RECORD NO. 08-6670

In The
United States Court of Appeals
For The Fourth Circuit

TYRONE LORENZO ROBINSON,

Plaintiff – Appellant,

v.

JOSEPH FRANKLIN CLIPSE, Public Safety Trooper First Class,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 08-6670 Caption: Tyrone Robinson v. Joseph Clipse

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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I certify that on November 30, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Nov. 30, 2009 (date)

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STATEMENT OF JURISDICTION

This is a civil-rights action under 42 U.S.C. § 1983. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment disposing of all claims. J.A. 382. The district court's judgment was filed on March 28, 2008, *id.*, and Plaintiff timely filed a notice of appeal on April 24, 2008. J.A. 383.

STATEMENT OF THE ISSUE

Tyrone Robinson timely filed this *pro se* § 1983 action alleging that trooper Joseph Clipse used excessive force when, during an arrest, he shot Robinson. The original complaint named the South Carolina Department of Public Safety, Highway Patrol (the state agency that employed Clipse) as the defendant. After the statute of limitations ran, Robinson amended the complaint to add Clipse as a defendant, but the district court, on summary judgment, held that the amendment did not relate back to the date of the original complaint under Fed. R. Civ. P. 15(c), and thus ruled that Robinson's claim is barred by the statute of limitations. Did the district court err in applying Rule 15(c)?

STATEMENT OF THE CASE

On November 14, 2002, during an arrest, trooper Joseph Clipse shot Tyrone Robinson, who was unarmed. On November 3, 2005, eleven days before the statute of limitations expired, Robinson filed this *pro se* § 1983 case against the

South Carolina Department of Public Safety, Highway Patrol ("Department") alleging that Clipse used excessive force in violation of the Fourth Amendment of the U.S. Constitution. J.A. 8. The complaint did not formally name Clipse as a defendant. J.A. 8–22. In early 2006, the district court *sua sponte* dismissed the suit against the Department on the basis of sovereign immunity. J.A. 31, 42. The court also held that Robinson could not state a claim against Clipse because he had qualified immunity. J.A. 34–37, 46–49. On appeal, this Court held that the district court erred in finding that Clipse was entitled to qualified immunity. J.A. 50. As part of its mandate, this Court also ordered that Clipse be formally added as a defendant. J.A. 53.

This Court's mandate issued on April 23, 2007. J.A. 3. Two weeks later, Robinson filed an amended complaint formally adding Clipse as a party. J.A. 54. On July 3, 2007, the district court entered an order directing the U.S. Marshals Service to serve process on Clipse. J.A. 276. The Marshals Service effected service on August 3, 2007. J.A. 279. Eleven days later, on August 14, 2007, Clipse answered the amended complaint. J.A. 280.

Clipse moved for summary judgment. On March 28, 2008, the district court granted Clipse summary judgment, holding that the amendment adding him as a party (pursuant to this Court's mandate) did not relate back under Rule 15(c) of the Federal Rules of Civil Procedure, and therefore it was barred by the statute of

limitations. J.A. 369. Robinson appealed *pro se*, and this Court appointed the undersigned counsel to represent him, designating the following issue for appeal: "Whether the district court erred by finding that the claim against a police officer in his individual capacity did not relate back, pursuant to Fed. R. Civ. P. 15, to the original complaint that alleged excessive force."

STATEMENT OF FACTS

The issue on appeal involves the application of Rule 15(c). Resolution of that issue requires an understanding of the procedural history of this case, which we discuss below. We begin first with a factual overview of Robinson's underlying claim to provide context for evaluating the relation-back issue.

I. OVERVIEW OF THE UNDERLYING EXCESSIVE-FORCE CLAIM

On the morning of November 14, 2002, on Buck Island Road in Bluffton, South Carolina, Clipse drew his pistol and fired eight rounds at Robinson and the car in which he was seated, striking and wounding Robinson. J.A. 10–12, 96, 135, 150–51, 170, 198–200. Robinson was unarmed. J.A. 357.

Before shooting Robinson, Clipse (in his patrol car) chased Robinson (in a Ford Taurus) at high speed; Robinson was driving erratically and causing other drivers to pull to the side of the road. J.A. 96–97, 105–06, 116. After turning onto Buck Island Road, Robinson caused an accident with another driver, Claudine Vaughan, whose car "t-boned" the Taurus that Robinson was driving, striking the

driver's side door and pushing the Taurus to the side of the road. J.A. 97–98, 115–16, 128, 144. Clipse arrived at the scene of the accident, drew his pistol, and began shooting at Robinson. J.A. 150–51. Clipse stood in front of the Taurus and fired as many as five rounds through the windshield, striking Robinson. J.A. 110–12, 15, 135, 357.

Wounded and fearing for his life, Robinson fled in the Taurus back to Highway 278. J.A. 98, 115–16, 130, 137, 154, 357. As Robinson drove away, Clipse fired several more rounds facing Robinson's back. J.A. 12, 13, 151, 357.

Shortly thereafter, Robinson was arrested. He was bleeding profusely; there was "blood everywhere." J.A. 134. A post-incident investigation revealed bullet fragments in the front driver's seat, the steering column, the rear passenger's seat, the driver's side dash board, the driver's side floor board, and the trunk. J.A. 199.

The key dispute in this excessive-force case concerns whether, after arriving at the scene of the accident and exiting his patrol car, Clipse was justified when he began shooting at Robinson. *See* J.A. 42–43. On this issue, Clipse contends that the Taurus began moving towards him when he was standing in front of it, and he started shooting to protect himself. J.A. 129–30, 136, 340. (Clipse does not dispute that he continued to fire as Robinson was driving away.) Robinson flatly disputes Clipse's account. Robinson maintains that he did not accelerate the car toward Clipse, and that the Taurus was stationary when Clipse began firing. J.A.

13, 15, 17, 151, 357. (The patrol car was not equipped with a video camera, so the incident was not recorded. J.A. 122.)

There were two other witnesses to the incident. Both gave signed statements shortly after the shooting. J.A. 96–98. Their accounts do not support Clipse's version of what happened. One witness was Robinson's older sister, Tonya, who was in the car with her brother. J.A. 96. She asserts that when Clipse arrived at the accident scene, "he got out of his vehicle with his gun drawn and beg[an] shooting." *Id.* When she heard the first shot, she opened the passenger door "and ran into the woods"; she "look[ed] behind . . . and saw that the trooper was still shooting, *then* [she] heard acceleration." *Id.* (emphasis added). The other witness, Claudine Vaughan, was the driver of the car that t-boned the Taurus. J.A. 97–98, 144–45. Vaughan testified at Robinson's criminal trial that she did not recall seeing the Taurus move toward Clipse when he began shooting. J.A. 144–45.

In May 2003, six months after the shooting, Robinson was tried in South Carolina state court for his actions on the morning of the shooting. J.A. 99. He was acquitted on the charge of resisting arrest but found guilty for failing to stop for Clipse's "blue light" and for possession of a stolen vehicle (the Taurus). J.A. 174, 182. He was sentenced to prison, where he remains. J.A. 9.

II. THE PROCEEDINGS BELOW

A. Although Robinson's Original Complaint Named Clipse's Employer As The Defendant, The Body Of The Complaint Identified Clipse As The Only Wrongdoer

On November 3, 2005, Robinson, proceeding *in forma pauperis*, filed this *pro se* § 1983 action in the District of South Carolina. J.A. 8.[1] Robinson's complaint alleged that Clipse's actions constituted excessive force in violation of Robinson's Fourth Amendment right. *See, e.g.* J.A. 13 ("State Trooper Joe Clipse violated the Plaintiff's civil rights in showing a conscious disregard for Plaintiff's right to be free from use of excessive force."); J.A. 16 ("State Trooper Joe Clipse . . . violate[d] [Robinson's] 4th amendment constitutional rights"). Although the complaint identified Clipse as the only wrongdoer, J.A. 10–21, the only defendant named (in the caption) was the South Carolina Department of Public Safety, Highway Patrol ("Department"), J.A. 8. Robinson's complaint sought compensatory and punitive damages. J.A. 22.

B. The District Court *Sua Sponte* Dismissed Robinson's Complaint On Immunity Grounds

A few weeks after the district court received Robinson's complaint, a magistrate judge issued a report recommending dismissal, J.A. 25–28, pursuant to

[1] Because Robinson mailed the complaint from prison on November 3, 2005, the district court correctly deemed it filed on that day. *See Houston v. Lack*, 487 U.S. 266 (1988) (holding that prisoner's filing is deemed filed the moment he delivers it to prison authorities for forwarding to the district court).

the court's "screening" authority under the Prison Litigation Reform Act of 1995. *See* 28 U.S.C. § 1915A (2006). The magistrate judge concluded the Department was entitled to sovereign immunity. J.A. 25. Two weeks later, on December 16, 2005, Robinson moved to add Clipse as a defendant.[2] J.A. 30.

The district court adopted the magistrate's recommendation. J.A. 31. The court observed that although the Department "cannot be held liable under the theory of *respondeat superior*, Trooper Clipse may be subject to suit." J.A. 34. The court held, however, that Clipse was entitled to qualified immunity in his individual capacity. J.A. 33–37. On a motion for reconsideration, the district court reiterated that Clipse was entitled to qualified immunity, J.A. 42–43, 46–49, based on the court's (inappropriate) finding that "the Plaintiff's car was rolling toward Clipse" when Clipse began shooting. J.A. 42–43.

C. This Court Vacated The District Court's Order, Holding That Clipse Is Not Entitled To Qualified Immunity, And Ordered That Clipse Formally Be Added As A Defendant

This Court "vacate[d] the portions of the district court's orders in which the court found that Clipse was entitled to qualified immunity and remand[ed] for further proceedings in the district court," J.A. 53, because the district court

[2] Because no responsive pleading had been filed and the district court had yet to adopt the magistrate's order, it appears that Robinson could have amended his complaint as a matter of right, without seeking leave to amend. *See* Fed. R. Civ. P. 15(a). For purposes of this appeal, however, it does not matter.

"improperly resolved a factual dispute in finding that Clipse was entitled to qualified immunity." J.A. 52.

In addition, after noting that Robinson had filed a motion to add Clipse as a party, this Court granted the motion, observing that "the district court effectively made Clipse a party by concluding that he was entitled to qualified immunity—a defense that is available only to a person sued in his individual capacity." J.A. 53.

The mandate issued on April 23, 2007. J.A. 3. By that time, nearly a year and a half had elapsed since Robinson filed his complaint.

D. On Remand, Robinson Filed An Amended Complaint, Formally Adding Clipse As A Defendant, And Clipse Answered The Complaint Within The 120-Day Service Period

Two weeks after this Court's mandate issued, Robinson filed an amended complaint adding Clipse as a defendant in his individual capacity. J.A. 54. On July 3, 2007, the district court issued an order authorizing the issuance of a summons and service of process by the U.S. Marshals Service.[3] J.A. 276. Before that order, the court's clerk was prohibited from issuing and authorizing service of process, based on an earlier order that was entered at the very inception of this action. J.A. 23 (Dec. 1, 2005 order directing the clerk "*not* to authorize the issuance and service of process . . . unless [the clerk] . . . is instructed by a United States District Judge or a Senior District Judge to do so" (emphasis in original)).

[3] The Marshal serves process for *in forma pauperis* plaintiffs. *See* p. 20, *infra.*

The summons issued to "Joseph Franklin Clipse, Public Safety Trooper 1st Class." J.A. 279. On August 3, 2007, the Marshals Service served the summons and Robinson's original and amended complaints at the South Carolina Highway Patrol Office of General Counsel, which "accepts papers for troopers at the SC Dept. of Public Safety." *Id.* Thirteen days later, on August 13, 2007, Clipse filed an answer to Robinson's amended complaint. J.A. 280.

E. The District Court Granted Summary Judgment To Clipse On The Ground That The Suit Against Him Is Barred By The Statute Of Limitations

After answering the complaint, Clipse moved for summary judgment. J.A. 286. Clipse argued, *inter alia*, that Robinson's amended complaint should be barred by the statute of limitations. J.A. 298–99. Clipse's motion did not address whether the amended complaint related back to the date of the original complaint under Rule 15(c); indeed, he never cited Rule 15(c). *Id.* Instead, Clipse's statute of limitations argument was a Rule 4 argument based on the manner in which the Marshals Service effected service: Clipse argued that he was not properly served under Rule 4, and therefore was not timely served under Rule 4, because, while the summons was in his name, the Marshals Service served it at the Highway Patrol and not on Clipse personally. *Id.*

The district court rejected Clipse's Rule 4 argument. J.A. 376–77. However, the court held that the suit was barred by the three-year statute of

limitations: although Robinson filed his original complaint within the statute of limitations, the court held that his amendment adding Clipse did not relate back to the date of the original complaint under Rule 15(c). J.A. 377–80. The court based that ruling on its belief that an amendment does not relate back unless a newly added defendant had notice of the action within the statute of limitations. *Id.*

SUMMARY OF ARGUMENT

I. Robinson's amended complaint adding Clipse as a defendant relates back to the date of the original complaint, and thus is not barred by the statute of limitations, because the amendment satisfies Rule 15(c)(1)(C). The rule provides that an amendment adding a party relates back to the date of the original complaint "if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Under Rule 15(c)(1)(C), the relevant period for assessing a newly added defendant's notice and what that party knew or should have known is the Rule 4(m) period for serving the summons and complaint. Rule 4(m) provides that service must occur within 120 days after filing the complaint, unless the district court extends the period. In this case filed by a *pro se* prisoner proceeding *in*

forma pauperis, the Rule 4(m) period did not commence until July 3, 2007, the date when the district court finally authorized the clerk to issue process and directed the U.S. Marshals Service to serve the summons and Robinson's pleadings. Before that date, Robinson could not have effectuated service. Thus, the Rule 4(m) period for serving the summons and complaint closed, at the earliest, 120 days after July 3, 2007—i.e., on October 31, 2007.

Clipse received notice of this action well before October 31, 2007, and thus within the Rule 4(m) service period. He answered Robinson's amended complaint on August 16, 2007, eleven days after the Marshals Service served the summons and Robinson's original and amended complaints. In fact, in a filing in another suit, Clipse acknowledged in October 2006 that he was aware of this action.

Clipse did not argue below, nor is there a legitimate basis for finding on this record, that he would be prejudiced in defending this action on its merits. When Robinson filed his amended complaint formally naming Clipse as a defendant on remand in 2007, the proceedings had not advanced to the point that Clipse could show any prejudice with regard to the presentation or preparation of his defense.

Rule 15(c)(1)(C)'s final requirement is satisfied because Clipse should have known that Robinson meant to name Clipse as a defendant all along but failed to do so as a result of a mistake. Robinson's mistake is evident from the face of the original complaint.

First, Clipse was the only actor identified in the original complaint, which alleged that Clipse violated Robinson's rights by using excessive force. All of the allegations and claims in the complaint were directed at Clipse individually.

Second, Robinson named Clipse's employer as the defendant (the South Carolina Department of Public Safety), even though that entity is an arm of the state with sovereign immunity in a § 1983 action, and even though the body of Robinson's complaint did not allege any wrongdoing by the Department. To the contrary, the complaint disavowed any liability by the Department by explicitly asserting that the Department did not have a policy authorizing what Clipse had done. Thus, there is no basis to characterize Robinson's decision to sue an immune sovereign entity as litigation strategy.

Third, Robinson's original complaint sought compensatory and punitive damages. This is significant because damages are available under § 1983 only in individual capacity suits. Courts have held that when a *pro se* § 1983 claimant sues a governmental entity but seeks damages, individual officers should know that the plaintiff would have named them as defendants but for a mistake.

II. This Court should disregard the district court's footnote on *res judicata*. Clipse argued below that judgments in two other suits that Robinson filed against Clipse should bar this action under the doctrine of *res judicata*: a 2003 suit for excessive force, and a 2006 suit (filed after this one) arising from

Robinson's criminal prosecution. In a footnote in its order, the district court "decline[d] to address [*res judicata*] in great detail" because the court based its decision on the statute of limitations. The district court speculated, however, that "it appears" Robinson's action may be barred by *res judicata*, although the court neither analyzed nor applied the elements of *res judicata.* Accordingly, in his informal Fourth Circuit brief for this appeal, Clipse asserted that "[t]he issue of *res judicata* is not before this Court as the District Court did not rule on that issue." That assertion was correct; the issue is not before this Court.

Nonetheless, this action is not barred by *res judicata*. Robinson's 2003 suit was not adjudicated on the merits because it was dismissed without prejudice. The disposition of Robinson's 2006 suit has no preclusive effect on this earlier-filed case because the 2006 suit and this action do not involve the same cause of action; they are based on two separate sets of operative facts and allege different types of wrongdoing, different causes of action, and different types of injuries.

STANDARD OF REVIEW

The district court granted summary judgment. This court reviews a summary judgment order *de novo*, drawing all reasonable inferences in the light most favorable to the non-moving party. *Garofolo v. Donald B. Heslep Assocs., Inc.*, 405 F.3d 194, 198 (4th Cir. 2005). If there is a genuine issue of material fact, or if Clipse is not entitled to judgment as a matter of law on this record, then

summary judgment is inappropriate. Fed. R. Civ. P. 56(c). Similarly, questions involving the relation back of an amendment under Rule 15(c) present mixed questions of law and fact and are reviewed *de novo*. *See Locklear v. Bergman & Beving AB*, 457 F.3d 363, 365 (4th Cir. 2006) (when the issue is "whether an amended complaint filed after the statute of limitations expired but during a court-ordered extension of time for service of process, which adds a new party in place of a mistakenly-named party, relates back to the original complaint pursuant Fed. R. Civ. P. 15(c)[(1)(C)], [w]e review the district court's analysis . . . *de novo*").

ARGUMENT

I. UNDER RULE 15(c), ROBINSON'S AMENDED COMPLAINT RELATES BACK TO THE DATE OF HIS ORIGINAL COMPLAINT AND THUS IS NOT BARRED BY THE STATUTE OF LIMITATIONS

There is no question that Robinson filed the original complaint within the applicable three-year statute of limitations: Clipse shot Robinson on November 14, 2002; and Robinson filed his original complaint on November 3, 2005, fewer than three years later. J.A. 8. Nor is it disputed that Robinson amended his complaint to add Clipse more than three years after Clipse shot him. The issue therefore is whether Robinson's amendment adding Clipse as a defendant relates back to the date of the original complaint. This issue is governed by Rule 15(c), which allows the "relation back of amendments" filed after the statute of limitations has expired. Fed. R. Civ. P. 15(c). Rule 15(c) provides, in relevant part:

> (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:
>
> > (A) the law that provides the applicable statute of limitations allows relation back;
> >
> > (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
> >
> > (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
> >
> > > (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> > >
> > > (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Id.[4] The relation-back issue in this appeal concerns subrule (1)(C).[5] Subrule (1)(C) has several requirements.

First, the amendment must "change[] the party or the naming of the party against whom a claim is asserted." Fed. R. Civ. P. 15(c)(1)(C). This condition is

[4] Before a 2007 revision, subrule (c)(1)(C) was codified as subrule (c)(3).

[5] Subrule (1)(A) does not apply in this case (and need not apply given Rule 15(c)'s disjunctive test) because South Carolina courts do not take a more lenient approach to the relation back doctrine than do federal courts. Subrule (1)(B) is incorporated as a requirement in subrule (1)(C), so it is discussed below.

met here. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 468–69 (4th Cir. 2007) (en banc) (addition of new party is "change" under Rule 15(c)).

Second, subrule (1)(C) incorporates subrule (1)(B): the amended complaint must arise from the same transaction or occurrence that was laid out (or attempted to be laid out) in the original pleading. Fed. R. Civ. P. 15(c)(1)(B). As the district court recognized, J.A. 378, this condition is satisfied because Robinson's amended pleading asserts the same excessive-force claim as does the original complaint.

The remaining requirements of Rule 15(c)(1)(C) are addressed in subparts A through D below. Subpart A shows that, contrary to the district court's premise, a newly added defendant's notice of the action must occur during "the period provided by Rule 4(m) for serving the summons and complaint," Fed. R. Civ. P. 15(c)(1)(C), not before the statute of limitations expires. As shown in subpart B, in this case Rule 4(m) service period ended, at the earliest, on October 31, 2007, because that was the 120th day after the district court authorized service of process. Subpart C shows that Clipse received sufficient notice of the action well before October 31, 2007 such that he will not be prejudiced by defending the action on the merits. Finally, subpart D shows that Clipse should have known that Robinson's excessive-force claim would have been brought against him but for Robinson's mistake in naming as the defendant the immune state agency that employed Clipse, rather than the officer personally.

A. Under Rule 15(c)(1)(C), The Relevant Notice Period Is The Rule 4(m) Period For Serving The Summons And Complaint

Before 1991, Rule 15(c) provided that the party to be added must have had notice of the action "'within the period provided by law for commencing the action against him.'" *See Schiavone v. Fortune*, 477 U.S. 21, 24 n.5 (1986) (quoting Fed. R. Civ. P. 15(c) (1986)). The Supreme Court interpreted that language to mean that the newly added defendant must have had the requisite notice within the statute of limitations. *Id.* at 30–31. *Schiavone* not only produced unfair results, it produced an anomaly: a timely filed claim against a named defendant would satisfy the statute of limitations as long as that defendant was served within the Rule 4 service period, even though that defendant's first notice of the action may have been upon service of the complaint, after the statute of limitations expired; but a claim against a newly added defendant would be barred if that defendant did not receive notice within the statute of limitations, even if that defendant received notice during the Rule 4 service period. *See Diaz v. Shallbetter*, 984 F.2d 850, 852 (7th Cir. 1993) (discussing that anomaly).

In response to *Schiavone*, Rule 15(c) was amended in 1991 to change the notice period from the statute of limitations period to "the period provided by Rule 4(m) for serving the summons and complaint." Fed. R. Civ. P. 15(c); 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.19[3][e] (3d ed. Supp. 2009).

> The 1991 amendment to Rule 15(c) changed the result in *Schiavone* and provided that an amendment would relate back as long as the intended defendant received notice of the action within the period allowed for service of the summons and complaint as set forth in Fed. R. Civ. P. 4(m), or 120 days, whether or not the statute of limitations had expired in the interim.

Urrutia v. Harrisburg County Police Dep't, 91 F.3d 451, 458 (3d Cir. 1996).

As a result of the 1991 amendment, the relevant period for assessing notice and knowledge under Rule 15(c)(1)(C) is the Rule 4(m) service period.

The district court below, however, concluded that Robinson's amendment did not relate back because Clipse did not have notice of the action before the statute of limitations expired. J.A. 377–79. The court relied on *Goodman*, where this Court said that a newly added defendant must, under Rule 15(c), have notice within the "limitations period." *See*, *e.g.*, *Goodman*, 494 F.3d at 475 ("We conclude that Praxair Services . . . knew or should have known within the limitations period that it was the proper party . . . ."). But *Goodman* should not be read as holding that a newly added defendant must receive notice of the action before the statute of limitations expires. Such a reading of *Goodman* would fly in the face of the 1991 amendment to Rule 15(c). Rule 15(c)(1)(C)'s text is clear that the notice period is the Rule 4(m) service period. Accordingly, *Goodman*'s use of the phrase "limitations period" to describe Rule 15(c)'s notice period presumably includes the Rule 4(m) service period.

Goodman, a case in which the plaintiff prevailed on appeal, was a pro-relation-back decision emphasizing that Rule 15(c) should be liberally applied. *See id.* at 474. *Goodman* did not address, much less purport to defy, the 1991 amendment replacing the statute of limitations period with the Rule 4(m) service period. In fact, *Goodman* never mentioned the text of the 1991 amendment: when this Court quoted Rule 15(c)(1)(C), it put an ellipsis in place of the text added by the 1991 amendment, *id.* at 467, which indicates that the Court did not deem the particular notice period in *Goodman* to be outcome determinative. This is not surprising, since the parties in *Goodman* did not even present the issue whether a newly added defendant must receive notice of the action within the statute of limitations. Thus, this Court had no occasion to hold—contrary to the plain text of Rule 15(c)(1)(C)—that notice within the Rule 4(m) service period is insufficient to satisfy Rule 15(c).

In fact, *Goodman*'s actual holding is reconcilable with the 1991 amendment. In reversing the district court, this Court held that it was unclear from the complaint when the statute of limitations expired; this Court did not determine when the statute of limitations expired, but instead left it for the district court to make that determination on remand. *Id.* at 466. Accordingly, *Goodman* could not have *held* that the newly added defendant, Praxair Services, had notice of the action before the statute of limitations expired. This Court presumably was

referring to the Rule 4 service period when it concluded, as a matter of law, that Praxair Services "knew or should have known within the limitations period that it was the proper party." *Id.* at 475. Indeed, because Praxair Services shared an identity of interest and counsel with its parent, Praxair, Inc. (the defendant named in the original complaint), this Court held that Praxair, Inc.'s knowledge should be imputed to Praxair Services when the original complaint *was served* on Praxair, Inc. *Id.* at 475 ("Praxair Services, Inc., as a subsidiary of Praxair, Inc., represented by the same attorneys, is accordingly imputed with knowledge of Goodman's claim against it and of the facts giving rise to that suit *when the original complaint was served*." (emphasis added)).

In sum, contrary to the district court's premise, Rule 15(c) does not require that Clipse had notice of this action before the statute of limitations expired. Instead, it requires that he had notice during "the period provided by Rule 4(m) for serving the summons and complaint." Fed. R. Civ. P. 15(c)(1)(C).

B. Robinson's Rule 4(m) Service Period Closed, At The Earliest, On The 120th Day After The District Court First Authorized The Issuance And Service Of Process: October 31, 2007

Because Rule 15(c)(1)(C) requires notice within the Rule 4(m) service period, the next issue is when that period closed in this case. As shown below, the Rule 4(m) period closed, at the earliest, on October 31, 2007, the 120th day after the district court first authorized the issuance and service of process in this case.

Rule 4(m) requires service of the summons and complaint within 120 days of the complaint's filing, unless good cause is shown for extending the service period. Fed. R. Civ. P. 4(m). Where, as here, an incarcerated plaintiff is proceeding *in forma pauperis*, he must rely on the district court and U.S. Marshals Service to effect service of process. *See* 28 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in [*in forma pauperis*] cases."); Fed. R. Civ. P. 4(c)(3) ("The court must so order [service by the U.S. Marshals Service] if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915[.]"); *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996) (holding that Rule 4(c) and 28 U.S.C. § 1915 "stand for the proposition that when a plaintiff is proceeding in forma pauperis the court is obligated to issue plaintiff's process to a United States Marshal who must in turn effectuate service upon the defendants, thereby relieving a plaintiff of the burden to serve process"); *Dumaguin v. Sec'y of Health and Human Servs.*, 28 F.3d 1218, 1221 (D.C. Cir. 1994) (*in forma pauperis* plaintiff is entitled to rely on Marshals Service to effectuate service of process).[6]

A district court's delay in processing and screening an *in forma pauperis* case and authorizing service of process by the Marshals Service is beyond the

[6] There are sound policy reasons for this requirement. Providing prisoners with the addresses of officials they are suing may pose security risks. *Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir. 1995). Moreover, "prisoners often get the 'runaround' when they attempt to obtain information through governmental channels and needless attendant delays in litigating a case result." *Id.*

plaintiff's control. *See, e.g.*, *Urrutia*, 91 F.3d at 453 ("An *in forma pauperis* plaintiff has no control over the amount of time the district court takes to make the § 1915(d) ruling."); *Paulk v. Dep't. of the Air Force*, 830 F.2d 79, 83 (7th Cir. 1987) ("an *in forma pauperis* plaintiff is not chargeable with this delay because it is solely within the control of the district court"). Accordingly, Rule 4(m)'s 120-day period is suspended or tolled until the district court screens an *in forma pauperis* complaint and authorizes service of process. As the Third Circuit has held, when an *in forma pauperis* complaint is filed before expiration of the statute of limitations and "an amendment will be necessary to cure a defect, the 120-day period of Rule 15(c)(3) is suspended while the district judge authorizes issuance of the summons and service of the amended complaint"; "[u]pon the entry of that order directing service of the amended complaint, the suspension ends and the 120 day period of Rule 15(c)[(1)(C)] beings to run." *Urrutia*, 91 F.3d at 459–60; *see also Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 558 n.5 (7th Cir. 1996) (holding that 120-day period is tolled while court acts on *in forma pauperis* petition); *Paulk*, 830 F.2d at 82–83 ("The *in forma pauperis* statute and Rule 15(c) interact to allow for tolling during the pendency of the § 1915 motion.").

Rule 4(m)'s "good cause" standard produces the same result. Rule 4(m) requires the district court to "extend the time for service to an appropriate period" if there is "good cause" for not serving the complaint within 120 days, Fed. R. Civ.

P. 4(m), and Rule 15(c)'s notice period incorporates any extension of the 120-day period under Rule 4(m). *See* Fed. R. Civ. P. 15, Advisory Comm. Notes to 1991 Amendment ("[T]his rule allows not only the 120 days specified in [Rule 4(m)], but also any additional time resulting from any extension ordered by the court pursuant to that rule."). In the case of an *in forma pauperis* plaintiff, the district court's failure to authorize the issuance and service of process within 120 days should, as a matter of law, constitute good cause requiring the 120-day period to be extended since that delay is beyond the plaintiff's control. *See Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir. 1995) (Marshals Service's failure to complete service is automatically "good cause" to extend time under Rule 4(m)).

Simply put, the period of time before the court authorizes service by the Marshals Service does not count against an *in forma pauperis* plaintiff's Rule 4(m) service period.

Accordingly, in this case, Rule 4(m)'s 120-day service period was tolled for a year and a half because of the district court's erroneous screening of Robinson's complaint and attendant delay in authorizing the issuance of process and service by the Marshals Service. The district court's delay began at the outset of the litigation with an order on December 1, 2005, directing the clerk *not* to authorize the issuance and service of process. J.A. 23 ("The Office of the Clerk of Court is directed *not* to authorize the issuance and service of process . . . unless it . . . is

instructed by a United States District Judge or a Senior District Judge to do so."). The district court then dismissed the suit, which necessitated Robinson's successful appeal, where this Court held that Clipse was not entitled to qualified immunity and that he should be formally added as a defendant. J.A. 53. As a result of this delay caused by the district court, the first time when the issuance and service of process was authorized in this action was July 3, 2007, ten weeks after this Court's mandate issued. Before July 3, 2007, Robinson—who was beholden to the district court to authorize service, and who was entitled to rely on the Marshals Service for service of process—could not have effectuated service.

In conclusion, Rule 4(m)'s 120-day service clock did not begin to run until July 3, 2007, when the district court first authorized service of process by the Marshals Service. *See Urrutia*, 91 F.3d at 459–60. The 120th day after that date was October 31, 2007. Therefore, for purposes of Rule 15(c)(1)(C)'s notice requirement, "the period provided by Rule 4(m) for serving the summons and complaint" ended, at the earliest, on October 31, 2007.

C. Clipse Received Such Notice Of This Action Within The Rule 4(m) Service Period That He Will Not Be Prejudiced In Defending On The Merits

As shown below, within the Rule 4(m) service period, Clipse "received such notice of the action that it will not be prejudiced in defending on the merits." Fed. R. Civ. P. 15(c)(1)(C)(i).

1. Clipse received notice well before October 31, 2007

Clipse clearly had notice of this action well before October 31, 2007. After all, Clipse filed his answer on August 16, 2007, J.A. 280, just thirteen days after the Marshals Service effected service of Robinson's original and amended complaints. J.A. 279. A defendant who answers a complaint is obviously aware of the action. *See Lundy v. Adamar of N.J., Inc.*, 34 F.3d 1173, 1182 (3d Cir. 1994) (the fact that the party to be added had answered a cross-claim meant that he was on notice of the existence of the litigation and "undoubtedly had reviewed the[] original complaint prior to filing that answer").

Actually, Clipse was aware of this action long before he filed his answer in August 2007: one of his own filings acknowledges that he was on notice, at the latest, by *October 2006*. In 2006, while this action was on appeal in this Court, Robinson filed a new suit against Clipse arising from Robinson's criminal prosecution; in that 2006 suit, Clipse filed a summary judgment motion in October 2006 in which Clipse referenced this excessive-force action. *See* Defs'. Mem. in Opp. to Plf's. Mot. for Summ. J. and Defs'. Mem. in Supp. of Defs'. Mot. for Summ. J., at p. 6 n.12, *Robinson v. S.C. Dep't of Pub. Safety*, No. 2:06-cv-01288-SB (D.S.C. Oct. 20, 2006). Thus, Clipse plainly had notice of this excessive-force action by at least October 2006.

2. Clipse did not contend below that the amendment will prejudice him in defending the action on the merits

Rule 15(c)(1)(C)(i) requires that a newly added defendant's notice of the action within the Rule 4(m) period for service be such that the defendant will not be prejudiced in defending the case on the merits. In moving for summary judgment below, Clipse never argued that he would be prejudiced in defending on the merits if Robinson's amendment related back. J.A. 288–300.

Nor did the district court find that Clipse would be prejudiced. Rather, the district court simply said, in conclusory fashion, that "the Court cannot say that the amendment at issue caused no prejudice to the added Defendant." J.A. 379. But that statement—which is not a finding of prejudice—was based on the district court's erroneous premise that a newly added defendant must receive notice of an action *within the statute of limitations period*; the court apparently concluded that absent such notice, prejudice is presumed. J.A. 378–79. As explained above, however, the district court's premise defies the 1991 amendment to Rule 15(c) and is incorrect. Therefore, the district court's presumption of prejudice also fails.

There is no legitimate basis for finding that Clipse will be prejudiced. The Marshals Service served the original and the amended complaints on August 3, 2007, *see* J.A. 279; those pleadings contained a plethora of exhibits, including this Court's 2007 decision reversing on qualified immunity. Clipse presumably saw these documents, since he answered the amended complaint thirteen days after the

Marshals Service effected service.[7] Because the district court initially dismissed this suit, the only proceedings that occurred before Clipse answered the complaint were the district court's dismissal order, the subsequent appeal, and Robinson's filing of an amended complaint after this Court's mandate issued. Thus, the proceedings had not advanced to the point that Clipse could show any prejudice with regard to the presentation or preparation of his defense. *See Bryant Elec. Co. v. Joe Rainero Tile Co.*, 84 F.R.D. 120, 124 (W.D. Va. 1979) (finding no prejudice because "the proceedings have not advanced to the point that defendant can show any prejudice with regard to its presentation or preparation of its defense").

Indeed, even if Robinson had formally named Clipse as a defendant in the original complaint, Clipse would be in precisely the same position he is in today: the district court would have dismissed the suit on the basis of qualified immunity, and this Court would have then reversed and remanded the excessive-force claim for litigation on the merits, with Clipse having to answer the complaint. Thus, Clipse is in no position to claim prejudice by having been omitted from the caption of the original complaint.

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[7] Clipse argued below that the Marshals Service did not effect service in the manner required by Rule 4, but the district court rightly rejected that argument. J.A. 377. It bears noting that Rule 15(c) does not require service in the manner required by Rule 4; instead, Rule 15(c) requires notice. *See W. Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir. 1989); *Singletary v. Pa. Dep't of Corr.*, 266 F.3d 186, 195 (3d Cir. 2001) ("Rule 15(c)(3) notice does not require actual service of process on the party sought to be added.").

The fact of delay in this litigation is not sufficient to find prejudice. *See Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 614 (4th Cir. 1980) (permitting amendment and relation back where the only concern was delay). This is particularly true here since the delay was outside of Robinson's control; the delay was caused by the district court's erroneous qualified immunity ruling and the subsequent appeal needed to rectify that error.

D. Clipse Should Have Known That Robinson's Failure To Name Him As A Defendant Was The Result Of A Mistake

Rule 15(c)'s last requirement is Rule 15(c)(1)(C)(ii). It is satisfied if, during the Rule 4(m) service period, a newly added defendant knew or should have known that the plaintiff meant to name him as a party all along. *See Goodman*, 494 F.3d at 471. As shown below, Clipse should have known during the Rule 4(m) service period that Robinson made a mistake in naming Clipse's employer—an immune state agency—as the defendant in this § 1983 action.

1. It is evident from Robinson's original complaint that he meant to name Clipse as a defendant

This Court has eschewed formalism in evaluating "mistake" under Rule 15(c). *See Goodman*, 494 F.3d at 470; *see also* 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.15[4] (2d ed. Supp. 1996) ("[T]he phrase 'a mistake concerning the identity of the proper party' should clearly not be read to limit its usefulness to cases of misnomer. . . . [I]f notice requirements are properly

met it should make no difference whether the amendment corrects a mistake of fact or a mistake of law."). Rather than focusing on why a plaintiff made a mistake, this Court has explained that "[t]he 'mistake' language is textually limited to describing the notice that the new party had," requiring simply that the newly added defendant expected or should have expected that he "was meant to be named a party in the first place." *Goodman*, 494 F.3d at 471. Specifically, this Court said that the "mistake" requirement is satisfied if a newly added defendant should have known from *the face of the original complaint* that he "was the party that would have been sued but for a 'mistake.'" *Id.* at 470, 474–75. Thus, in *Goodman*, where the plaintiff named only "Praxair, Inc." as a defendant but later attempted to add that corporation's subsidiary, "Praxair Services, Inc.," this Court concluded that Praxair Services should have known from the body of the original complaint that, but for a mistake, it would have been named, since the body of the complaint evinced an intent to sue Praxair Services. *Id.* at 474–75.

Accordingly, the focal point for determining what Clipse knew or should have known is Robinson's original complaint. From that pleading a reasonable officer would know that Robinson mean to name Clipse as a party all along.

First, the original complaint alleged *only* "acts . . . which were carried out by state trooper Joe Clipse." J.A. 14. The complaint was based on a single episode, a shooting, and it identified Clipse as the shooter. The pleading's causes of action

alleged that Clipse—and *only* Clipse—violated Robinson's rights. All of the allegations and claims in the complaint were directed at Clipse individually. The complaint's statements distinguish this case from cases where the complaints were "pleaded in such a way that the new party . . . *could not reasonably have known* that it would have been named originally." *Goodman*, 494 F.3d at 472 (emphasis in original). Therefore, upon reviewing the original complaint, Clipse knew or should have known that he "was the party that would have been sued but for a mistake." *Id.* at 470 (internal quotations omitted).

Second, while Robinson named Clipse's employer, the "SC Dept. of Public Safety, Highway Patrol," that entity is an arm of the State that has sovereign immunity in a § 1983 action. *See, e.g.*, *Keller v. Prince George's County*, 923 F.2d 30, 32 (4th Cir. 1991).[8] Furthermore, the body of Robinson's complaint did not allege any wrongdoing by the Department. To the contrary—and significantly—the complaint asserted that "it is *not* SC State Troopers [sic] *policy and procedure* to get out of there [sic] vehicles side arm drawn and begin discharging their weapon [during a stop for minor violations]." J.A. 18 (emphasis added). In other words, the complaint explicitly disavowed any custom or policy. Because a governmental entity cannot be liable under § 1983 unless its "policy or custom"

[8] Before this suit, this Court had specifically held that South Carolina's Department of Public Safety "cannot be sued under Section 1983." *S.C. Troopers Fed'n Local 13 v. South Carolina*, 112 F. App'x 883, 885 (4th Cir. 2004) (unpublished).

contributed to the constitutional violation, *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 416–17 (1997); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), it was evident from the complaint that Robinson was not really intending to sue the government. Instead, he was contending that Clipse acted beyond the scope of his authority, the type of allegation that bespeaks an individual-capacity claim.

Third, Robinson's original complaint sought compensatory and punitive damages. J.A. 22. This is significant because damages are available under § 1983 only in an individual capacity suit. Courts have held that when a *pro se* § 1983 claimant sues a governmental entity but seeks damages, individual officers should know that the plaintiff would have named them as defendants but for a mistake. *See, e.g.*, *Sanders-Burns v. City of Plano*, 578 F.3d 279 (5th Cir. 2009); *Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991); *Blaskiewicz v. County of Suffolk*, 29 F. Supp. 2d 134 (E.D.N.Y. 1998). In *Hill*, the *pro se* plaintiff originally sued a prison guard without stating whether the guard was being sued in his official or individual capacity. 924 F.2d at 1375. When the plaintiff amended the complaint to add a claim against the guard in his individual capacity, the Seventh Circuit held that the amendment related back under Rule 15(c) because the officer should have known from the original complaint's prayer for punitive damages that the plaintiff intended to sue the officer in his individual capacity. *Id.* at 1377–78. Similarly, in *Sanders*, the Fifth Circuit relied in part on the *pro se* complaint's plea for punitive

damages in holding that an amendment naming an official in his individual capacity related back under Rule 15(c). 578 F.3d at 289–90. And in *Blaskiewicz*, which is closely analogous to this case, a *pro se* plaintiff sued a county for excessive force, seeking punitive damages. When the plaintiff later sought to amend the complaint to add the individual officers involved, the court held that the officers should have known that they would have been named as defendants but for the plaintiff's mistake in believing that he could recover punitive damages without naming the individual officers as defendants. 29 F. Supp. 2d at 139–40. Likewise, Clipse should have known from Robinson's pursuit of damages that Robinson intended to sue Clipse personally for his use of excessive force.

* * *

In sum, it was evident from the body of Robinson's original complaint that Robinson intended to hold Clipse accountable personally for shooting him. Therefore, Clipse should have known or expected that he "would have been sued but for a 'mistake.'" *Goodman*, 494 F.3d at 470. There is no basis to characterize Robinson's decision to sue an immune sovereign entity (the South Carolina Department of Public Safety) as litigation strategy.

2. Rule 15(c) decisions from other circuits confirm that Clipse should have known that he would have been sued but for a mistake

A number of courts have held that when a *pro se* plaintiff suing under

§ 1983 makes a mistake of law in suing the government rather than an officer in his individual capacity, the mistake permits relation back under Rule 15(c). Although it appears that this Court has not addressed the issue, cases from other circuits are instructive and add further support for relation back in this case.

In *Urrutia v. Harrisburg County Police Dep't*, 91 F.3d 451 (3d Cir. 1996), the plaintiff brought a *pro se* § 1983 action alleging he was stabbed while in the custody of police officers, but named only the police department, not the officers, as the defendant. *Id.* at 453. After the magistrate judge recommended dismissal because the police department was not amenable to suit, and after the statute of limitations had expired, the plaintiff sought to add the individual officers as defendants. *Id.* at 455. Applying Rule 15(c), the Third Circuit held that it was "clear" that the plaintiff made a mistake because it was "a legal blunder to pursue a municipal defendant for the misdeeds of individual state actors." *Id.* at 458. The Third Circuit concluded that the "mistake" was apparent because, after the magistrate judge recommended dismissal of the action, the plaintiff moved to amend the complaint to add the officers. *Id.* at 457–58; *see also Arthur v. Maersk, Inc.*, 434 F.3d 196, 209 (3d Cir. 2006) (newly added defendant should have known it would have been named but for a mistake because there was "no basis to characterize [plaintiff's] decision to sue his statutorily immune employers as litigation strategy").

In *Woods v. Indiana Univ.-Purdue at Indianapolis*, 996 F.2d 880 (7th Cir. 1993), the district court dismissed without prejudice, on sovereign immunity grounds, a civil rights action against state entities, including a police department. *Id.* at 883. The plaintiff then filed an amended complaint naming several individuals employed by those entities. *Id.* The district court dismissed the claims as time-barred under the statute of limitations, but the Seventh Circuit reversed. *Id.* at 890. The Seventh Circuit held that the amendment satisfied Rule 15(c) because the employees should have known that the plaintiff made a mistake "of law" in suing governmental entities that had sovereign immunity; the "mistake" was "the plaintiff's failure to understand that the originally omitted defendant . . . should have been sued in the first place." *Id.* at 886–87; *see also Hill v. Shelander*, 924 F.2d 1370, 1371, 1373–75 (7th Cir. 1991) (ruling in a § 1983 case alleging physical injuries inflicted by a jail guard that an amendment naming the guard in his individual capacity related back because it was evident from the original complaint's allegations that the plaintiff intended to sue the guard personally).

Likewise, in *Soto v. Brooklyn Corr. Facility*, 80 F.3d 34 (2d Cir. 1996), the *pro se* plaintiff sued a government institution under § 1983 after he was assaulted by inmates; the original complaint did not name individual officers as defendants. *Id.* at 35. In allowing relation back under Rule 15(c), the Second Circuit held that the officers knew or should have known that the plaintiff made a "mistake" of law

in failing to name them as defendants initially because the original complaint did not allege any policy or custom by the government institution that would permit liability under § 1983. *Id.* at 36–37. The court observed that Rule 15(c) "was expressly intended to preserve legitimate suits despite such mistakes of law at the pleading stage." *Id.*

The Sixth Circuit has followed the same path. *See Brown v. Shaner*, 172 F.3d 927 (6th Cir. 1999). In *Brown*, the plaintiff amended his § 1983 complaint to name officers in their individual capacities. *Id.* at 933. The Sixth Circuit held that the amendment related back because "it was clear from a reading of the complaint that [the] defendants could not be held liable in their official capacity," and thus the original complaint contained a "mistake" of which the defendants knew or should have known. *Id.* at 933–34. In a later case, *Black-Hosang v. Ohio Dep't of Pub. Safety*, 96 F. App'x 372, 376 (6th Cir. 2004) (unpublished decision), the Sixth Circuit reiterated that Rule 15(c)'s reference to a "mistake concerning the identity of the proper party" includes a plaintiff's mistake of naming an immune institutional rather than individual defendant. *Black-Hosang* involved a complaint initially filed against a State department of public safety for an arrest allegedly undertaken without probable cause. *Id.* at 373. After the agency invoked sovereign immunity, the plaintiff sought to amend the complaint to add the

individual officer who arrested her; the Sixth Circuit held that the amendment related back under Rule 15(c). *Id.* at 377–78.

These decisions are persuasive and consistent with this Court's liberal approach to Rule 15(c)'s mistake prong. *See Goodman*, 494 F.3d at 469–70, 472–73. They are also consistent with the policies of construing *pro se* pleadings liberally and allowing *pro se* litigants some leeway with strict pleading requirements. *See, e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) ("A document filed *pro se* is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). These policies entail interpreting pleadings liberally so as "to avoid an unnecessary dismissal, to avoid inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis." *Castro v. United States*, 540 U.S. 375, 381–82 (2003) (citations omitted). *Pro se* litigants often misapprehend the law's requirements, and their complaints should not be dismissed for failure to comply with formal pleading requirements. Here, Robinson's "failure to add [Clipse] as a defendant in [his] *pro se* complaint would probably not have occurred if [Robinson] had the assistance of a lawyer." *Fields v. Blake*, 349 F. Supp. 2d 910, 918 (E.D. Pa. 2004).

3. Denying relation back to correct Robinson's mistake would conflict with Rule 15(c)(1)(C)'s purpose

Denying relation back under the circumstances of this case would conflict with Rule 15(c)(1)(C)'s purpose. The "mistake" language of Rule 15(c)(1)(C) was introduced in the rule's 1966 amendment and was intended to permit relation back when plaintiffs mistakenly sue government entities instead of officers. *See* Fed. R. Civ. P. 15, Advisory Comm. Notes, 1966 Amendment; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 409–10 (1967) (reporter for the Advisory Committee on Civil Rules explaining that the amendment sought to address the problem of errors that occurred when "suing the Government"). This Court has observed that "[t]he central concern when the current [Rule 15(c)(1)(C)] was added [in 1966] was the misnaming of government instrumentalities." *Goodman*, 494 F.3d at 476. This is the same type of mistake that Robinson made. Thus, allowing relation back would be faithful to the purpose of Rule 15(c)(1)(C). Denying relation back would conflict with that purpose.

* * *

In sum, all of Rule 15(c)'s requirements are satisfied in this case. Therefore, Robinson's amendment formally naming Clipse as a party defendant should relate back to the original complaint, and the district court's statute of limitations ruling should be reversed.

II. THE COURT SHOULD DISREGARD THE DISTRICT COURT'S FOOTNOTE ON *RES JUDICATA*

Clipse's summary judgment brief devoted a mere fifteen lines to arguing that this suit should be barred by *res judicata.* J.A. 297–98. The argument was based on two suits that Robinson filed against Clipse: an excessive-force action that Robinson filed in 2003 and dismissed without prejudice; and a malicious prosecution suit that Robinson filed in May 2006, while this action was previously on appeal. *Id.* In recommending summary judgment in this case, the magistrate judge below relied on the statute of limitations and did not address *res judicata*. J.A. 362–67. The district court accepted the magistrate's recommendation and granted summary judgment based on the statute of limitations. J.A. 377–79.

In a footnote, the district court noted that it chose to "decline to address [*res judicata*] in great detail" because the court based its decision on the statute of limitations. J.A. 380–81. The district court speculated, however, that "it appears" that Robinson's action may be barred by *res judicata,* although the court neither analyzed nor applied the elements of *res judicata.* J.A. 381. Recognizing that the district court did not rely on *res judicata,* Clipse's informal Fourth Circuit brief for this appeal asserted (at p. 4) that "[t]he issue of *res judicata* is not before this Court as the District Court did not rule on that issue." Informal Br. of Appellee, *Robinson v. Clipse*, No. 08-6670, at 4 (4th Cir. May 28, 2008). Clipse is correct that the affirmative defense of *res judicata* is not properly before this Court. (In

appointing counsel, this Court's description of the issue on appeal made no mention of *res judicata*.)

Nonetheless, we briefly explain why this suit is not barred by *res judicata*.[9] Federal law determines the preclusive effect of a prior federal judgment, including the question of whether that judgment was on the merits. *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989). Furthermore, because *res judicata* is an affirmative defense, the defendant has the burden of proving its existence. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2179–80 (2008); *see also* Fed. R. Civ. P. 8(c) (stating that res judicata is an affirmative defense). For *res judicata* to bar this action, Clipse would have to establish three elements: (1) that there was final judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) that this suit is based on the same cause of action. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 210 (4th Cir. 2009).

Robinson's 2003 lawsuit has no preclusive effect because, while it did claim that Clipse used excessive force when he shot Robinson, that suit was dismissed *without* prejudice for failure to prosecute. J.A. 336. When a district court specifies that a dismissal is without prejudice, its action will not operate as an adjudication on the merits. *See* Fed. R. Civ. P. 41(b); *Payne ex rel. Estate of Calzada v. Brake*,

[9] When a district court does make *res judicata* the basis for its decision, this Court exercises *de novo* review. *See Q Int'l Courier, Inc. v. Smoak*, 441 F.3d 214, 216 (4th Cir. 2006); *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir. 1990).

439 F.3d 198, 204 (4th Cir. 2006) (concluding that Rule 41(b) gives the district court discretion to specify that a dismissal is not on the merits by dismissing without prejudice); *see also Hughes v. Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003) ("A dismissal without prejudice is not an adjudication on the merits and thus does not have a *res judicata* effect."). Thus, because the district court expressly dismissed Robinson's 2003 action without prejudice, it has no preclusive effect.

With respect to the 2006 suit, its disposition has no preclusive effect on this earlier-filed case because the 2006 suit was based on a different cause of action. As noted, to establish a bar by *res judicata*, a defendant must prove that the two suits were based on the same cause of action. *See Ohio Valley*, 556 F.3d at 210. "No simple test exists to determine whether causes of action are identical for claim preclusion purposes, and each case must be determined separately within the conceptual framework of the doctrine." *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999). This Court has said that *res judicata* applies if the present suit "arises out of the same transaction or series of transactions as the claim resolved by [a] prior judgment." *Ohio Valley*, 556 F.3d at 210 (citation omitted). "The expression 'transaction' in the claim preclusion context 'connotes a natural grouping or common nucleus of operative facts.'" *Pittston*, 199 F.3d at 704 (quoting Restatement (Second) of Judgments § 24 cmt. b (1982)). Among the factors to consider when deciding whether the operative facts of two causes of

action constitute a single claim "'are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.'" *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. b (1982)). The interests of finality must be balanced with the plaintiff's interest in not being denied the right to prosecute a valid claim. *Id.*

Clipse did not carry his burden of proving that the 2006 suit and this earlier-filed suit are based on the same transaction or series of transactions. This suit is an excessive-force action based on Clipse's shooting on Buck Island Road on the morning of November 14, 2002. The transaction—the shooting—concluded when Clipse fired his last shot that morning. In contrast, the 2006 suit, the gist of which is a theory of malicious prosecution, arose from Robinson's criminal prosecution for resisting arrest; the claims in the 2006 suit were for perjury, forgery, fraud, false swearing, double jeopardy, and false imprisonment, all arising from Robinson's criminal prosecution. The relevant transaction for that suit began when Clipse altered an arrest warrant on November 15, 2002, resulting in a grand jury indictment on January 13, 2003, for resisting arrest. The cause of action did not accrue until Robinson was acquitted of resisting arrest on May 12, 2003. Thus, the

2006 suit and this action are based on separate sets of operative facts and involve different types of alleged wrongdoing, injuries, and causes of action.[10]

An additional point bears noting, and it arises from the fact that Robinson filed the 2006 suit *while this action was pending on appeal in this Court in 2006*, after the district court had dismissed this action with prejudice upon erroneously finding that Clipse was entitled to qualified immunity. Because the excessive-force claim had been dismissed with prejudice and was pending on appeal, Robinson could not have repleaded that claim in the 2006 suit. This is significant because *res judicata* cannot apply if a plaintiff did not have "a fair opportunity to advance all [of] its 'same transaction' claims in a single unitary proceeding." *Dionne v. Mayor of Baltimore*, 40 F.3d 677, 683 (4th Cir. 1994); *see* 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4412 (3d ed. 2009) ("It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding."). Rather than wrongly repleading the dismissed excessive-force claim in his 2006 suit, Robinson did the right thing by successfully taking an appeal of the district court's qualified immunity ruling and obtaining a decision from this Court allowing Robinson to formally "add Clipse as a party"

[10] The district court alluded to Robinson's filing of a number of lawsuits. J.A. 381. Except for this case and the 2003 suit, Robinson's other suits alleged claims arising from his criminal prosecution, including a suit against prosecutors.

and "remand[ing] for further proceedings in the district court" on the excessive-force claim against Clipse J.A. 53.

For these reasons, the district court's footnote speculating about *res judicata* should be disregarded.

CONCLUSION

This Court should reverse the district court's judgment and remand so that the action may be adjudicated on the merits.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that this Court hear oral argument in this case. This case presents an important opportunity to clarify the operation of Rule 15(c). The decisional process may be significantly aided by oral argument.

Respectfully submitted,

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ADDENDUM

Contents Page

Federal Rule of Civil Procedure 15

*** * ***

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

* * *

Federal Rule of Civil Procedure 4

*** * ***

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

*** * ***

28 U.S.C. § 1915 Proceedings in forma pauperis

*** * ***

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

*** * ***

28 U.S.C. § 1915A Screening

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition.--As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(C):

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2000.

I further certify that this brief complies with the volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 10,739 words.

/s/ Sean E. Andrussier
Sean E. Andrussier

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 30th day of November 2009, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 30th day of November, 2009, the required number of bound copies of the foregoing Brief of Appellant and Joint Appendix have been hand-filed with the Clerk of this Court and that one copy of the same has been served, via U.S. Mail, postage prepaid, upon all Counsel of Record at the above-listed address.

/s/ Sean E. Andrussier
Sean E. Andrussier