IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel KENnNETH GOMEZ,

Plaintiff,

vs. **No. CIV 10-00594 JP/LFG**

ELEVENTH JUDICIAL DISTRICT COURT,

Defendant.

MOTION TO DISMISS NO. I:
DISMISSAL OF GOMEZ'S FOURTEENTH AMENDMENT EQUAL PROTECTION AND PROCEDURAL AND SUBSTANTIVE DUE PROCESS CLAIMS

Defendant, Eleventh Judicial District Court, through its attorneys Robles, Rael & Anaya, P.C. (Luis Robles, Esq.) and pursuant to Fed.R.Civ.P. 12(b)(6), states the following for their Motion to Dismiss No. I: Dismissal of Gomez's Fourteenth Amendment Equal Protection and Procedural and Substantive Due Process Claims:[1]

INTRODUCTION

Even accepting all of Gomez' allegations as true for purposes of this Motion, Defendant is entitled to the dismissal of Gomez' Fourteenth Amendment procedural due process and equal protection claims. In the alternative, this Court should dismiss Gomez' Fourteenth Amendment claims because Defendant, Eleventh Judicial District Court, is not considered a "person" under 42

[1] As allowed by D.N.M.LR-Civ. 7.7, Defendant's counsel has combined this Motion with the memorandum in support thereof. As required by D.N.M.LR-Civ. 7.1(a), Defendant's counsel asked Plaintiff on June 30, 2010, to determine whether Plaintiff would agree to dismiss this lawsuit. Plaintiff did not concur with this motion.

U.S.C. § 1983. The dismissal of Gomez' Fourteenth Amendment equal protection claim is proper because he failed to allege that Eleventh Judicial District Court judges treated him differently than similarly situated litigants who are before the court.

As a matter of law, Gomez' alleged loss of his "good reputations" fails to state an actionable Fourteenth Amendment claim under Paul v. Davis, 424 U.S. 985 (1976). The clearly established case law does not support Gomez' claim that Eleventh Judicial District Court judges' alleged intentional, though random and unauthorized, deprivation of Gomez' property (reputation) violated his Fourteenth Amendment procedural due process rights. For these reasons, this Court should dismiss Gomez' Fourteenth Amendment procedural due process and equal protection claims with prejudice.

STANDARD OF REVIEW

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir.1994). A complaint challenged by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations, but a plaintiff's obligation to set forth the grounds of his or her entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S.Ct. 1955, 1965 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 1965 (internal citation omitted).

"[T]he Supreme Court [of the United States] recently. . . prescribed a new inquiry for the courts to use in reviewing a dismissal: whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting Twombly, 127 S.Ct. at 1967 & 1969). "The [Supreme] Court explained that a plaintiff must 'nudge his claims across the line from conceivable to plausible' in order to survive a motion to dismiss." Ridge at Red Hawk, 493 F.3d at 1177 (quoting Twombly, 127 S.Ct. at 1974) (alterations omitted). "Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." Ridge at Red Hawk, L.L.C., 493 F.3d at 1177.

STATEMENT OF THE FACTS

As stated in the Complaint, the relevant facts are these: Since 1963, judges of the Eleventh Judicial District have entered a series of judgments against Gomez. *See [Docket No. 8-1, pp. 7 & 9 (Exhibit 1)]*. According to Gomez, the judges who entered the judgments against Gomez have done so without the corporate surety bond required by State law. *See [Docket No. 8-1, p. 3]*. For the depravation of his constitutional rights, Gomez claims that he is entitled to damages in the amount of $100,000.00. *See [Docket No. 8-1, p. 7]*. Despite spanning nine pages, these are all the facts which Gomez alleged in his Complaint. *See [Docket No. 8-1, pp. 1-9]*.

CAUSES OF ACTION SUBJECT TO DISMISSAL

In his Complaint, Gomez alleged the violation of his federal constitutional rights. *See [Docket No. 1-3, ¶¶ 43-63]*. More specifically, Gomez claims that Defendant violated his

Fourteenth Amendment rights in the following manner:

> [Defendant has] severely injured him by denying him constitutional rights under Sections 1, and 3, Fourteenth Amendment and all civil rights laws giving the said constitutional powers effect. In addition, said decisions and judgments have damaged his personal character without recourse, since there are no persons who have acquired title to positions as judges in any State of New Mexico courts of law, and since there are no courts of law to which he could appeal the non-competent judgments rendered.

See [Docket No. 8-1, p. 1]. Unfortunately, Gomez' Complaint does not elsewhere plead his claim with greater clarity. *See [Docket No. 8-1, pp. 1-9]*.

LEGAL ARGUMENT

I. THIS COURT SHOULD DISMISS GOMEZ' FOURTEENTH AMENDMENT CLAIMS BECAUSE DEFENDANT, ELEVENTH JUDICIAL DISTRICT COURT, IS NOT CONSIDERED A "PERSON" UNDER 42 U.S.C. § 1983.

Alleging a cause of action under 42 U.S.C. § 1983, Gomez alleges that Defendant deprived Gomez of his property (reputation), violating his Fourteenth Amendment due process rights. *See [Docket No. 8-1, pp. 1 & 6]*. In order to state a claim under 42 U.S.C. § 1983, Gomez must show that a person acting under the color of state law committed a violation of his civil rights. It is well-settled that the state itself is not a "person" for the purposes of this statute. Will v. Mich. Dept. of State Police, 491 U.S. 58 (1989). Moreover, it is equally well-settled that state agencies are considered "arms of the state," and thus not "persons" for the purposes of liability under 42 U.S.C. § 1983. Harris v. Champion, 51 F.3d 901, 905-06 (10th Cir. 1995).

Defendant is clearly not a "person" for the purposes of liability under 42 U.S.C. § 1983. While Gomez has claimed that Defendant was a person acting under color of state law, this is a legal conclusion which, as shown above, is not deemed to be true for the purposes of this Motion. Nixon

v. Belmont-Harrison Juvenile Center, 113 Fed. Appx. 51, 54 (6th Cir. Unpublished Decision, Sept. 7, 2004) (citing Ernst v. Roberts, 379 F.3d 373, 377 (6th Cir. 2004)). While Defendant brings this Motion on the basis of Gomez' lack of personhood, rather than Eleventh Amendment immunity, the analysis under which both of these defenses are reviewed is identical; for both of these defenses, courts determine whether the defendant is an "arm of the state." Harris, 51 F.3d at 905-06.

The Tenth Circuit has established a two pronged test for determining whether an agency is an "arm of the state." "[T]he court first examines the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state. Second, the court examines the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." Watson v. University of Utah Medical Center, 75 F.3d 569, 574-75 (10th Cir. 1996) (citing Haldeman v. State of Wyo. Farm Loan Bd., (10th Cir. 1994)).

In Watson, the Tenth Circuit held that the University of Utah was an arm of the state. Regarding the first test, the court held that the University was a "state controlled entity," because it was largely controlled by a sixteen member Board of Regents, fifteen members of which were appointed by the governor with the consent of the senate, and by a ten member Board of Trustees, eight members of which were appointed by the governor. Watson, 75 F.3d at 575. Regarding the second prong, the University was the beneficiary of a state Risk Management Fund, and the budget of the University was largely controlled by the Board of Regents, the legislature, and the governor. Id.

In Haldeman, the Wyoming Farm Loan Board earned income from interest on the loans, but the interest was placed in a fund that was "strictly controlled by the legislature." 32 F.3d at 473. Because of this lack of autonomy over the funds, the Board was considered a governmental entity for the purposes of Eleventh Amendment immunity. Id. at 474.

In the present case, Defendant certainly qualifies as an "arm of the state." Regarding the first prong of the Watson/Haldeman test, the Eleventh Judicial District Court is entirely controlled by the State. The district courts are creatures of state statute. NMSA 1978, § 34-6-1. "The district courts are agencies of the judicial department of the state government. Personnel of the district court are subject to all laws and regulations applicable to state offices and agencies and state officers and employees except where otherwise specially provided by law." NMSA 1978, § 34-6-21.

Regarding the second prong of the Watson/Haldeman test, the judiciary is funded by the State. The Defendant is a state agency beneficiary of New Mexico's Risk Management Fund. NMSA 1978, §41-4-23. Further, the courts are considered a state agency for the purposes of the preparation of the state budget. NMSA 1978, §6-3-9. It is required to submit a form to the state specifying its income and expenses. NMSA 1978, §6-3-18. It is required to submit a budget request prepared by the secretary, and it requires approval of the governor for all applications for outside funds. NMSA 1978, §9-19-6(C). Moreover, judicial compensation is determined by a commission who's members are appointed by the Governor. NMSA 1978, § 34-1-10. Accordingly, the Eleventh Judicial District Court is not a "person" under 42 U.S.C. § 1983, so the causes of action based on that statute should be dismissed.

II. THE DISMISSAL OF GOMEZ' FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM IS PROPER BECAUSE HE FAILED TO ALLEGE THAT ELEVENTH JUDICIAL DISTRICT COURT JUDGES TREATED HIM DIFFERENTLY THAN SIMILARLY SITUATED LITIGANTS WHO ARE BEFORE THE COURT.

In his complaint, Gomez alleges that Defendant deprived Gomez of his property (reputation), violating his Fourteenth Amendment equal protection rights. *See [Docket No. 8-1, pp. 1 & 6]*. The Equal Protection Clause states that "[no state shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause grants to all citizens "the right to be free from invidious discrimination in statutory classifications and other governmental activity." Harris v. McRae, 448 U.S. 297, 322 (1980). The Equal Protection Clause requires, therefore, that all similarly situated persons be treated in a similar manner. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

The Supreme Court has "recognized successful equal protection claims brought by a class of one, where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The classic "class of one" case is one in which a public official inflicts or imposes a burden or cost of some sort on one person or entity without imposing the same burden or cost on other similarly situated persons or entities. Lauth v. McCollum, 424 F.3d 631, 633 (7th Cir. 2005).

Class-of-one cases have presented a challenge to the lower courts since the Supreme Court established the doctrine in Olech. See, e.g., Jennings v. City of Stillwater, 383 F.3d 1199, 1211 (10th Cir. 2004). The lower courts have recognized the risk that, "unless carefully circumscribed, the

concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors." Id. at 1211-12. The Tenth Circuit further stated in Jennings that it is nearly always possible for persons aggrieved by a government action to produce evidence of being treated differently than others, and that it is always possible to allege such differential treatment. Id.

Recognizing the fraught nature of the claim, the circuits have "proceeded cautiously in applying this theory." Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202, 1209 (10th Cir. 2006). The Tenth Circuit in Jicarilla cautioned that "[a]n approach that reads Olech too broadly could transform the federal courts into general-purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system." Id. at 1209 (citing Jennings, 383 F.3d at 1211)(internal quotation marks omitted).

The law of equal protection traditionally deals with "groups unified by the characteristic alleged to be at the root of the discrimination." Jennings, 383 F.3d at 1213. Where a group is involved, the problem is simplified; in this traditional situation, "the sample size is large enough to raise a concern that the disfavored class was selected. . . because of their membership in the class." Id. at 1213. A unique feature of the class-of-one claim is that it essentially exempts plaintiffs from proving membership in one of these groups; rather, they need only prove that he or she is "similarly situated" to other individuals or entities who have been treated more favorably. "[i]t is therefore imperative for the class-of-one plaintiff to provide a specific and detailed account of the nature of the preferred treatment of the favored class." Id. at 1214.

Contrary to the controlling Tenth Circuit law, Gomez did not plead "a specific and detailed account of the nature of the preferred treatment of the favored class." Id. at 1214. Indeed, Gomez did not allege any facts which suggest that the Eleventh Judicial District Court officials treated Gomez differently than other similarly situated parties to litigation in that court. Indeed, Gomez has not alleged any fact supporting a claim of disparate treatment by the Eleventh Judicial District Court employees. Therefore, this Court should dismiss Gomez' Fourteenth Amendment equal protection cause of action based on his failure to allege the facts necessary to state an actionable claim.

III. AS A MATTER OF LAW, GOMEZ' ALLEGED LOSS OF HIS "GOOD REPUTATIONS" FAILS TO STATE AN ACTIONABLE FOURTEENTH AMENDMENT CLAIM UNDER PAUL v. DAVIS, 424 U.S. 985 (1976).

In his Complaint, Gomez alleged that Defendant violated Gomez' Fourteenth Amendment substantive due process rights based on the fact that "said decisions and judgments hav[ing] damaged his personal character without recourse. . .. *See [Docket No. 8-1, p. 1]*. In Paul v. Davis, 424 U.S. 693 (1976), however, the Supreme Court made clear that reputation alone is not an interest protected by the Constitution. "The words 'liberty and property,' as used in the Fourteenth Amendment do not in terms single-out reputation as a candidate for special protection over and above other interests that may be protected by state law." Id. at 701. Further, the Court confirmed in Siegert v. Gilley, 500 U.S. 226, 233-34 (1991) that there is no constitutional protection for the interest in reputation.

In Paul v. Davis, Davis was arrested for shoplifting, but the charge was dismissed. 424 U.S. at 695-96. The police, nonetheless, distributed to area merchants a flyer of active shoplifters with Davis' name and picture on the flyer. Id. at 695. Davis brought an action under 42 U.S.C. § 1983

against the police chiefs that had distributed the flyer alleging that their action was under color of state law and deprived him of his constitutional rights. Id. at 696. The Court stated,

> "[h]is complaint asserted that the active shoplifter designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyers in question, [Davis'] complaint would appear to state a classical claim for defamation, actionable in the courts of virtually every State."

Id. at 697.

However, the Court in Paul held that the defendants in that case were not liable to Davis under Section 1983. Id. at 699. The Court stated:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Id. at 710-11 (footnote omitted).

The Court then noted two cases where a state right or status was removed or significantly altered, one involving the withdrawal of a driver's license, the other revocation of parole status, and continued:

> [i]n each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of

> present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons, we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Id. at 711-12.

In his Complaint, Gomez alleged that Defendant violated Gomez' Fourteenth Amendment substantive due process rights based on the fact that "said decisions and judgments hav[ing] damaged his personal character without recourse. . .. *See [Docket No. 8-1, p. 1]*. Paul v. Davis makes clear that Gomez' reputation alone is not an interest protected by the Constitution. As a matter of law, therefore, Gomez' alleged loss of his "good reputation" in the community fails to state an actionable Fourteenth Amendment claim.

VI. THE CLEARLY ESTABLISHED CASE LAW DOES NOT SUPPORT GOMEZ' CLAIM THAT ELEVENTH JUDICIAL DISTRICT COURT JUDGES' ALLEGED INTENTIONAL, THOUGH RANDOM AND UNAUTHORIZED, DEPRIVATION OF GOMEZ' PROPERTY (REPUTATION) VIOLATED HIS FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS.

In his Complaint, Gomez alleges that Defendant deprived Gomez of his property (reputation), violating his Fourteenth Amendment due process rights. *See [Docket No. 8-1, p. 1]*. Even if the facts in this case are liberally construed in his favor, Gomez has nonetheless failed to state a claim for the violation of his procedural due process rights which is recognized under Parratt v. Taylor, 451 U.S. 527 (1981), ovr'd in part, not relevant here, 474 U.S. 327 (1986) or Hudson v. Palmer, 468 U.S.

517 (1984).

In this case, it was impossible for the State of New Mexico to foresee, much less control, the Eleventh Judicial District Court officials' alleged unconstitutional conduct because the alleged deprivation of Gomez' property interest in his reputation was a result of the officials' random and unauthorized acts. Moreover, the New Mexico Tort Claims Act provides Gomez with an adequate post-deprivation tort remedy within the meaning of Parratt. For these reasons, this Court should dismiss Gomez' Fourteenth Amendment procedural due process claim as a matter of law.

A. IN A CASE WHERE A RANDOM, UNAUTHORIZED ACT CAUSES THE LOSS OF PROPERTY, THE SUPREME COURT IN PARRATT v. TAYLOR HELD A PLAINTIFF HAD RECEIVED ALL OF THE DUE PROCESS PROTECTION TO WHICH HE WAS ENTITLED UNDER THE FOURTEENTH AMENDMENT WHEN THE STATE PROVIDED THE PLAINTIFF WITH AN ADEQUATE TORT REMEDY.

In Parratt v. Taylor, a state prisoner sued prison officials under 42 U.S.C. § 1983, alleging that the officials' negligent loss of a hobby kit he ordered from a mail order catalog deprived him of property without due process of law in violation of the Fourteenth Amendment. 451 U.S. at 530. The prisoner in this case claimed that he was entitled to a "hearing before his possession is in any way disturbed," based on Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972). Parratt, 451 U.S. at 539-40. The Supreme Court disagreed. Id. The Court held that no due process violation occurs when a state employee negligently deprives an individual of property, so long as the state provides an adequate post-deprivation remedy. Id. at 543; but see, Daniels v. Williams, 474 U.S. 327, 328 (1986) (the negligent violation of constitutional rights is not actionable under § 1983).

The Court in Parratt began its analysis by stating that the Fourteenth Amendment does not protect against all deprivations of property by the State, but only against those deprivations "without due process of law." 451 U.S. at 537 (citing Baker v. McCollan, 443 U.S. 137, 145 (1979)). The Court reasoned that:

> either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with some meaningful means by which to assess the propriety of the State's action at some time after the initial taking. . .satisf[ies] the requirements of procedural due process.

451 U.S. at 539 (footnote omitted). Moreover, a hearing need not always precede the actual seizure of private property so long as a hearing is held "before one is *finally* deprived of his property . . .." Id. at 540 (italics added); see also, Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

As the Court observed,

> [i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation.

451 U.S. at 541. Thus, in a case where the random, unauthorized acts of a defendant caused the loss of plaintiff's property, the Supreme Court in Parratt made clear that by making a tort remedy available to the plaintiff, the plaintiff had received all of the due process protection to which he or she was entitled to under the Fourteenth Amendment.

B. IN HUDSON v. PALMER, THE SUPREME COURT FOUND THAT AN INDIVIDUAL STATE EMPLOYEE'S ABILITY TO FORESEE THE DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS CAUSED BY THAT EMPLOYEE'S OWN *INTENTIONAL* ACTS IS "OF NO CONSEQUENCE," BECAUSE THE PROPER INQUIRY UNDER PARRATT IS "WHETHER THE STATE IS IN A POSITION TO PROVIDE FOR PRE-DEPRIVATION PROCESS."

In Hudson v. Palmer, the Supreme Court extended the reasoning of Parratt to an *intentional* deprivation of property. In Hudson, the Court examined a state prisoner's claim that due to a "shakedown" of his cell a prison guard intentionally destroyed the prisoner's noncontraband property, including his legal papers. 468 U.S. at 520. The prisoner brought an action under Section 1983, alleging that the prison guard's intentional destruction of the prisoner's noncontraband property deprived him of his Fourteenth Amendment right not to be deprived of property without due process of law. Id. The Court in Hudson held that the prisoner's Fourteenth Amendment rights were not violated when the prison guard intentionally destroyed the prisoner's property due to the shakedown because the State provided the prisoner with an adequate post-deprivation remedy. Id. at 533 & 536.

In holding that the intentional deprivation of property by a state employee does not violate due process, the Court in Hudson stated:

> The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.

Id. at 533. In rejecting the contention that one who intentionally deprives another of property can provide pre-deprivation process and therefore must do so, the Court in Hudson emphasized that "[t]he controlling inquiry is solely whether the *State* is in a position to provide for predeprivation process." Id. at 534 (italics added).

C. IN THIS CASE, IT WAS IMPOSSIBLE FOR THE STATE OF NEW MEXICO TO FORESEE, MUCH LESS CONTROL, THE ELEVENTH JUDICIAL DISTRICT COURT OFFICIALS' ALLEGED UNCONSTITUTIONAL CONDUCT BECAUSE THE ALLEGED DEPRIVATION OF GOMEZ' PROPERTY WAS CAUSED BY THE OFFICIALS' RANDOM AND UNAUTHORIZED ACTS.

Parratt and Hudson preclude any Fourteenth Amendment claims for the "random and unauthorized" conduct of state officials because the state cannot "anticipate and control [such conduct] in advance." Zinermon v. Burch, 494 U.S. 113, 130 (1990); Easter House v. Felder, 910 F.2d 1387, 1402 (7th Cir.1990) (en banc), cert. denied, 498 U.S. 1067 (1991) (concluding that "Zinermon holds only that predictable deprivations of liberty and property which flow from authorized conduct are compensable under § 1983"). In addition, the Supreme Court has made clear that unauthorized deprivations of property by state employees does not constitute due process violations under the Fourteenth Amendment so long as meaningful post-deprivation remedies are available. Zinermon, 494 U.S. at 128-30 & 132. The Court, moreover, has emphasized that "no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing pre-deprivation process." Id. at 129 (citations omitted). Therefore, "the proper inquiry under Parratt is whether the state is in a position to provide for pre-deprivation process." Zinermon, 494 U.S. at 130 (quotation omitted);

Hudson, 468 U.S. 534.

In this case, there are no circumstances which require the State of New Mexico to provide Gomez with a "pre-deprivation hearing." Since 1963, judges of the Eleventh Judicial District have entered a series of judgments against Gomez. *See [Docket No. 8-1, pp. 7 & 9 (Exhibit 1)]*. According to Gomez, the judges who entered the judgments against Gomez have done so without the corporate surety bond required by State law. *See [Docket No. 8-1, p. 3]*. Moreover, Gomez failed to allege that the State of New Mexico could have predicted the officials would have illegally entered judgments against Gomez. Finally, Gomez did not contend that the State of New Mexico could have foreseen that the Eleventh Judicial District Court officers would negligently deprive Gomez of his reputation.

Zinermon, moreover, does not require the State of New Mexico to hold a "hearing" before Eleventh Judicial District Court officials entered judgments against Gomez. Instead, the officials' alleged extra-legal actions are precisely the kind of random and unauthorized conduct which deprives Gomez of his property but which the State of New Mexico could not reasonably be expected to provide a *pre*-deprivation hearing. See, e.g., Phillips v. City of Albuquerque, Civ. No. 97-1324 JP/LFG, slip op. at 4-5 (D.N.M. filed June 11, 1998) (in a police shooting case, Chief Judge Parker dismissed Plaintiff's procedural due process claim, stating that "Plaintiff's argument regarding the pre-deprivation remedy is absurd."). Certainly, Gomez' Complaint does not contend that pre-deprivation procedures would have meaningfully reduced the risk of having court officials engage in unconstitutional conduct.

Without question, the Parratt doctrine applies to the Court officials' alleged conduct in this case; otherwise, "it would be absurd to suggest that the State hold a hearing to determine whether [court officials] should engage in such conduct." Hudson, 468 U.S. at 533. Additionally, Gomez has no evidence from which this Court could reasonably infer that the court officials were vested with "the power and authority to effect the very deprivation complained of here." Zinermon, 494 U.S. at 138. Accordingly, Gomez' Fourteenth Amendment procedural due process claim falls within the Parratt-Hudson doctrine. Thus, if the State provided Gomez with an adequate post-deprivation tort remedy, this is all the process that is due to Gomez. Hudson, 468 U.S. at 533.

D. THE NEW MEXICO TORT CLAIMS ACT PROVIDES GOMEZ WITH AN ADEQUATE POST-DEPRIVATION TORT REMEDY WITHIN THE MEANING OF PARRATT.

Under the facts of this case, Gomez has an adequate post-deprivation tort remedy which is set forth in the New Mexico Tort Claims Act, NMSA 1978, § 41-4-12 (1996) ("NMTCA"). See Parratt, 451 U.S. at 543; Lavicky v. Burnett, 758 F.2d 468, 473 (10th Cir. 1985), cert. denied, 474 U.S. 1101 (1986). To state a claim under the NMTCA, Gomez' tort claim must fall within one of the specific waivers of immunity. Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 177, 793 P.2d 855, 859 (1990); Caillouette v. Hercules, Inc., 113 N.M. 492, 497, 827 P.2d 1306, 1311 (Ct. App. 1992), cert. denied 113 N.M. 352, 826 P.2d 573 (1992). The NMTCA waives immunity from liability for the following conduct undertaken by law enforcement officers:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, *libel, slander*, defamation of character, *violation of property rights or* deprivation of any rights, privileges or immunities secured by the

> constitution and the laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

NMSA 1978, § 41-4-12 (1996) (italics added). Whether an adequate post-deprivation remedy exists is a question of law, not of fact. Gudema v. Nassau County, 163 F.3d 717, 724 (2nd Cir. 1998).

Based on a review of the plain language of Section 41-4-12, the NMTCA waived immunity for Gomez' claims against the court officials. Under the NMTCA, Gomez, for example, had the right to bring an action for the violation of his property rights, libel, and slander. Recognizing that the NMTCA provided an avenue for recovery, Gomez' Complaint alleged federal constitutional causes of action. *See [Docket No. 1-3, Count 1-V]*. Thus, the tort claims remedy under Section 41-4-12 of the NMTCA is the same kind of remedy that was available in Parratt which the Supreme Court found "entirely adequate." Hudson, 468 U.S. at 531 n. 11. Therefore, Gomez' claim that the court officials violated his Fourteenth Amendment procedural due process rights is not actionable because the NMTCA provided Gomez with a meaningful post-deprivation remedy. See Harper v. City of Albuquerque, Civ. No. 96-1048 BB/WWD, slip op. at 10 (D.N.M. filed September 18, 1997) (in a police shooting case, Judge Black dismissed an Estate's procedural due process claim because "the state provides an adequate post-deprivation remedy").

WHEREFORE, Defendant respectfully requests that this Court grant its Motion to Dismiss No. I, dismiss Gomez' Fourteenth Amendment procedural due process and equal protection claims with prejudice, award Defendant its attorney's fees and costs, and order all other relief which this Court deems just and proper.

Respectfully submitted,

ROBLES, RAEL & ANAYA, P.C.

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I hereby certify that on this 1st day of July 2010, the foregoing was electronically served through the CM/ECF system to the following:

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