Filed
Supreme Court of New Mexico
11/5/2020 8:19 AM
Office of the Clerk
Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

November 05, 2020

NO. S-1-SC-38476

ALREE B. SWEAT, III,

Plaintiff-Petitioner,

v.

CITY OF LAS CRUCES; JAIME MONTOYA, Chief of Police; DETECTIVE MIKE RICHARDS; and DETECTIVE JEFF FERGUSEN,

Defendants-Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari and response filed under Rule 12-502 NMRA, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Michael E. Vigil, Justice Barbara J. Vigil, Justice Judith K. Nakamura, Justice C. Shannon Bacon and Justice David K. Thomson concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED; and

IT IS FURTHER ORDERED that the Court of Appeals may proceed in *Sweat v. City of Las Cruces*, Ct. App. No. A-1-CA-38130 in accordance with the

[APPENDIX B]

Rules of Appellate Procedure.

IT IS SO ORDERED.

WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 5th day of November, 2020.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

By Madeline Garcia
Chief Deputy Clerk

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

Received 8-24-20

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 8/18/2020 11:00 AM

Mark Reynolds

ALREE B. SWEAT, III,

Plaintiff-Appellant,

v. **NO. A-1-CA-38130**

CITY OF LAS CRUCES; JAIME MONTOYA, Chief of Police; DETECTIVE MIKE RICHARDS; and DETECTIVE JEFF FERGUSEN,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
James T. Martin, District Judge

Alree B. Sweat III
Clayton, NM

Pro Se Appellant

Jennifer Vega-Brown, City Attorney
Mark D. Standridge, Deputy City Attorney
Robert A. Cabello, Assistant City Attorney Senior
Las Cruces, NM

for Appellees

MEMORANDUM OPINION

HANISEE, Chief Judge.

{1} Plaintiff appeals from the district court's summary judgment order entered in Defendants' favor. This Court's calendar notice proposed summary affirmance.

[APPENDIX A]

Plaintiff filed a memorandum in opposition to the proposed disposition. Not persuaded by Plaintiff's arguments, we affirm.

{2} Plaintiff continues to argue that the district court erred in granting summary judgment because it improperly decided the Tort Claims' Act (TCA) notice of claim issue. [MIO 11-14] This Court's calendar notice proposed to conclude that Plaintiff's notice was deficient under the TCA because it failed to state the time and place of the occurrence; nor did it indicate the basis for the loss or injury, as was later more specifically asserted in the complaint. [CN 3] While Plaintiff seemingly asserts that the complaint later filed provided the necessary information [MIO 12, 13], the actual complaint filed subsequent to the notice did not suffice to provide the necessary information required by statute. *See* NMSA 1978, § 41-4-16 (1977) (providing that "a written notice stating the time, place and circumstances of the loss or injury" is required). Insofar as Plaintiff continues to assert that the exception to immunity under the TCA applies [MIO 14], we again reiterate that in the absence of proper notice, the claims are barred, and the exception to immunity is not at issue.

{3} In response to our proposal that based on the incident occurring on August 9, 2013, the TCA statute of limitations expired long before either the date Plaintiff asserted his complaint was placed into the institutional mailbox, November 28, 2017, or the date the complaint was actually filed, December 27, 2017. [CN 4], Plaintiff continues to argue that the district court erred in calculating the statute of limitations period. [MIO 14-16] Plaintiff relies on NMSA 1978, Section 37-1-14 (1880), which governs when a second suit is deemed a continuation of the first. Section 37-1-14 ("If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first."). Plaintiff asserts that his federal claim was dismissed on October 23, 2017 [MIO 15], which appears to be the date the Tenth Circuit Court of Appeals affirmed the dismissal of Plaintiff's third complaint in federal court. [RP 203] We note that Plaintiff does not dispute that the basis of his claim was an incident occurring on August 9, 2013, the date relied upon in the calendar notice. [CN 4] *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."). Even assuming that the statutory period of limitations was tolled during the pendency of Plaintiff's initial federal action, which was filed on January 9, 2014, the time since the August 9, 2013 incident was five months. That federal action was then dismissed on August 19, 2014 [RP 205], and Plaintiff's action in district court was not filed until, November 28, 2017 (the date Plaintiff claims the complaint was deemed filed), over three years later. This, not even taking into account the initial five months since the incident, exceeds the TCA's two-year statute of limitations. Moreover, to the extent Plaintiff relies on NMSA 1978, Section 37-1-12 (1880), that statute is inapplicable, as Plaintiff has not demonstrated that the commencement of his action was stayed or prevented by injunction or other lawful proceeding such that the statute of limitations was tolled.

{4} Defendant continues to argue that the district court erred in ruling that the doctrine of res judicata applied where the federal court did not rule on the issue of ultimate fact. [DS 12; MIO 16] Our calendar notice proposed to conclude that res judicata was properly applied to preclude Plaintiff's claims in district court and that to the extent any claims were dismissed with prejudice on the basis of failure to state a claim, those claims were decided on the merits and the dismissal constitutes a final judgment. [CN 5] Plaintiff does not point to any error with the proposal that dismissal with prejudice is an adjudication on the merits in the context of res judicata determinations. [CN 6] *See Hennessy*, 1998-NMCA-036, ¶ 24. Moreover, we are not persuaded by Plaintiff's citation to other statutes and rules, which are inapplicable to the res judicata inquiry at issue. [MIO 16-19]

{5} To the extent Plaintiff continues to assert that the district court erred in granting summary judgment as to the racial profiling claim, Plaintiff does not dispute the facts relied upon in the calendar notice to conclude that his claim for racial profiling was also barred by the statute of limitations. [CN 6; MIO 19-22] *See id.* Additionally, we are not persuaded by Plaintiff's citation to district court rules concerning amended, supplemental pleadings or relief from a judgment or order, as those rules are inapplicable. [MIO 19-20]

{6} As to Plaintiff's first request for production, our calendar notice proposed to affirm the district court's ruling that the request was moot because it occurred following the completion of briefing on Defendants' motion for summary judgment, on which the district court ruled in Defendants' favor. [CN 7] Plaintiff contends that there was no scheduling deadline with which the parties were required to comply and Rule 1-026(D) NMRA clearly states that the "methods of discovery may be used in any sequence[.]" Nevertheless, "[a] trial court's ruling limiting discovery is subject to reversal only upon a showing of an abuse of discretion." *DeTevis v. Aragon*, 1986-NMCA-105, ¶ 10, 104 N.M. 793, 727 P.2d 558. Insofar as Plaintiff relies on Rule 1-056(F) NMRA, that rule also gives the district court discretion to order discovery ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."). Plaintiff has not demonstrated how the district court abused its discretion in this regard. *See Griffin v. Thomas*, 2004-NMCA-088, ¶ 53, 136 N.M. 129, 95 P.3d 1044 (stating that the denial of a motion for continuance is reviewed for an abuse of discretion); *see also*

Farmers, Inc. v. Dal Mach. & Fabricating, Inc., 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 ("Appellant must affirmatively demonstrate its assertion of error.").

✓5 {7} Plaintiff continues to argue that the district court improperly denied appointment of counsel below, despite this Court's proposal that there is no right to counsel in a civil action. [DS 13; MIO 24; CN 8-9] To the extent that Plaintiff relies on federal statutes and case law in support of his contention that a federal court may appoint counsel to assist a pro se litigant with a colorable claim, "we are not bound by federal law when we interpret state law," as our statutory provisions for civil cases differ. *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 29, 140 N.M. 879, 149 P.3d 976; *see also Archuleta v. Goldman*, 1987-NMCA-049, ¶ 23, 107 N.M. 547, 761 P.2d 425 ("As a general rule, there is no absolute right on the part of a litigant to the appointment of an attorney in a civil case.").

6 {8} With regard to Plaintiff's motion for reconsideration, our calendar notice proposed to conclude that the district court did not abuse its discretion in denying the motion for reconsideration that reasserted the arguments previously made, and that Plaintiff nevertheless raised the same arguments in the docketing statement, which we have addressed. [CN 9] Plaintiff relies on Rule 1-059(C) NMRA, which provides the district court authority to extend the time for serving affidavits when a motion for new trial is based on such affidavits. [MIO 24] We note that Subsection C, on which Plaintiff relies, applies to motions for a new trial; this case was not tried,

but was resolved on summary judgment. Thus, the rules pertaining to a motion for new trial are inapplicable to Plaintiff's motion for reconsideration. In addition, Subsection C does not apply to Subsection F, which does concern a motion to reconsider and allows for an extension of time to file such a motion. In either case, the rule does not provide support for Plaintiff's contention.

{9} Lastly, Plaintiff continues to argue that the district court erred in granting summary judgment because it improperly decided disputed factual issues pertaining to his criminal prosecution when the issue of ultimate fact had once been determined by a valid and final judgment, and that the issue of DNA evidence could not be litigated between the same parties in any future criminal prosecution, absent additional evidence to support the DNA evidence. [DS 13-14; MIO 25] While we are constrained in our ability to discern the argument, it appears that Plaintiff seeks relief with regard to criminal cases in which this Court affirmed his sentences. *See Clayton v. Trotter*, 1990-NMCA-078, ¶ 12,110 N.M. 369, 796 P.2d 262 (stating that this Court will review pro se arguments to the best of its ability, but cannot respond to unintelligible arguments). To the extent that Plaintiff seeks relief in different, but related, criminal cases, this Court acts as an appellate court, reviewing only matters that were presented to the district court in the underlying case. *See Campos Enters. v. Edwin K. Williams & Co.*, 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855.

The current case concerns Plaintiff's civil action, and we have no jurisdiction to review the propriety of the criminal cases for which he seeks relief.

{10} For all of these reasons, and those provided in the calendar notice, we affirm.

{11} **IT IS SO ORDERED.**

J. MILES HANISEE, Chief Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

MEGAN P. DUFFY, Judge

Court of Appeals of New Mexico
Filed 9/17/2019 8:55 AM

Received
9-23-19

Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ALREE B. SWEAT, III,

Plaintiff-Appellant,

v.

No. A-1-CA-38130
Doña Ana County
D-307-CV-2017-03972

CITY OF LAS CRUCES; JAIME MONTOYA, CHIEF OF POLICE; DETECTIVE MIKE RICHARDS; and DETECTIVE JEFF FERGUSEN,

Defendants-Appellees.

NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **July 8, 2019**.

This case has been assigned to the **SUMMARY CALENDAR** pursuant to Rule 12-210(D) NMRA.

Summary affirmance is proposed.

Note: This is a *proposal* of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA.

[Appendix E]

Issue I: Plaintiff argues that in granting summary judgment, the district court improperly decided the notice of claim issue, which Defendants clearly stated they did not dispute during the hearing. [DS 12] Specifically, Plaintiff argues that there is no ninety-day notice requirement under the Tort Claims Act (TCA) for one who claims damages against a public employee. [DS 9] To address the issue, we interpret the TCA notice provision, NMSA 1978, Section 41-4-16 (1977). "Our interpretation of a statute is a question of law that an appellate court reviews de novo." *State ex rel. Children, Youth & Families Dep't v. Maurice H. (In re Grace H.)*, 2014-NMSC-034, ¶ 65, 335 P.3d 746.

We propose to conclude that the TCA notice requirement is applicable here. Section 41-4-16(A) provides:

> Every person who claims damages from the state or any *local public body* under the Tort Claims Act shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality . . . within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a *written notice stating the time, place and circumstances of the loss or injury.*

(Emphasis added). NMSA 1978, Section 41-4-3(C) (2015) defines a "local public body" as "all political subdivisions of the state and their agencies, instrumentalities and institutions." A "governmental entity" is defined as "the state or any *local public body* as defined in Subsection[] C[.]" Section 41-4-3(B). The individually named

Defendants were employed as law enforcement officers for the City of Las Cruces. A "law enforcement officer" is defined as "a full-time salaried *public employee of a governmental entity*, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes." Section 41-4-3(D) (emphasis added).

We also propose to conclude that Plaintiff's notice was deficient under the TCA. It appears from the record that on December 23, 2013, Plaintiff sent the mayor of the City of Las Cruces a letter stating his intent to file a 42 U.S.C. § 1983 (1996) claim, on the basis of allegations that an officer obtained an arrest warrant on false charges just to execute a search warrant. [2 RP 217] Importantly, Plaintiff's notice does not state the time and place of the occurrence; nor does it indicate the basis for the loss or injury, as is later more specifically asserted in the complaint. Plaintiff's notice only provides the date of October 11, 2013. [2 RP 217] In contrast, the complaint asserts that on August 9, 2013, an officer conducted a pretextual arrest in violation of the New Mexico Constitution, absent evidence that the alleged offense was committed within the city limits. [1 RP 2] We therefore propose to conclude that Plaintiff has not demonstrated error with the district court's application of Section 41-4-16(A). *See Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 ("The presumption upon review favors the correctness of the trial court's actions. Plaintiff must affirmatively demonstrate its assertion of error.").

Issue II: Plaintiff also argues that in granting summary judgment, the district court improperly calculated the statute of limitations governed by NMSA 1978, Section 41-4-15 (1977), *held unconstitutional on other grounds as recognized by Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 4, 136 N.M. 498, 100 P.3d 204. [DS 12] This raises a statutory question that we review de novo. *See In re Grace H.*, 2014-NMSC-034, ¶ 65.

Plaintiff asserts that his complaint was deemed filed on November 28, 2017, when the federal court declined supplemental jurisdiction over Plaintiff's state claims. [DS 9] However, the complaint alleges that the incident occurred on August 9, 2013. [1 RP 2] Consequently, we propose to conclude that the TCA statute of limitations expired long before November 28, 2017, the date Plaintiff asserts the complaint was deemed filed, or December 27, 2017, the date Plaintiff's complaint was actually filed. *See* § 41-4-15 ("Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death[.]"). We therefore propose to affirm the district court.

Issue III: Plaintiff further argues that the district court erred in ruling that the doctrine of res judicata applied where the federal court did not rule on the issue of ultimate fact. [DS 12] Insofar as Plaintiff argues that the federal court did not rule on the substantive state law claims, that was for the district court to do, which it did by awarding summary judgment in favor of Defendants. The district court determined that "[a]ll of the claims raised in Plaintiff's December 27, 2017 Complaint . . . were based on the same operative facts alleged by Plaintiff in prior lawsuits, each of which has been previously dismissed" and ruled that all of the claims that were either raised, or could have been raised, in his previous lawsuits, were precluded by res judicata. [3 RP 567] *See State ex rel. Bd. of Cty. Comm'rs v. Williams*, 2007-NMCA-036, ¶ 25, 141 N.M. 356, 155 P.3d 761 (stating that "res judicata, precludes a subsequent action involving the same claim or cause of action" and for the doctrine to apply "the claimant must have had a full and fair opportunity to litigate the claim in the original action and there must have been a final decision on the merits." (alterations, internal quotation marks, and citations omitted)).

To the extent Plaintiff suggests that a dismissal with prejudice does not constitute a final judgment on the merits, we propose to disagree. We have previously observed:

> A dismissal with prejudice is an adjudication on the merits only to the extent that when a claim has been dismissed with prejudice, the fourth

element of res judicata (a final valid judgment on the merits) will be presumed so as to bar a subsequent suit against the same defendant by the same plaintiff based on the same transaction. If this were otherwise, plaintiffs could simply ignore dismissals and file the same claim as many times as they wished, so long as the claim never progressed to a determination of the substantive issues.

Kirby v. Guardian Life Ins. Co. of Am., 2010-NMSC-014, ¶ 66, 148 N.M. 106, 231 P.3d 87. Hence, we propose to affirm.

Issue IV: Plaintiff contends the district court erred in granting summary judgment because it improperly ruled on the additional racial profiling claim. [DS 13] Plaintiff asserts that the facts alleged to support the racial profiling claim were different, and should therefore be considered as evidence supporting his claim. [DS 10] The district court determined that while the claim for racial profiling was different and not subject to the doctrine of res judicata, as the other claims were, Plaintiff nevertheless failed to timely file the claim within the two-year statute of limitations under Section 41-4-15(A). The district court made findings to support its determination: "Plaintiff asserted that his claim for racial profiling consisted of a chain of continuing allegations from August 8, 2013 to April 8, 2015; therefore, a timely suit would have to have been filed by April 8, 2017." [3 RP 567 ¶ 2] Plaintiff's claim for racial profiling was included in his December 27, 2017 complaint, which was filed eight months after the statute of limitations expired. [Id.] Plaintiff does not dispute the facts relied upon by the district court. Consequently, we propose to affirm the district court in this regard. *See Farmers, Inc.*, 1990-NMSC-100, ¶ 8.

Issue V: Plaintiff also contends that the district court improperly denied his first request for production of documents. [DS 13] We note, however, that the docketing statement does not present the facts necessary to address the issue. A failure to provide this Court with sufficient facts can result in affirmance of the decision below. *See State v. Chamberlain*, 1989-NMCA-082, ¶ 11,109 N.M. 173, 783 P.2d 483 (holding that the appellant's failure to provide the court with a summary of all the facts material to consideration of an issue on appeal necessitated a denial of relief). Our appellate rules require that a docketing statement shall contain "a concise, accurate statement of the case summarizing all facts material to a consideration of the issues presented." Rule 12-208(D)(3) NMRA. Those rules place an obligation to set out all relevant facts in the docketing statement, including those facts that support the district court's decision. *Thornton v. Gamble*, 1984-NMCA-093, ¶ 18, 101 N.M. 764, 688 P.2d 1268. Moreover, those rules apply equally to pro se litigants. *See Woodhull v. Meinel*, 2009-NMCA-015, ¶ 30, 145 N.M. 533, 202 P.3d 126 ("Pro se litigants must comply with the rules and orders of the court and will not be treated differently than litigants with counsel."). This Court has no obligation to "search the record for facts, arguments, and rulings in order to support generalized arguments." *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104.

Nevertheless, it appears from the record proper that Plaintiff's first request for production of documents occurred following the completion of briefing on Defendant's motion for summary judgment. [2 RP 429; 3 RP 505] It also appears that Defendants filed a motion for protective order and to stay all further discovery in the case. [3 RP 517] In light of summary judgment, the district court denied Defendants' motion for protective order and to stay all further discovery as moot. We agree with the district court's decision. "As a general rule, this Court does not decide moot cases." *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 23, 140 N.M. 77, 84, 140 P.3d 498, 505 (quotation marks and citation omitted). Because the case was resolved and dismissed by summary judgment, we propose to conclude that Plaintiff's issue regarding the request for production of documents is moot. *See id.* ("A case is moot when no actual controversy exists, and the court cannot grant actual relief.").

<u>Issue VI & IX</u>: Plaintiff further contends that the district court improperly denied appointment of counsel where the allegations were serious and presented a question of credibility. [DS 13] Neither party has a right to counsel, however, in a civil case such as this. [1 RP 20] *See Bruce v. Lester*, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 980 P.2d 84. Accordingly, we propose to affirm the district court's order. Furthermore, because Plaintiff is not entitled to counsel on appeal, we propose to not address Plaintiff's assertion of any additional issues that may be determined to have appellate merit upon further review by the "Appellate Division of New Mexico." [DS 14]

Issues VII: Plaintiff further contends that the district court improperly denied his motion for reconsideration. [DS 12] "We review the denial of a motion for reconsideration for [an] abuse of discretion." *Unified Contractor, Inc. v. Albuquerque Hous. Auth.*, 2017-NMCA-060, ¶ 77, 400 P.3d 290. "This Court has held that a district court does not abuse its discretion in denying a motion for reconsideration that was merely a restatement of the arguments [the moving party] had already advanced." *Id.* (internal quotation marks and citation omitted). The issues raised in the motion for reconsideration are essentially the same arguments raised in Plaintiff's response to Defendants' motion for summary judgment. [*Compare* 2 RP 400-407 *with* 3 RP 569-579] Moreover, Plaintiff raises these same issues in the docketing statement, which we address on appeal. [DS 10-13] Insofar as Plaintiff raised the request for production issue for the first time in his motion for reconsideration, we have addressed this issue on appeal. Accordingly, we propose to conclude that the district court did not abuse its discretion in refusing to reconsider these issues. *See id.* ¶¶ 77-78.

Issues VIII: Lastly, Plaintiff argues that the district court erred in granting summary judgment because it improperly decided disputed factual issues pertaining to his criminal prosecution when the issue of ultimate fact had once been determined by a valid and final judgment; that issue could not be litigated between the same parties in any future criminal prosecution. [DS 13-14] We have attempted to address Plaintiff's arguments to the best of our ability. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."). We do not, however, understand Plaintiff's argument on this point and we have proposed to conclude that summary judgment was proper. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)). Consequently, we propose to conclude that Plaintiff has not met his burden of demonstrating error in this regard, and to affirm the district court. *See Farmers, Inc.*, 1990-NMSC-100, ¶ 8.

For all of the reasons above, we propose to affirm.

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ALREE B. SWEAT, III,

Plaintiff-Appellant,

No. A-1-CA-38130

v.

Doña Ana County

D-307-CV-2017-03972

CITY OF LAS CRUCES;

JAIME MONTOYA, CHIEF OF POLICE;

DETECTIVE MIKE RICKARDS; and

DETECTIVE JEFF FERGUSEN,

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

DONA ANA COUNTY, NEW MEXICO

THE HONORABLE JAMES T. MARTIN

PLAINTIFF/APPELLANT MEMORANDUM IN OPPOSITION

TO PROPOSED SUMMARY AFFIRMANCE AND

MOTION TO AMEND THE DOCKETING STATEMENT

ALREE B. SWEAT III

Pro se

S.N.M.C.F.

P.O. Box 639

Las Cruces, NM 88004

[Appendix B]

MEMORANDUM IN OPPOSITION TO PROPOSED SUMMARY AFFIRMANCE AND MOTION TO AMEND THE DOCKETING STATEMENT

On December 23, 2013, Plaintiff gave the City notice of likelihood that litigation may ensue from the favorable termination on October 11, 2013, for the pretextual arrest and prosecution that occurred on or about August 9, 2013, to reasonably alert City to necessity of investigating merits of potential claim. Had the City conducted it's own investigation when Notice was given, " the whole purpose for the Notice" City would have been aware that the arrest and prosecution lead to two (2) seperate prosecutions arising out of one incident. The investigation would have revealed that the (Resisting, Evading or Obstructing an officer ...) case No. M-14-MR-2013-02675 had incorporated the crimes committed on or about April 26, 2013, April 28, 2013, and May 1, 2013.

The Notice of claim investigation would have revealed that the charge of (Resisting, Evading or Obstructing an officer ...) had been prosecuted seperate the felony charges and was in Plaintiff's favor. It also would have revealed that Plaintiff was residing in Luna County as stipulated in Det. Rickard's complaint the day he called Plaintiff to advise him of a search warrant. Therefore, clearly identifing Plaintiff to be in Luna County and not in Dona Ana County as Det. Rickards stated, "under penalty of perjury." And Det. Rickards made three (3) attempts to get Plaintiff indicted on the felony charges thru presentment to the District Court Attorney in August 29, 2013, September 19, 2013, and October 17, 2013, but the State were unable to obtain a true bill.

On October 25, 2013, the felony charges that Det. Rickards had incoporated in the criminal complaint for (Resisting, Evading or Obstructing an Officer...) case No. M-14-MR-2013-02675, were removed from the District Court and refiled under three (3) seperate case No.'s. These case No.'s are as follows: M-14-FR-2013-00896, M-14-FR-2013-00920, and M-14-FR-2013-00364. An investigation from the "Notic of Claim" and the first complaint filed on January 9, 2014, would have alerted the City that there would be more possible claims. Plaintiff also stated he would be pursuing individual capacity claims against the "public employee."

Plaintiff maintains that he did not commit these crimes and that the State failed to present sufficient evidence that he did and the record supports his allegations. Precluding a subsequent prosecution using the "identical" evidence that had already been ruled insufficient by the Third Judicial District

Court, contrary to Rule 5-203(A), Rule 6-306 and Rule 6-101 N.M.R.A. There is no question that their was a jury trial pertaining to only "identity" and "DNA" was the only evidence presented in both trials in case No.'s D-307-CR-2013-1164 and D-307-CR-2013-1165 (See attached exhibits A&B).

Plaintiff moves pursuant to Rule 12-208(E) NMRA to amend the docketing statement to add the unclear issue stated above. Also pursuant to Rule 12-309(B) except the additional supporting papers. A citizen is not required under the New Mexico Tort Claims Act to name an individual public employee as a defendant. The District attorney is immune from suit in these cases.

New Mexico courts have frequently broadened search and seizure protections under our state constitution. See Granville, 2006-NMCA-098 (listing nine cases from the previous years in which our courts have contrued article II, section 10 to provide broader protections than are available under the Fourth Amendment). Det. Rickards had already obtained a search warrant an executed the search of Plaintiff for "DNA" evidence, so the pretextual arrest on August 9, 2013, was clearly an excessive use of force and nothing more. The case was ultimately dismissed.

And once the plaintiff was not indicted following the arrest, it is not necessary for a plaintiff to prove actual malice; legal malice is sufficient and may be inferred from, among other things, a lack of probable cause, gross negligence, or great indifference to persons, property, or the rights of others. As in this case, the issue of probable cause is in dispute and Plaintiff produced evidence from which a jury could infer that the "public employees" intentionally provided false information to the Court.

"The law requires only that a particular prosecution complained of shall have been terminated -- in this case there is two - and not that the liability of the plaintiff for prosecution for the same offense shall have been extinguished -- before the action for malicious prosecution is brought. Consequently, the refusal of the grand jury to file an indictment, a nolle prosequi, or any proceeding by which the particular prosecution is disposed of in such a manner that it cannot be revived, and that the prosecutor if he intends to proceed further, must institute proceedings de novo, is a sufficient termination of the prosecution to enable the plaintiff to bring his action. (See Russell v. Dennison, 45 Cal. 337)."

This being true, we should not be led so astray by the notion of a "disfavored" action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority, or by adopting stricter requirements of pleading than are warranted by the general rules of pleading.

The federal court never ruled on the favourable termination of the felony case that ended on April 8, 2015 after the Court found the evidence insufficient. Therefore due to the fact that the issue was raised and the federal judge's misinterpretation lead to a wrong determination. See Morgan v. City of Rawlins, 792 F.2d 975, 979 (10th cir. 1986) (quoting Clegg v. U.S., 112 F.2d 886 (10th cir. 1940). (See Defendants' Memorandum In Support of Defendants' Motion For Summary Judgement Exh. 11 under B. Nature of the Case, ¶¶ 10-15, C. Cause of Actions, Count VII pg. 20-21) The continued violation was not presented in plaintiff's first civil Rights complaint, so therefore, res judicata does not apply to that theory. The Federal Court based it's decision on the dismissed charge of Evading or Obstructing justice, res judicata would apply to that issue only. Courts have generally held pro se complaints to less stringent standards than formal pleadings drafted by lawyers, e.g., Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197 (2007).

A violation is called "continuing", signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period, when it would be unreasonably to require or even permit him to sue seperately over every incident of the defendant's unlawful conduct, e.g., Heard v. Sheahan, 253 F.3d at 318.

This motion is timely filed by October 15, 2019, plaintiff was served on September 23, 2019, thru the institutional legal mail system. See State v. Rael, 1983-NMCA-081, ¶18, 100 N.M. 193, 668 P.2d 309; See Also State v. Moore, 1989-NMCA-073, ¶47, 109 N.M. 119, 782 P.2d 91.

I. FACTS AND PROCEDURAL HISTORY

On December 23, 2013, Plaintiff alerted the City that litigation may ensue upon the prosecution that ended in his favor on October 11, 2013, for the crime of (Resisting, Evading or Obstructing an Officer...) on or about August 9, 2013. Plaintiff clearly also stated for various reasons. At that time the governmental entity allegedly at fault had knowledge of facts and circumstances of occurrence, it also had knowledge of its public employees potential liability, and reasonable inference of likelihood of suit may arise from such knowledge.

On January 9, 2014, Plaintiff filed his §1983 claim on the October 11, 2013, prosecution for the crime committed on or about August 9, 2013. This claim along with the "Notice of Claim" served on the City on December 23, 2013, are both within the 90 days and states the time, place and circumstances of the loss or injury that include the felony claims in the occurrence. Therefore, the governmental entity had actual notice of the occurrence as required. (See Memorandum In Support of Defendants' Motion For Summary Judgement, Exh.'s 1, 2, and 3); §41-4-16(B), N.M.S.A. 1978.

On August 19, 2014, Plaintiff's §1983 case No. CV-14-0034 LH/LAM was dismissed without prejudice, For the fact that the arrest was bound over for trial when the grand jury indicted him on November 14, 2013. Declining to exercise supplemental jurisdiction over a claim, pursuant to §1367(c)(3), dismissing Plaintiff's state law claims without prejudice to his right to pursue these claims in a state forum. (See Memorandum In Support of Defendants' Motion For Summary Judgement, Exh. 6 at pg. 3 and 5).

On May 22, 2015, upon the completion of the prosecution for two counts of auto burglary, alleging to occurred on May 1, 2013, then Plaintiff was prosecuted on the "same evidence", on March 27, 2015, for three counts of auto burglary, alleging to occurred on or about April 26, 2013, two counts and April 28, 2013, one count. After the first trial in case No. D-307-CR-2013-1164, the Court and the jury

Found the "DNA" evidence insufficient to convict. (See Memorandum In Support of Plaintiff's Opposition To Defendants' Motion For Summary Judgement and attached Exh. K 1-7). In Plaintiff's §1983 claim he did bring up the fact that he was prosecuted by the State and Defendants' and the charges were ultimately dismissed for insufficient evidence. In his §1983 claim he did talk about the continued wrong that began August 8, 2013 and ended April 8, 2015. That either the federal court ignored or misinterpreted as the record reflects in that case there was two dismissals. The first was on October 11, 2013, for the crime of (Resisting, Evading or obstructing an Officer, ...) under case No. M-14-MR-2013-2675, then one year and six months later case No. D-307-CR-2013-1164 was dismissed for insufficient evidence arising out of the second prosecution formally filed on October 25, 2013, under different case numbers M-14-FR-2013-00920, M-14-FR-2013-00896 and [M-14-FR-2013-00364 that pertains to case No. D-307-CR-2013-1165] which clearly identifies that a "DNA" search warrant had already been served on June 26, 2013 and filed on June 27, 2013. So Plaintiff's claims are substantiated from the Court records. (See attached Exh.'s A-D); Also see §1983 filed May 22, 2015 "Memorandum In Support of Defendant's Motion For Summary Judgement", Exh. 11 under B. Nature of The Case, ¶¶1-15, C. Cause of Action, under claims II; VI claim talks about the three (3) attempts to get the Plaintiff indicted and the subsequent refiling of the felony charges that he self-surrendered to Deming Police on October 29, 2013. Plaintiff also talk about the abuse of the grand-jury proceedings. Plaintiff also brought up the fact that a Fourth target notice was issued on November 1, 2013 and a hearing was held November 14, 2013 for crimes that had already been heard by prior juriers. Plaintiff also brought up the fact that the Court failed to comply with state rules that are mandated (1) more than two offenses shall be joined in one complaint and not brought by piecemeal; (2) a just, speedy and inexpensive determination of each cause of action. claim VII. talks about the favorable prosecution of the felony offense he went to trial for on February 10-11, 2015, that was in his favor. He also talks about the perjury committed by Det. Mike Rickards. when he filed a criminal complaint charging him for (Resisting Evading or Obstructing an officer...) and then he finish this claim with the favorable termination of the felony charges clearly identifing case No. D-307-CR-2013-1164 and nothing more. So how does the federal court confuse the felony termination as the misdemeanor termination filed April 8, 2015, when the Plaintiff filed the Court document "Nolle Prosequi," and the "Target Notice" that specifically indicated the charges being investigated. Nowhere does it include the misdemeanor charges that were dismissed October 11, 2013, in it's language and neither in the Formal indictment. (See Memorandum In Support Of Defendants' Motion For Summary Judgement, Exh. 11 at Exh. 7-10). Pro se complaints are entitled to liberal construction due to the special problems in writing detailed complaints that are caused by incarceration. (See Memorandum In Support Of Defendants' Motion For Summary Judgement, Exh. 13 at pg. 4 middle ¶), nowhere in the Federal courts (MOO) does it address the favorable termination of the felony crime that was adjudicated on April 8, 2015, that was technically determined by the Court when it ruled that count 1 was insufficient evidence under the "same evidence" rule. "collateral estoppel" applies to any subsequent prosecution using only the "same evidence" and not as the federal court interpreted the April 8, 2015, "Nolle prosequi" is not on the merits of the main subject matter. The §1983 was ultimately dismissed and the Court of Appeals For The Tenth Circuit affirmed on October 23, 2017.

On November 28, 2017, Plaintiff placed his (TCA) claim into the institutional mailbox to the Third Judicial District Court. The Court did not file the (TCA) claim until December 27, 2017. (See Memorandum In Support Of Defendants' Motion For Summary Judgement, Exh. 15). Plain tiff specifically asserted the continue wrong theory that pinpointed each cause of action leading to Plaintiff's favorable termination.

On December 17, 2018, Plaintiff continued to specifically assert the continued wrong and identified each cause of action that the April 8, 2015, "Nolle prosequi alleged to began on August 9, 2015, ended in his favor. He also addresses the mistakes made by the federal court that were not on the merits of the main subject matter. Defining the "merits" as "the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form." (See Memorandum In Support Of Plaintiff's Opposition To Defendants' Motion For Summary Judgement.)

On January 15, 2019, Plaintiff made his "first request of production of documents" and filed "Plaintiff's Response To Defendants' Reply To Plaintiff's Response In Opposition To Motion For Summary Judgement".

On March 6, 2019, a hearing was held on Defendants' Motion For Summary Judgement. On March 15, 2019, Plaintiff filed a timely motion for reconsideration. On March 25, 2019, Order by the Court denying Plaintiff's complaint was filed. This appeal follows.

II. ISSUE I: Plaintiff argues that in granting summary judgement, the district court improperly decided the notice of claim issue, which Defendants did not dispute during the hearing. (Listen to hearing on March 6, 2019, recording). Written notice requirements of New Mexico Tort Claims Act (NMTCA) do not apply to claims against public employees. See Martz v. Anderson, 2010, 685 F. Supp. 2d 1273; Dutton v. Mc Kinley County Bd. of Com'rs, 1991, 113 N.M. 51, 822 P.2d 1134; see also Frappier v. Mergler, 1988, 107 N.M. 61, 752 P.2d 253.

On December 23, 2013, Plaintiff alerted the governmental that the plaintiff was going to file a lawsuit pertaining to a prosecution that ended on October 11, 2013 and various reasons. Plaintiff's subsequent §1983 filed January 9, 2014, stated the time, place and circumstances of the loss or injury. Pursuant to §41-4-16(B), N.M.S.A. 1978 provides:

No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

[1] "public employee" means an officer, employee or servant of a government entity, (2) law enforcement officer. Section 41-4-3 (F)(2) as defined. In this case the governmental entity and "public employee" was alerted by a written notice, formal complaint and an additional complaint filed forty-five (45) days after the favorable termination on April 8, 2015, prosecution of felony crimes of auto burglary. The first complaint clearly alleged that Plaintiff was indicted and bound over for trial after the arrest on August 9, 2013. When governmental entity allegedly at fault for the "public employees" conduct had knowledge of facts and circumstances of occurrence, it may also have knoledge of it own potential liability, and reasonable inference of likelihood of suit may arise from such knowledge, e.g., Smith v. State ex rel. New Mexico Dept. of Parks and Recreation, 1987, 106 N.M. 368, 743 P.2d 124.

Plaintiff is suing the Defendants' in there Official Capacity and Individual capacity. Individual capacity suits "seek to impose individual liability upon a government officer for actions taken under color of state law." Melo, 502 U.S. at 25, 112 S.Ct. 358 "To establish personal liability in a [TCA] action, it is enough to show that the official, acting under color of state law caused the deprivation of a State right." Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Plaintiff alleges Police Defendants tortious conduct violated the waived immunities in § 41-4-12, N.M.S.A. 1978; states as follows:

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 damages 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 laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties, See e.g., Blea v. City of Espanola, 117 N.M. 217, 220-21, 870 P.2d 755, 758-59 (Ct.App.). Defendants did not meet their burden of establishing a lack of notice under Section 41-4-16(B) to the "public employee" e.g., Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (Ct.App. 1980).

ISSUE II: Plaintiff also asserts that in granting summary judgement, the district court improperly calculated the statute of limitations governed by NMSA 1978, Section 41-4-15 (1977). Pursuant to N.M.S.A. 1978, Section 37-1-12; states "When the commencement of any action, shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation."

N.M.S.A. 1978, Section 37-1-14, states "If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

In this case, Plaintiff's §1983 was ultimately dismissed on October 23, 2017. Declining to take supplemental jurisdiction and dismissed the Prisoner's Civil Rights Complaint, pertaining only to the misdemeanor arrest and not ruling on the favorable termination of the felony crime. That was clearly dismissed April 8, 2015. Plaintiff's (TCA) claim was placed into the institutional mailbox on November 28, 2017. See Houston v. Lack, 487 U.S. 266, 276 (1988).

The complaint asserts that the incident occurred on or about August 9, 2013 on the misdemeanor arrest and the prosecution for that misdemeanor arrest ended on October 11, 2013. (Complaint (Tort) under IV. FACTS ¶¶ 1-3). However, the complaint asserts that a second prosecution had commenced on the felony crime on October 25, 2013, under case No. M-14-FR-2013-00920 and he self-surrendered to the Deming Police pursuant to an arrest warrant on October 29, 2013. [Complaint (Tort) under IV. FACTS ¶¶ 4-13] And these chain of events were incorporated in his prior Prisoner's Civil Rights Complaint and was not ruled on. See e.g., Heard v. Sheahan, 253 F.3d at 318; Heusley v. City of Columbus, 557 F.3d 693, 697 (6th Cir. 2009). Therefore, the District Court did error on calculating the statute of limitations and did not liberally construe Plaintiff's pro se complaint to less stringent standards than formal pleadings drafted by a lawyer. Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197 (2007).

ISSUE III: Plaintiff asserts that the district court erred in ruling that the doctrine of res judicata applied where the federal court did not rule on the issue of ultimate fact. [Rule 1-060 (B)(1) and (6) NMRA provides: On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgement, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (6) any other reason justifying relief from the operation of the judgement. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one-year after the judgement, order or proceeding] was entered or taken. A motion under this paragraph does not affect the finality of a judgement or suspend its operation. This rule does not limit the power of a court to entertain an independant action to relieve a party from a judgement, order or proceeding, or to set aside a judgement for fraud upon the court. Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the proceeding for obtaining any relief from a judgement shall be by motion as prescribed in these rules or by a independant action.

Rule 1-082, NMRA provides: These rules shall not be construed to extend or limit the jurisdiction of the district courts of the state or venue of actions therein. Being that this court has concurrent jurisdiction.

Section 41-4-17(A), N.M.S.A. 1978 provides in pertinent part: (A) The Tort Claim Act 41-4-1 to 41-4-25 NMSA 1978 shall be the exclusive remedy against a government entity or public employee for any tort for which immunity has been waived under the Tort Claims Act... Emphasis added. Plaintiff contends that, since the above provision makes the Tort Claim Act the exclusive remedy for "any tort" for which immunity has been waived, the Legislature did not intend to make the Act the exclusive remedy for a constitutional violation. Since not all tortious conduct amounts to a deprivation of constitutional rights. The federal remedy for damages is only intended to compensate for injuries caused by the deprivation of a constitutional right, Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); it is not intended to be a remedy for tortious conduct. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). So excluding the determination of the constitutional claims of the previous adjudication, Section 41-4-12, N.M.S.A. 1978, waives immunity for certain specified torts and for the violation of constitutional rights when caused by law enforcement officers.

Also, since Section 1983 is supplementary to state remedies, a plaintiff can first file suit in state court under the Tort Claims Act, obtain a favourable judgement, and then proceed to federal court under Section 1983 for deprivation of constitutional rights. However, if given the reading proffered by the defense, an attorney could not file first or simultaneously in federal court under Section 1983 and then proceed to state court. The literal reading of Section 41-4-17, as proffered by the defense, would lead to an injustice and procedural absurdity. We cannot construe the Tort Claims Act in such a fashion when a just and reasonable alternative construction exists. See State v. Nance, supra.

The Tort Claims Act does not prohibit a plaintiff from bringing an action for damages under the Tort Claims

Act where the plaintiff also persues, by reason of the same occurrence, an action against the same government under 42 U.S.C. § 1983.

The New Mexico Constitution hold that pretext stops are unconstitutional under article II, section 10 of the New Mexico Constitution "prohibits pretextual stops," Departing from federal precedent. See State v. Cardenas-Alvarez, 2001-NMSC-017, ¶¶6, 130 N.M. 386, 25 P.3d 225; State v. Gomez, 1997-NMSC-006, ¶¶17, 19-22, 122 N.M. 777, 932 P.2d 1. New Mexico courts have frequently broadened search and seizures protections under our state constitution. See Granville, 2006-NMCA-098, ¶14.

Two prosecutions were dismissed against the plaintiff. One charged (Resisting, Evading or Obstructing an Officer...) on or about August 9, 2013 and dismissed on October 11, 2013. Second charged (Felony crimes of auto burglary) on or about May 1, 2013 and dismissed on April 8, 2015. Plaintiff has clearly pinpointed the mistake or inadvertence by the federal court and he has complied with Rule 1-060(B)(1) and (6), NMRA in a timely manner. Therefore, this Court should reconsider this claim for reasons states above. This case was dismissed October 23, 2017.

ISSUE II: Plaintiff asserts that the district court erred in granting summary judgement because it improperly ruled on the additional racial profiling claim. Being that this court has concurrent jurisdiction and Plaintiff has filed an independent action pursuant to Rule 1-060 (B)(1) and (6) asking this court to revision the claims that the federal court mistakenly ruled on and to address the (1) enumerated common-law torts, (2) state constitutional claims, and (3) the deprivation of a statutory right. The federal courts ruling contradicts the chain of events in reference to what was dismissed on April 8, 2015 and never ruled on any enumerated common-law claims brought by the Plaintiff.

In this case, Plaintiff's independent action is an Amended complaint pursuant to Rule 1-015 (B) and (C) NMRA, which provides:

"(B). When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; [emphasis added]

(C). Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the pleading..." [emphasis added].

In this case, two prosecutions commenced and two were favorable to the Plaintiff. The first, began on August 8, 2013, on the misdemeanor crime and ended on October 11, 2013. Second, began on October 25, 2013, on the felony crimes that had been presented to a Grand Jury as stated: "August, September and October out of the arrest on the misdemeanor crime"; and ended on April 8, 2015.

Plaintiff cause of action for racial profiling alleges that Defendants' deprived him of his rights to equal protection. Here, Plaintiff has alleged that his rights were infringed and he was harmed because of his race. Seeking to prove the racially selective nature of his arrest not by means of statistical inference but by direct evidence of Defendants' behavior during the events in question, Defendants' own statements and testimony (the credibility of which can be evaluated by a jury), and Defendants' record of racially selective stops and arrests in any case and similar circumstances in Las Cruces, N.M.

The requirements for a claim of racially selective law enforcement draw on what the Supreme Court has called "ordinary equal protection standards," Armstrong, 517 U.S. at 465, 116 S.Ct. 1480 (quoting Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). The discriminatory purpose need not be the only purpose, but it it must be a motivating factor in the decision. c.f. Mc-Garry v. Board of County Com'rs, 175 F.3d 1193, 1200 (10th Cir. 1999) (in employment discrimination context, change of story tends to show pretext); Cole v. Ruidoso Mun. Schools 43 F.3d 1373, 1382 (10th Cir. 1994) (same). Defendants' changed their testimony under "penalty of perjury." During the trial on February 10-11, 2019, their testimony was in reference to how the "DNA" was handled and stored. On March 27, 2019, during the second trial on the "DNA" their testimony completely change in reference to the handling and storage of the "DNA" obtained on August 9, 2013.

ISSUE I: Plaintiff asserts that the district court erred in denying his first request for production of documents. Plaintiff made a request for discovery pursuant to Rule 1-026 (A) and (D) prior to the disposition of this case, and (D) clearly states: methods of discovery may be used in any sequence. In this case, there was not any scheduling deadlines to comply with so Plaintiff's request was timely filed. E.g., Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982). Documents in the possession of a party's attorney may be required to be produced. Schultz v. Butcher, 24 F.3d 626, 630 (4th Cir. 1994). Plaintiff requested documents that would help him to establish a prima facie case to defeat a summary judgement motion by the

Defendants. Rule 56(F) states that "should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgement or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

When reviewing a motion for summary judgement, the court should keep in mind three principles. First, the Court's role is not to weigh the evidence, but to assess the threshold issue whether a genuine issue exists as to material facts requiring a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 249, 106 S.Ct. 2505. Second, the Court must resolve all reasonable inferences and doubts in favor of the non-moving party, and construe all evidence in the light most favorable to the non-moving party. See Hunt v. Cromartie, 526 U.S. 541, 550-55, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). Third, the Court cannot decide any issues of credibility. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S.Ct. 2505. Discovery would have clearly established a right Plaintiff alleges that is generall defined as "a right so thoroughly developed and consistently recognized under the law of the jurisdiction as to be 'indisputable' and 'unquestioned'." Zweibon v. Mitchell, 720 F.2d 162, 172-73 (D.C. Cir. 1983).

ISSUE VI & IX: Plaintiff also contends that the district court improperly denied appointment of counsel where the allegations were serious and presented a question of credibility. This Court may request an attorney to represent an indigent litigant under a provision of the in forma pauperis statute, citing that "if it is apparent to the district court that a pro se litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him." McCarthy v. Weinberg, 753 F.2d 836, 838 (10th Cir. 1985) (citing Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978); see also Miller v. Glanz, 948 F.2d 1562, 1572 (10th Cir. 1991) (same).

ISSUE VII: Plaintiff contends that the district court improperly denied his motion for reconsideration. Rule 1-059 (C) provides:

When a motion for new trial is based upon affidavit they shall be served with the motion. The opposing party has fifteen (15) days after such service within to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty (20) days either by the court for good cause shown or by the parties by written stipulations. The court may permit reply affidavits. The court failed to comply with it's own rule, see e.g., Ruffin v. Fuller, 125 F.Supp.2d 105, 109-10 (S.

D.N.Y. 2000). Defendants' never had a chance to respond.

ISSUE VIII.: Plaintiff asserts that the district court erred in granting summary judgement because it improperly decided disputed factual issues pertaining to his criminal prosecution when the issue of ultimate fact had once been determined by a valid and final judgement; that the issue of "DNA" evidence could not be litigated between the same parties in any future criminal prosecution, without additional evidence to support the "DNA" evidence.

On February 5, 2013, Plaintiff's attorney went before the court on a motion to consolidate grand jury indictments; case No.'s D-307-CR-2013-1164, D-307-CR-2013-1165, and D-307-CR-2013-1166. Pursuant to Rule 5-203 (A) NMRA states:

Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a seperate count, if the offenses, whether felonies or misdemeanors or both:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan. (Emphasis added). The rule is mandatory; it "is not a discretionary or permissive rule;

it demands that the State join certain charges." e.g., State v. Gallegos, 2007-NMSC-007, ¶10, 141 N.M. 185, 152 P.3d 828. [See attached Exh. A] Plaintiff's criminal case pertained specifically to only "DNA" evidence to determine "identity." The "DNA" evidence pertaining to each charge would have been cross-admissible at seperate trials, the trial court abused its order to consolidate all case No:s into D-307-CR-2013-1164.

What the court did is piecemeal the prosecutions. It is well settled law that if ruling court finds the evidence insufficient, it is treated as an acquittal. The principle of collateral estoppel "bars relitigation between the same parties of issues actually determined at a previous trial. C.f., Ashe v. Swenson, 397 U.S. 436, 442 90 S.Ct. 1189, 1193, 25 L.Ed.2d 469 (1970)"; State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973). On February 10-11, 2013, the Court and the jury found the "DNA" evidence insufficient in both counts 1 and 2. That is why I need the discovery process to be compelled in order to obtain the Trial transcripts on both case No.'s D-307-CR-2013-1164 and D-307-CR-2013-1165 to prove his case. Case No. D-307-CR-2013-1165 and D-307-CR-2013-1166 were severed from D-307-CR-2013-1164 [See attached Exh. B].

[After the first Court and jury had acquitted the Plaintiff of auto burglary. New Mexico could certainly not] have brought him to trial again upon that charge. Once a judge and jury had determined upon the sufficiency of the evidence that there was at least a reasonable doubt that the Plaintiff was the burglary suspect, the State could not present the same or different identification evidence in a second prosecution for auto burglary in the hope that a different jury might find that evidence more convincing.

As it did in case No. D-307-CR-2013-1165. The case went to a jury on instructions identical to those given at the first trial in case No. D-307-CR-2013-1164. This time the jury found the Plaintiff guilty, and he was sentenced to 11 years and 1 year parole consecutive to another case Plaintiff is serving under D-307CR-2013-00452. The finality of a previous adjudication as to the matters determined by it is the ground of decision in Com. v. Evans, 101 Mass. 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says, [See attached Exh. E1-2].

This Court having original jurisdiction over the criminal conviction complained about under case No. 35,106 was not informed that a prior trial was improperly severed and tried on the "same evidence" for the "same crime" and had already been determined that the "DNA" standing alone was insufficient to convict is a fundamental error on part of plaintiff's defense attorney Bernard Montrose. [See attached Exh. 6]. On January 13, 2017, this Court issued a Mandate to District court Clerk, affirming the sentence [see attached Exh. H]. Being that this Court has concurrent jurisdiction over this case and original jurisdiction over Plaintiff's criminal case, Plaintiff ask this Court to reconsider it's ruling in case No. 35,106 on plain error and/or substantial error by his Trial attorney's and the District Court's error in not alerting the appeal court of this issue upon the criminal appeal. This Court has the authority pursuant to Rule 12-402, NMRA to stay issue of mandate or as the Court deems appropriate.

Lastly, but not least Plaintiff would like to mention that both felony crimes as stated in this opposition at the begining was presented to a district attorney to get Plaintiff indicted but failed to do so. These charges were then removed from the district court and refiled in magistrate court and did not include the misdemeanor crime of (Resisting, Evading or Obstructing an Officer...) as the affidavit for arrest on August 9, 2013, did that included the felony crimes. Instead, the new cases only incorporated the felony crimes under three different case No's: M-14-FR-2013-00896, M-14-FR-2013-00920, and M-14-FR-2013-00364. Once these cases were indicted by a grand jury they changed to case No's: D-307-CR-2013-1164, D-307-CR-2013-1165, and D-307-CR-2013-1166. When considering the effects of dismissal and refiling of criminal charges, our courts look past the form to the substance to determine if the second filing constitutes a new case. See State v. Talamante, 2003-NMCA-135, ¶¶ 9-10, 134 N.M. 539, 80 P.3d 476 (holding that two indictments charging identical offenses were the same case for speedy trial purposes); State v. Lucero, 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct. App. 1989) ("Where the subsequent complaint contains no new charges or is not based on new facts or information regarding prior charges, the original complaint is not superseded"). The State never demonstrated a bona fide reason for refiling charges after dismissing those charges and plaintiff asserts that it was done to circumvent the six-month rule. [See attached Exh. F, 1-2]. Need discovery to get the affidavit.

III. CONCLUSION

For the reasons stated above, Plaintiff-Appellant, respectfully request that this Court reverse his summary judgement, or as the court deems appropriate, or in the alternative place his case on the General calendar.

Respectfully submitted,

Alree B. Sweat III #39850

S.N.M.C.F.

P.O. Box 639

Las Cruces, NM 88004

CERTIFICATE OF SERVICE

I hereby certify on the 4th day of October 2019, a true and correct copy of the forgoing was placed into the institutional mailbox at S.N.M.C.F in a properly addressed and stamped envelope to:

Court of Appeals of New Mexico
P.O. Box 2008
Santa Fe, N.M. 87504-2008

Robert A. Cabello
Senior Assistant City Attorney
P.O. Box 20000
Las Cruces, N.M. 88004

Alree B. Sweat III

ALREE B. SWEAT III #39850

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALREE B. SWEAT, III,

Plaintiff - Appellant,

v. S-1-SC-38476

No. A-1-CA-38130

JAIME MONTOYA, et al.,

Defendants - Appellees.

PETITION FOR WRIT OF CERTIORARI

TO THE NEW MEXICO COURT OF APPEALS

ALREE B. SWEAT III

Pro se

185 Dr. Michael Jenkins

Rd.

Clayton, N.M. 88415

[Appendix E]

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Alree B. Sweat III petitions this Court to issue its Writ of Certiorari to the New Mexico Court of Appeals for review of its opinion in Alree B. Sweat III v. Chief of Police, Jaime Montoya, et al., No. A-1-CA-38130 (Memorandum opinion, N.M. Ct. App., August 18, 2020). This petition is filed pursuant to Article VI, Section 3 of the New Mexico Constitution; N.M. S.A. 1978, Section 34-5-14.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the district court in granting summary judgement improperly decided the "Notice of claim," issue. That defendants' did not dispute during the hearing, (2). Whether the district court in granting summary judgement improperly calculated the "statute of limitations," (3) Whether the district court in granting summary judgement improperly ruled on Res judicata once a United States District Court clearly did not rule on an ultimate issue of fact, (4) Whether the district court in granting summary judgement improperly ruled on the addition of racial profiling claim, (5) Whether the district court improperly denied plaintiff's "first request for production of documents.", (6) Whether the district court improperly denied Appointment of Counsel (7) Whether the district court improperly denied plaintiff's Motion for reconsideration, (8) Whether the district court in granting summary judgement improperly decided disputed factual issues pertaining to

the plaintiff's related criminal prosecution when the ultimate issue of fact had once been determined by a valid and final judgement, that issue could not be relitigated between the same parties in any future criminal prosecution.

BASIS FOR GRANTING THIS WRIT OF CERTIORARI

This petition is brought by Alree B. Sweat III to determine whether his right to due process; equal protection, as guaranted by the Fifth and Fourteenth Amendments to the United States Const, and Article II, §§ 15 and 18 of the New Mexico Const. was violated by the Court of Appeals' affirmance of his Tort Claim.

FACTS MATERIAL TO THE QUESTION PRESENTED

The Memorandum Opinion reiterated the calender notice proposed to conclude that Plaintiff's notice was deficient under the TCA because it failed to state the time and place of the occurrence; nor did it indicate the basis for the loss or injury, as was later more specifically asserted in the complaint (Memo. Opinion pg2, ¶¶ 13 & 13) This Courts ruling is contrary to multiple cases determined by this Court. The purpose of the Notice requirements of the Tort Claims Act" is to ensure that the agency allegedly at fault is notified that it may be subject to a lawsuit." Notice under Section 41-4-16(B)" means that the particular agency that caused the alleged harm must have actual notice before written notice is not required." See Powell v. State Hwy. & Transp. Dep't, 117 N.M. 415, 418, 872 P.2d 388, 391 (Ct. App.) The earliest date plaintiff actually felt an impact from the officers' action was when he was indicted and arrested again October 29, 2013, subsequent from the officers beginning investigation on August 9, 2013. e.g. O'Connell v. City of Santa Fe, No. 03-979 BB-DJS, 2005 U.S. Dist. Lexis 47 934 (D.N.M. Mar. 9, 2005). The Memo. Opinion never ruled on the public employee claim as this court interpreted the notice provision as being inapplicable to a governmental employee in Martinez v. City of Clovis, 95 N.M. 654, 656, 625 P.2d 583, 585 (Ct. App. 1980). In that case, the plaintiff sued the City of Clovis and a Clovis police officer for damages. Id. at 655, 625 P.2d at 584. In holding that the notice of claim provision did not apply to the plaintiff's claims against the employee police officer, making reference to the TCA's employee defense and indemnification provisions and observed that merely because [the employee defense and indemnification provision] imposes upon the governmental entity for which the employee works the obligation to provide a defense to its employee and pay any settlement or judgement reached, it does not convert a public employee into a public body, a governmental entity, or the state or state agency [for purposes of the notice provision] This Court admits that actual notice did suffice to provide the necessary information required by statute. See N.M.S.A. § 41-4-16 (1977). (Proposed Summary Disposition pg. 3)

In rebuttal to the proposal that is focusing of the initial investigation beginning on August 9, 2013 and disregarding the prosecution that ended on April 8, 2015, After the close of the evidence to the jury, the judge ruled that the evidence was insufficient dismissing count 1 and left count 2 for the jury to make the same ruling on the "same evidence". April 8, 201[redacted] would be the trigger date of the statute of limitations. (See M.I.O pg. 5 ¶). This Courts ruling is contrary to the Multiple causes of action, computation of time N.M.S.A 1978, 37-1-1, ¶12 and § 37-1-4, ¶5, citing Tiberi v. Cigna Corp. 1996, 89 F.3d 1423. Plaintiff filed his first complain after the dismissal of CR-2013-001164 in the federal Court on May 22, 2015, that was acknowledged by this Court as being dismissed on October 23, 2017 (Memo. Opin. pg 3, ¶¶ 6-14). This Court has confused plaintiff first complaint arguing the intial arrest August 9, 2013 and nothing more. The complaint filed May 22, 2015, was based on the continuing wrong doctrine That was never ruled on, and since the prosecution was dismissed on April 8, 2015 in plaintiffs favor he would have until April 8, 2018, to file a TCA pursuant to N.M.S.A. 1978 Section 37-1-18 as this Court identified as the relevant limitations statute adapted in Walker v. Maruffi, 105 N.M. 763 (1987) by this Court. (TCA Doc. i)

Plus, It is not unique for a statute of limitations from a fed. source, like § 1367(d), to govern the time in which to sue in a state court, and there should be no difficulty about the validity of such a provision. Substantiating N.M.S.A. Section 37-1-12 (1880).

In order for res judicata to be applicable in this case the ultimate issue of fact would have to be ruled on. The issue of the dismissal of the felony charges in favor of the plaintiff was never ruled on. The federal court ruling was based on error and a conclusion of law, not the facts. (Doc. Stmt. ¶ 9). The ultimate facts necessary for the resolution of the two suits were different. The issues necessarily dispositive in the prior cause were therefore different from those in the present cause. City of Santa Fe, supra. In the situation before you the "subject matter" of the two suits is different since the "subject matter" of the suits is not simply the arrest on August 9, 2013, but the multiple prosecutions leading from that one arrest. Likewise the "cause of action" in each suit is different because each seek review of the three different prosecutions that are in violation of State law. See U.S. v. Moser, 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262 (1924); McDonald, supra. When there exists "established precedent" demonstrating that interpretation of the New Mexico Constition departs from federal constitutional law requires less of the plaintiff to preserve his claim. Gomez, 1997-NMSC-006 confirms that New Mexico courts interpret Article II, section 10 of the State Const. more broadly than its federal counterpart.

To rebuttal the issue of racial profiling, since this Court has ruled in Walker v. Maruffi, 105 N.M. 763 (1985) that section 37-1-18 as the relevant limitations statute applicable for wrongs committed by public officials — is as well within the statute of limitations The harm done to the plaintiff did not end until April 8, 2015, upon the completion of the prosecution This courts ruling is in error and fondamental to the administration of justice. (MIO pg. 20-22). This is a case of deliberate indifference. Since I'm an inmate in the Dept. of corrections a collusion is not a cognitive matter plaintiff has knowledge there of.

As to Plaintiff's first request for production of documents, in order to contest the issues at hand plaintiff would need to have the facts that are material Like the trial transcripts for cases CR-2013-01164 and CR-2013-001165 to pinpoint the fact that the judge and jury ruled the evidence insufficient and that the evidence was cross-admissible in both trials Subjecting the plaintiff to a double jeopardy claim. And the criminal trial judge abused his discretion to sever pursuant to N.M.R.A. 1978 Rule 5-203(A). And due to the fact that the rule 1-026(D) give partie the freedom to ask for production of documents in any sequence was contrary to the rules of impartial judgement (See N.M.R.A. Rule 21-100). Harman v. Pullock, 586 F.3d 1254, 1268 (10th Cir. 2009) The Court cannot decide any issues of credibility without supporting facts. Anderson v. Liberty Lobby, Inc. 477 U.S. at 255, 106 S.Ct. 2505. The District court judge made a determination that this case was not related to my criminal case which this court has acknowledge it is Being the respondent to the summary judgement by defendants I needed the documents requested to support my allegations as required pursuant to Rule 56(e), And plaintiff was not given that right. This case was mismanaged and the improprieties disadvantaged the plaintiff. Summary judgement is to be rendered if the pleadings, the discovery and disclosure materials are on file. Defendants cannot deny that the plaintiff was subjected to multiple prosecutions lending from one arrest and ending on April 8, 2015. Rule 56(c), (MIO 22-23)

Plaintiff contends that the appointment of counsel was denied so that plaintiff could be hampered due to his incarceration, which makes it difficult to research and pinpoint the laws required. As he stated in his (MIO 24)

With regard to Plaintiff's motion for reconsideration, the defendants are required to be given (15 days) to oppose his motion as the Court did not allow. Plaintiff asserted N.M.S.A. Section 41-4-4(D) as interpreted by this court in Martinez v. City of Clovis, 95 N.M. 654, 656, 625 P.2d 583, 585 (Ct App. 1980) as he did in his docketing statement and (MIO 13-14) And the district court nor this court ever making a ruling in reference to the public employee to overcome the TCA's employee indemnification provision Section 41-4-4(D). The district courts acted in bias. As stated, this case is a clear and concise of deliberate indifference. Since I'm an Inmate in the Dept. of Corrections a collusion is not a cognitive matter plaintiff has knowledge there of. N.M.S.A. 1978 Rule 21-300.

Lastly, this court has jurisdiction on all civil and criminal matters within this state pursuant to N.M.S.A. 1978, section 41-4-18 (A) and plaintiff is seeking relief from judgement on related criminal case CR-2013-00165 as this court has acknowledged are clearly related. This Court has jurisdiction pursuant to N.M.S.A. 1978, sections 31-11-1 and 31-11-6. Habeas petitions are civil cases and this case incorporates plaintiff's criminal prosecution. This issue was preserved for review once plaintiff brought these arguments before the district court in prior hearings and by motion (Memo. In Support of Plaintiff's Opposition To Def. Motion For SJ pgs 2-3, 6-10, 22-23). See Rule 12-216(B)(2) (providing appellate court discretion, as an exception to the preservation rule, to review questions involving fundamental error). The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgement. N.M.S.A. section 30-1-10 (emphasis added). Plaintiff has submitted documentation that substantiates his claim of innocence, (MIO 26-29), and that the case at hand is clearly related for those purposes stated above. The defendants do not deny that the "DNA" evidence were specifically dismissed for lack of evidence, thereby amounting to an acquittal. Martin Linen, supra, at 574, 97 S.Ct. 1349. The Supreme Court has incorporated the principles of collateral estoppel into the protections of the Double Jeopardy Clause." U.S. v. James, 109 F.3d 597, 600 (9th Cir. 1997); see Ashe v. Swenson, 397 U.S. 436, 445, 90 S.Ct. 1189, 25 L.Ed.

2d 469 (1970), collateral estoppel prevents relitigation "when an issue of ultimate fact has once been determined by a valid and final judgement." Ashe, 397 U.S. at 443, 90 S.Ct. 1189. This is exactly why New Mexico adopted N.M.R.A. 1978 Rule 5-203(A) into law to forbid relitigation of the same issue between the same parties citing the "same evidence" test. State v. Day, 94 N.M. 753, 756, 617 P.2d 142, 145 (1980); accord Swafford v. State, 112 N.M. 3, 7 n. 3, 810 P.2d 1223, 1227 n.3 (1991). Plaintiff has preserved this claim. How many times does the Defendants get a bite of the apple! Defendant made cumulative errors in administering justice by violating N.M.R.A. 1978, Rules 5-604 and 6-506A. Again Plaintiff has submitted documentation to support the facts. Also, discovery would allow plaintiff to pinpoint each and every claim including racial profiling. Article II, section [illegible], Rule 52.

IMPORTANCE OF THE QUESTIONS PRESENTED

This case presents a fundamental question of the interpretation of State Court's decision in Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 and Dutton v. McKinley County Bd. of Comm'rs, 1991-NMCA-130, 113 N.M. 51, 822 P.2d 1134, 1991 N.M. App. LEXIS 221 (N.M. Ct. App. 1991). The question presented is of great importance because it affects the operations of the TCA. In view of the large amount of litigation proceedings, guidance on the question is also of great importance to prisoners, because it affects their ability to receive fair decisions in proceedings.

The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted Martinez v. City of Clovis. The N.M. Ct. of Appeals has held in Martinez v. Clovis, interpreting the Notice provision as being inapplicable to a governmental employee under Section 41-4-16(A). Holding that the Notice of Claim provision did not apply to the plaintiff's claim against the employee police officer, making reference to the TCA's employee defense and indemnification provisions section 41-4-4(D) merely because it does not convert a public employee into a local public body, a governmental entity, or the state or state agency [for purposes of the notice provision].

The common sense understanding of Section 41-4-16(A) is plaintiff did not have to provide the city with written notice of his claims against Det. Mike Rickards and Det. Jeff Ferguson pursuant to Section 41-4-16(A) because plaintiff's claims was against the officers in their official and individual capacity. However, New Mexico courts consistently have applied the "likelihood that litigation may ensue" standard, looking at whether, from the totality of the circumstances known to the governmental entity with fault in the occurrence, a reasonable person would have concluded that the victim may claim compensation. See Parkhurst v. Lampert, 264 F. App'x 748, 749 (10th Cir. 2008) (unpublished) (quoting Bergman v. U.S., 751 F.2d 314, 317 (10th Cir. 1984). Mr. Swent has alleged multiple unlawful acts contrary to State law and specifically the dismissal of the criminal complaint that he prevailed precluding subsequent proceedings in related case CR 2013-001165.

This case presents a fundamental question of the interpretation Walker v. Manuffi, 105 N.M. 763(1987). The question presented is of great public importance because it affects the operations of the litigation process. For New Mexico, the Court identified Section 37-1-8 as the relevant limitation statute. This choice was designed to best insure that" the borrowed period of limitations not discriminate against the federal civil rights remedy." 471 U.S. at 276, 105 S.Ct. at 1947. This Court specifically rejected the Tort Claims Act statute of limitations applicable for wrong committed by public officials. See §41-4-15. This Court stated that "it was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. 471 U.S. at 279, 105 S.Ct. at 1948. (MIO 14-14) The question is important because it affects the ability to receive a fair decision in proceedings.

This case presents a fundamental question of the interpretation of state rule 5-203(A) citing Ashe v. Swenson, 397 U.S. at 443, 90 S.Ct. 1189 to related case CR-2013-001165. The question presented is of great importance because it affects the administration of justice. In view of the large amount of litigation proceedings, guidance on the question is also of great importance to society, because it affects their ability to receive fair decisions in proceedings.

The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted rule 5-203(A) citing Ashe v. Swenson, 397 U.S. at 443, 90 S.Ct. 1189. "The Supreme Court has incorporated the principles of collateral estoppel into the protections of the Double Jeopardy Clause." U.S. v. James, 109 F.3d 597, 600 (9th Cir. 1997); See Ashe v. Swenson, collateral estoppel prevents relitigation "when an issue of ultimate fact has once been determined by a valid and final judgement." Ashe, 397 U.S. at 443, 90 S.Ct. 1189.

The Supreme Court's decision in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970), ruled in circumstances not dissimilar from those here that collateral estoppel is an integral part of the concept of double jeopard[redacted] The holding was that where an issue of ultimate fact has been determined by a valid and final judgement in a criminal case, to relitigate the issue in any subsequent trial between the same parties violates the double jeopardy prohibition[redacted]Which this Court has acknowledge to be the case at hand, but claims no jurisdiction contrary to N.M.S.A. 1978 sections 41-4-18, 31-11-1, 31-11-6 and 30-1-10 (emphasis added).

This is exactly what the law forbid and is subject to strict scrutiny. If the law applies to one then it must apply to all. This is contrary to "ordinary equal protection standards." "A Court abuse its discretion when it makes a clear error of judgement, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgement." Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1156 (10th Cir. 2007).

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully request that this Court issue its Writ of Certiorari in order to review the memo. opinion of the Court of Appeals in this case.

Respectfully submitted,

Alree B. Sweat III #39850

ALREE B. SWEAT III

185 Dr. Michael Jenkins Rd.

Clayton, NM 88415

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was placed into the N.E.N.M.C.F. legal mailbox in a properly stamped envelope on the 4th day of Sept. 2020 to:

Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

Robert A. Cabello (city attorney)
P.O. Box 20000
Las Cruces, NM 88004

Alree B. Sweat III

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ALREE B. SWEAT, III, Pro se,

Plaintiff - Appellant,

v.

S-1-SC-38476

No. A-1-CA-38130

JAIME MONTOYA, et al.,

Defendants - Appellees.

STATEMENT OF COMPLIANCE

COME NOW, Alree B. Sweat III, pursuant to N.M.R.A. 1978 Rule 12-502(E) and states as follows;

1. Plaintiff Writ of Certiorari is in compliance with 3,150 words limitation. The Writ contains 3,144 words in totality and is well in the limits.

Wherefore, plaintiff request that the Writ of Certiorari be excepted for compliance with local rules.

Respectfully submitted,

Alree B. Sweat III

ALREE B. SWEAT III

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September 2022, a true and correct copy of the foregoing was placed into the institutional mailbox at N.E.N.M.C.F. in a properly addressed and stamped envelope to:

Supreme Court
Office of the Clerk
P.O. Box 848
Santa Fe, NM 87504-0848

Robert A. Cabello (city attorney)
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Las Cruces, NM 88004

[signature] III