

No. 19-7872

ORIGINAL

Supreme Court, U.S.  
FILED

FEB 23 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL WILDER

— PETITIONER

(Your Name)

vs.

WILLIAM F. KERBS

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 4th CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SAMUEL WILDER

(Your Name)

386 Redemption Way,

(Address)

McCormick, S.C. 29899

(City, State, Zip Code)

N/A

(Phone Number)

**QUESTION(S) PRESENTED**

1. Whether the court should have assist this prose litigate with time to respond to the Defendant's motion to extend time and Defendant's response to the informal brief?
2. Whether this case is ripe for a remand to the U.S. Court of Appeal for the Fourth Circuit to respond to Defendant's motion to extend time and Defendant's response to the informal brief.
3. Whether Defendant waived or forfeiture their affirmative defense.

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

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**OTHER**

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[x] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11/26/19.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## STATEMENT OF THE CASE

The Petitioner forfeited his response to the Defendant's Motion to extend time and Response to Informal ~~Brief~~, waiting on the Court to tell me when to respond, thereafter, Petitioner forfeited rehearing and rehearing en banc because it was untimely. This case is base on error of law for the court informed Defendant when to respond to the informal brief but did not informed me when to respond to the motion to extend time filed after the appointed deadline or informal brief.

Prose complaints are held to a less stringent standard than those drafted by attorneys. Gordon v. Leek, 574 F.2d 1147, 1151 (4th Cir. 1978) and a federal district court is charged with liberally construing a complaint filed by a prose litigant to allow the development of a potentially meritorious case. Erickson v Pardus 551 U.S. 89, 94 (2002). When a federal court is evaluating a prose complaint, Plaintiff allegations are assumed to be true. De'lonta v. Angelone, 330 F.3d 63 n 1 (4th Cir 2003) Nevertheless, the requirement of liberal construction does not mean that this court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal court. Weller v. Dep't of Soc. Servs 901 F.2d 387,391 (4th Cir, 1990). Even under less stringent standard the complaint filed in this case is subject to summary dismissal under the provisions of 28 U.S.C. § 1915(e)(2)(B).

Here Petitioner was denied his right to respond to the motion to extend time and respond to Defendant's response to the Informal Brief, when both were filed pass the deadline, because never assist me with time to respond, The duty of a district court to assist a pro-se prisoner litigant in presenting a claim under 42 U.S.C. § 1983, Gordon v. Leeke 574 F.2d 1147 (4th Cir. 1978). The Petitioner was also denied his right to file a rehearing and rehearing en banc because it was untimely. When a federal court is evaluating a prose complaint, Plaintiff allegations are assumed to be true. De'lonte v. Angelone, 330 F.3d 63 n. 1(4th Cir. 2003).

## REASONS FOR GRANTING THE PETITION

First this certiorari should be granted to assist pro se litigant on appeal, second, Petitioner did not know that a party could forfeited the affirmative defense, then waived it, and then doing a pretrial conference bring it up again by using Rule 15. Thirdly, Petitioner did not know that he had to plead to the Defendant they a forfeited or waived their affirmative defense or it will be granted. Rule 8(c) is in conflict.

### LAW

In Wood v. Milyard, 566 U.S. 463, 132 S.Ct. 1826 (2012) provides: Affirmative defense, once forfeited, is excluded from the case. S.C. Wright & A. Miller, Federal Practice and Procedure § 1278 p.p. 644-645 (3rd Ed 2004) and as a rule cannot be asserted on appeal. See Day, 547 U.S. at 217, 126 S.Ct. 1675 (Scalia), J., dissenting.

In Babb v. Lee County Landfill S.C., LLC, 298 F.R.D. 318 (2014) is the closest case similar to Petitioner's provides absent of surprise and prejudice to plaintiff, however, a defendant may raised an affirmative defense for the first time in a dispositive pretrial motion. Grundy Walsh U.S. LLC. v. Raap, 386 Fed Appx 455, 459 (4th Cir. 2011). See also S. Wallace Edward & Sons Inc. v. Cincinnati Ins. Co. 353 F.3d 367 (4th Cir. 2003)(holding that

insurer waived affirmative defense by failing to raise it until the summary judgment stage and noting that the delayed assertion of the defense prejudice the opposing party. That is because the Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and chance to rebut it. Grunley Walsh, 586 Fed Appx at 459. Thus if a plaintiff received notice of an affirmative defense by some other means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice. The plaintiff argue in their response to defendant in motion for summary judgment that the preemption defense was waived during the course of litigation and that Defendant should be precluded from asserting it now. The Court agreed.

The Supreme Court has emphasized, the value of waiver and forfeiture rules which ensures that parties can determine when an issue is cut out of the case, and that the litigation remains to the extent possibly an orderly progression. See Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 n. 6, 128 S.Ct. 265 (2008).

The reasons for the rules is not that litigation is a game like golf, with arbitrary rules to test the skill of the players. *id.* Rather litigation is a winnowing process and the procedure for pursuing or waiving issues are part of the machinery by which courts narrow what remain to be decided. See also Sales v. Grant 224 F.3d 293 (4th Cir. 2000) (having no trouble deeming affirmative defense waived because the mention of qualified

immunity, in the defendant's answer consisted of one sentence on the matter in a list of several affirmative defenses. The individual defendants are protected by qualified immunity from suit and because defendants failed to pursue affirmative defense in motion and trial.

And in Nejia v. Sessions, 866 F.3d 573, 594 (4th Cir. 2017) held when a claim is waived, it is not reviewable on appeal, even for plain error at all. A party who identifies an issue and then explicitly withdraws it has waived the issue. It is axiomatic that a party must affirmatively state any avoidance or affirmative defense ... Fed. R. Civ. P. 8. Further, it is a frequently stated preposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case ... 5 Fed. Prac. & Pro. Civ. § 1278 (3d ed 2012). Suntrust Mortg. Inc. v. United Gaar Residential Inc. Co. of N.C., 2013 WL 388040.

Here, the Petitioner who is pro se, with no schooling in law need to know which of these rulings to follow, even, thought he mentioned waived in his reconsideration motion, the Defendant replied it was too late and just like filing a response to Defendant's motion to extend time and response to Defendant's informal brief with the fourth circuit, the court did not tell me when to respond after telling Defendant's they could respond.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: February 23, 2020