at *15-16.

not contain “detailed factual allegations,” but must ““give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”” Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). The complaint is required to contain “only enough facts to state a claim to relief that is plausible on its face.” Id. at 1974. A court must accept all facts in a complaint as true, and must construe the complaint in favor of the plaintiff. M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1156 (11th Cir. 2006). However, “conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1246 (11th Cir. 2005) (citation and internal quotations omitted).

“To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” West v. Atkins, 487 U.S. 42, 48 (1988). Defendants argue that Plaintiff has failed to do so here regarding his “challenge to the lethal injection method of capital punishment, or the three drugs utilized” (Defs. Br. in Supp. of Their Pre-Answer Mot. to Dismiss 14) because (1) lethal injection is authorized by statute in a majority of the states, and (2) jurisdictions that have examined the issue of the

constitutionality of death by lethal injection have all rejected the argument that it violates the prohibition against cruel and unusual punishment. On the latter point, Defendants delve deeply into case law and even some record evidence in order to show that it is not in fact likely that Mr. Alderman would suffer pain, be involved in an accident or a deviation from protocol during his execution, or be executed by untrained individuals. Of course, this argument completely misconceives the standard on a motion to dismiss. On such a motion, all Plaintiff is required to do is give fair notice of the claim and the ground upon which it rests, and its claim must be plausible on its face. See Bell Atl. Corp., 127 S.Ct. at 1964, 1974. Plaintiff, by alleging that the method of his execution deprives him of certain rights guaranteed by the United States Constitution, satisfies that standard. Furthermore, though the court may consider material outside the pleadings on a 12(b)(6) motion, if it chooses to do it must convert the motion to dismiss into one for summary judgment. Fed. R. Civ. P. 12(b)(6); see Prop. Mgmt. & Invest., Inc. v. Lewis, 752 F.2d 599, 604 (11th Cir. 1985). The court declines to consider material outside the pleadings here and so convert the motion here.

Finally, Defendants' citation to Crowe v. Terry, 426 F. Supp. 2d 1310, 1353-1354 (N.D. Ga. 2005) (Evans, J.), which rejected a habeas petitioner's claim that execution by lethal injection is cruel and unusual punishment, is completely

unavailing. First, that case is merely persuasive, not binding, authority on this court. Second, and more importantly, the posture of that case was a merits review of a state inmate's 28 U.S.C. § 2254 habeas petition - not, as here, a motion to dismiss. As such, in the absence of controlling Eleventh Circuit case law finding that Georgia's specific chosen method of execution is constitutionally adequate, the court has absolutely no basis to find that Plaintiff has failed to even state a claim for relief here. Perhaps, after an opportunity for discovery and further argument, the court will find, as the Crowe court did, that petitioner's constitutional claims are unavailing; or perhaps it will find that those claims are meritorious. Either way, for present purposes it is sufficient to say that a 12(b)(6) motion is far too preliminary, and wholly inappropriate, for such a determination. Accordingly, Defendants' Pre-Answer Motion to Dismiss is DENIED in this and all other respects.

III. Emergency Motion to Compel Discovery

Under the Local Rules of the Northern District of Georgia, "the discovery period shall commence thirty (30) days after the appearance of the first defendant by answer to the complaint, unless the parties mutually consent to begin earlier." L.R. 26.2A., N.D. Ga. Plaintiff, however, less than a month after it initiated the case and before Defendants answered, filed an Emergency Motion to Compel Discovery. While acknowledging that under "normal circumstances" the court would first rule

on Defendants' pending Pre-Answer Motion to Dismiss before turning to discovery matters, Mr. Alderman argues that "this case is unique for the obvious reason that irreparable harm will result if Plaintiff is executed before discovery commences." (Mem. of Law in Supp. of Pl.'s Emergency Mot. to Compel Discovery 3.) As such, Mr. Alderman requests that this court, in its discretion, order discovery to begin immediately - and specifically, that Defendants should "properly Answer Plaintiff's Complaint, provide responses to Plaintiff's First Request for Production of Documents and Plaintiff's First Set of Interrogatories immediately, and [] cease and desist their continued obstruction of discovery." (Id. 6.) Defendants respond, pointing out that Mr. Alderman's Motion to Compel is frivolous for a number of reasons, such as that (1) the discovery period has yet to commence, see L.R. 26.2A., N.D. Ga.; (2) Mr. Alderman's requested discovery was filed on the same date as the Motion to Compel; (3) parties generally have thirty days to respond to discovery requests, see Fed. R. Civ. P. 33(b)(3) & 34(b); and (4) Mr. Alderman failed to confer in good faith as required, see Fed. R. Civ. P. 37(a)(2).

Of course, Plaintiff's Motion to Compel is, as Defendants persuasively argue, wholly inappropriate under these circumstances, long before discovery has commenced and with his production requests served on the same day as his

Emergency Motion to Compel.⁷ As such, the court DENIES the Emergency Motion to Compel as baseless and not grounded in law.

Nevertheless, in spite of Defendants' request, the court declines to impose sanctions upon Plaintiff. Federal Rule of Civil Procedure 37(a)(4)(B) states that if the court denies a motion to compel, it "shall, after affording an opportunity to be heard," require that the moving party pay the expenses of the party opposing the motions, "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(4)(B). Considering the special circumstances of the previously voluntarily-dismissed Alderman I, the fact that Mr. Alderman's representation is *pro bono*, and the inevitability of charged emotions revolving around capital cases, the court finds sanctions inappropriate here. The court does admonish counsel from both parties to refrain from recklessly impugning the motives of their counterparts in the future, however, as it wishes to reach a just and speedy resolution of this matter, and this will require the cooperation of both parties.

Along those lines, and despite feeling that Plaintiff was overzealous in filing such a premature Motion to Compel, the court understands Mr. Alderman's concern

⁷Even though the same or similar document requests may have been served in the previously-dismissed Alderman I, this is a different action; as such, the court's presumption is that the default time periods apply to the commencement of the discovery period and response to discovery requests.

about expedited discovery in the special circumstances of this capital case. Plaintiff writes, “[i]f discovery proceeds immediately, a stay of execution will not be required because the Parties would be prepared for a full hearing prior to Mr. Alderman’s scheduled execution.” (Mem. of Law in Supp. of Pl.’s Emergency Mot. to Compel Discovery 5.) The Supreme Court recently held that “there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” Nelson v. Campbell, 541 U.S. 637, 650 (2004). In light of that decision, as well as the Eleventh Circuit’s recent holding in Jones II,⁸ the court finds it unlikely in this case that it will issue a stay of execution based only on the fact that there was not enough time to reach the merits of his claim or for him to exhaust any appeals. Yet, the court certainly agrees with Mr. Alderman that it would be far better to avoid having to decide that question simply by proceeding in such manner as to reach the merits of his suit prior to when such a stay would be necessary.

⁸In Jones II, which like this case involved a § 1983 challenge to a lethal injection procedure (in that case, Alabama’s), the court noted that “the proper query in this case is whether Jones could have brought his claim ‘at such a time as to allow consideration of the merits without requiring entry of a stay.’” Jones II, 485 F.3d 635, 641 (quoting Nelson, 541 U.S. at 650). The Plaintiff had brought his suit on November 1, 2006; several months later, on February 27, 2007, the Alabama Supreme Court set his execution date for May 3, 2007. The Eleventh Circuit found no abuse of discretion in the lower court’s denial of a stay of execution, based on the rationale that bringing his action six months prior to his eventual execution date did not allow sufficient time for consideration of the merits and an appeal without requiring entry of such a stay. Id.

To that end, the court will attempt to hasten the discovery period somewhat. Notwithstanding that the court's Local Rules do not provide an explicit mechanism for early commencement of the discovery period, it is certainly true that this court "is 'entitled to broad discretion in managing pretrial discovery matters.'" Klay v. All Defendants, 425 F.3d 977, 982 (11th Cir. 2005) (quoting Perez v. Miami-Dade County, 297 F.3d 1255, 1263 (11th Cir. 2002)). Accordingly, the court will order the discovery period to commence as of the date of this Order. Defendants will have thirty days to respond to Mr. Alderman's interrogatories and document production requests. See Fed. R. Civ. P. 33(b)(3) & 34(b). In addition, Defendants will still be required to file their Answer within the time prescribed by the Local and Federal Rules.

One final word of caution - the court noticed that Plaintiff served sixty production requests on Defendants. (See Pl.'s Emergency Mot. to Compel Discovery, "Pl.'s First Request for Production of Docs. and Things" Ex. A.) The number of such requests surprises the court, in light of the detailed factual allegations in the Complaint and its supporting exhibits. As the court noted above, it is unlikely to grant a stay of execution in this case given the Eleventh Circuit's recent holding in Jones II. As such, if Plaintiff would like to reevaluate its discovery requests in order to get to the merits of this action more quickly, it may certainly do so by serving defendants with an amended Request for Production. In any event, the court will

certainly do its best to keep this action moving at an appropriate pace, with the interests of both parties in mind.

IV. Conclusion

For the foregoing reasons, Defendants' Pre-Answer Motion to Dismiss [Doc. No. 2] is DENIED. Plaintiff's Emergency Motion to Compel Discovery [Doc. No. 4], Request for Oral Argument on Emergency Motion to Compel Discovery [Doc. No. 7], and Request for Oral Argument on Defendants' Pre-Answer Motion to Dismiss and Plaintiff's Opposition to Same [Doc. No. 9] are all DENIED.

In addition, discovery in this case is to commence immediately. Defendants have thirty days to respond to Plaintiff's outstanding Request for Production of Documents and Things and Interrogatories, and are also, in light of the denial of their Motion to Dismiss noted above, required to file an Answer in accordance with the rules of this court.

IT IS SO ORDERED, this 30th day of July, 2007.

s/Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE