

**Appeal Number 05-14239-JJ**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**DENNY C. CORMIER,**  
*Plaintiff/appellant, pro se*

v.

**NANCY B. CORMIER**  
*Defendant/appellee.*

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On Appeal from the United States District Court  
For the Middle District of Georgia  
Case Number 6:05-CV-26(WLS)

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**APPELLANT'S INITIAL BRIEF**

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**CERTIFICATE OF INTERESTED PERSONS**  
**AND CORPORATE DISCLOSURE STATEMENT**

*Cormier v. Cormier.*  
Case Number 05-14239-JJ

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Thurbert E. Baker, Attorney General's office (Georgia)

Laura W. Hyman, Attorney General's Office (Georgia)

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Nancy B. Cormier Defendant/ Appellee

Denny C. Cormier Plaintiff/Appellant

Honorable W. Louis Sands United States District Judge

Honorable William Harken Colquitt County Georgia Judge

All Interested Parties in *Greenberg v. Zingale* 11<sup>th</sup> Cir. Case No. 05-10187-F

All Interested Parties in *Cormier v. Green* 11<sup>th</sup> Cir. Case No. 04-16220-AA

All Interested Parties in *Martyak v. Martyak* 11<sup>th</sup> Cir. Case No. 05-13843-

FF

All Interested Parties in *Stanley v. Stanley* Case No. 05-0281-CV-W-GAF In  
the United States District Court for the Western District Missouri,  
Western Division

All Interested Parties in *Mills v. Mills* Case No. 2:04-23286-DCN-GCK In  
The District Court of the United States For the District of South  
Carolina, Charleston Division

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellant, Denny C. Cormier, *pro se*, submits that oral argument on this remand of removed proceedings is not necessary to properly address this court's review of this appeal/Writ of Mandamus as such issue rests squarely on an interpretation of well established precedent, and thus such argument may not ultimately aid the court in the decision-making process. If the Appellee requests oral argument, then Appellant will consent.

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review this appeal from the final judgment entered by the District Court on July 8, 2005. Appellant timely filed his Notice of Appeal.

This appeal is not foreclosed by 28 U.S.C. § 1447 (c) (d) because the remand order is not based upon a procedurally defective removal process or lack of subject matter jurisdiction. *In re Bethesda Memorial Hospital, Inc.*, 123 F.3d 1407 (11th Cir. 1997)

If this Court believes this Appeal should be construed as a petition for Writ of Mandamus, this Court has jurisdiction to issue a Writ to Mandamus to the district court to assume its delegated jurisdiction over this case pursuant to 28 U.S.C. § 1651.

## **STATEMENT OF THE ISSUE**

Whether the district court erred by remanding the removed action based on collateral estoppel of the jurisdictional issue contrary to *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) and on res judicata as to the cause of the action without there ever being a fair and full litigation as well as a judgment on the merits?

## STATEMENT OF THE CASE

### **A. Statement of Proceedings**

The Appellant's pursuit of a judicial ruling on the constitutionality of the Georgia alimony statute has ranged across state and federal courts in eight proceedings before two state courts and three federal courts prior to this appeal. In addition to this appeal the state court has now entered a divorce and award of alimony against the Appellant. The state divorce process continues. This narrative tracks all the proceedings on the claims and issues.

October 21, 2003 the Appellee, after thirty two years of marriage, exercised her fundamental rights of association and privacy by asking the state of Georgia, in the Colquitt County Superior Court before the Honorable Frank D. Horken, to dissolve her marriage to the Appellant. She requested alimony. There are no children of the marriage. (Colquitt County Superior Court Case No. 03-CVD-221)

On April 22, 2004, the Appellant filed a declaratory judgment constitutional challenge to the Georgia alimony statutes, O.C.G.A. §§ 19-6-(1-35) as violative of the 14<sup>th</sup> Amendment Right of Privacy and a 42 U.S.C. § 1983 claim in the United States District Court Middle District of Georgia.

Supplemental state law constitutional claims were also raised. That case is Case No. 6:04-CV-19 (HL). The Appellee here was not a party to Case No. 6:04-CV-19 (HL). The lawsuit's parties included only proper state officials designated to enforce the challenged statute.

On May 24, 2004, the Georgia State Attorney General filed a Motion to Dismiss with the district court based on the *Younger* abstention. *Younger v. Harris*, 401 U.S. 37, 43 (1971). In response, Appellant filed a cross-motion to deny Appellees motion to dismiss with the district court on June 17, 2004.

On June 22, 2004 the Appellant removed his dissolution proceeding from the Colquitt County Georgia Superior court to the U.S. district court (Middle District of Georgia, Thomasville Division) based upon a 42 U.S.C. § 1983 claim, along with a completed JS-44 form notifying the district court of his related open federal lawsuit. The removed case in the U.S. District Court became Case No. 6:04-CV-30 (WLS).

On August 9, 2004, the district court (Case No. 6:04-CV-19 (HL)) granted the state defendants Motion to Dismiss, declining to grant declaratory relief based upon a judgment that such relief was readily available to the Appellant in state court even if he had to pay Appellee's fees and costs. *Younger* abstention was evoked to grant state court comity.

On August 18, 2004, the Appellant timely moved for reconsideration of the dismissal based on *Younger* being inapplicable as the state court case had been removed to federal court.

On October 29, 2004, the district court (Case No. 6:04-CV-19 (HL)) denied the Appellant's Motion for Reconsideration. Furthermore, the district court cautioned the *pro se* Appellant to refrain from any further filings pertaining to the constitutionality of the Georgia alimony statutes upon threat of sanctions.

On November 15, 2004 the federal district court remanded the removed action (Case No. 6:04-CV-30 (WLS)) to state court for lack of subject matter jurisdiction based on *Ankenbrandt* abstention.

On November 23, 2004 the Appellant appealed to this court his first federal lawsuit (Case No. 04-CV-19 (HL)) which had been dismissed without prejudice based on *Younger* abstention. On July 12, 2005 this court affirmed the district court's dismissal based on *Younger* abstention. (11<sup>th</sup> Cir. Case No. 04-16220; District Court Case No. 6:04-CV-19 (HL))

On February 17, 2005, back in state court, by directive of the federal court, the Appellant, with *England*, *Jennings*, and *Fields* reservations of his federal claims requested a declaratory judgment that the Georgia alimony statutes impermissibly infringed the Georgia constitution right of privacy,

basic rights, and ban on involuntary servitude. *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1303 (11th Cir. 1992) citing *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

On March 25, 2005 the Colquitt County Superior Court overruled and denied the declaratory judgment without reasoned opinion and awarded temporary alimony against the Appellant.

On April 11, 2005 the Appellant requested the Georgia Supreme Court accept jurisdiction to hear his state constitutional alimony statutory claims. Though having jurisdiction based on Georgia Constitution Article VI, Section VI, Paragraphs (1) and (6) the state Supreme Court declined to hear his claims.

On May 24, 2005 the Appellant removed for a second time based on *Benson v. SI Handling Systems, Inc.*, 188 F.3d 780 (7th Cir. 1999) (significantly changed circumstances), 28 U.S.C. § 1331, 28 U.S.C. § 1441, and 42 U.S.C. § 1983 to the district court. (This now appealed district court Case No. 06-CV-130 (WLS))

On June 7, 2005, despite proper Notice of Removal the Appellee and the Colquitt County Superior Court held ex parte ultra vires state court

proceedings and ruled on June 14, 2005 that it would proceed with motions and trial on August 1, 2005. It also found that Appellant was in contempt for not participating in the trial court's ultra vires proceedings.

On June 24, 2005, in this case in the district court, the Appellee filed a motion to remand based on collateral estoppel and res judicata.

On July 8, 2005 the district court, in this case, remanded based on collateral estoppel against jurisdiction and res judicata on the cause of the action.

On July 12, 2005 the Appellant, timely, answered to deny remand within the 20-day time limit defined in Fed. Rule Civ. Proc. Rule 12(a).

The district court ignored the Writ of Mandamus and the timely answer to deny remand as moot.

On August 1, 2005, the Superior Court of Colquitt County proceeded with an ex parte hearing on a final decree of monetary awards and permanent alimony against Appellant, and it subsequently ruled on August 3, 2005 that Appellant must pay an immediate sum of \$50,000 to Appellee, \$5,000 to Appellee's mother, all attorney's fees and permanent alimony in the amount of \$2,500 per month. The state court's awards were made

without substantiated financial affidavits in the record. The final order is being appealed to the Georgia Supreme Court.

**B. Statement of the Facts**

The facts are accurately recited in the previous Notices of Removal and the original lawsuit complaint which was appealed to this court (Eleventh Circuit Court of Appeals Case No. 04-16220) They are briefly noted here.

Appellant, DENNY C. CORMIER, is a 55 year old physician in good health who is now a resident of Glynn County, Georgia. NANCY B. CORMIER is a healthy 56 year-old employed woman who is the beneficiary of a substantial non-marital trust fund. They have no minor children and child support was not an issue.

Divorce proceedings were initiated by NANCY B.CORMIER against the Appellant, DENNY C. CORMIER on October 21, 2003, in Colquitt County Superior Court.

**C. Standard of Review**

Subject matter jurisdiction is a question of law subject to de novo review. *See Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 755 (11th

Cir. 2000); *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1318 (11th Cir. 2001); *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1285 (11th Cir. 2001).

A de novo standard of review for issue preclusion determinations is appropriate.. *United States v. Bailin*, 977 F.2d 270, 281 (7th Cir. 1992).

Barring a claim on the basis of res judicata is a determination of law. *Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir.1992). This court's standard of review therefore is *de novo*. *Id.*, citing *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1548 n. 1 (11th Cir.), *cert. denied*, 498 U.S. 959 , 111 S.Ct. 387, 112 L.Ed.2d 398 (1990).

This court applies a liberal standard when reviewing *pro se* arguments. See *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000).

### **SUMMARY OF THE ARGUMENT**

When a federal court instructs a party to return to state court to have state law claims adjudicated and the party properly reserves its federal claims the federal court must assume jurisdiction if a federal question exists in the action when the party returns to federal court. *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

Collateral estoppel is inapplicable to bar jurisdiction when a party has properly reserved his federal claims in state court. *Jennings v. Caddo Parish*

*School Bd.*, 531 F.2d 1331 (5th Cir.1976), *cert. denied*, 429 U.S. 897 , 97 S.Ct. 260, 50 L.Ed.2d 180 (1976).

A federal court must assume its delegated jurisdiction absent an expressed Congressional act. *Breuer v. Jim's Concrete of Brevard Inc.*, 292 F.3d 1308 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 816, affirmed 123 S.Ct. 1882(2003).

Federal courts cannot abstain from all claims in an action simply because they may not have jurisdiction in one claim. Federal courts are obligated to assume their unflagging duty to assume delegated jurisdiction of all federal question claims in an action. *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047 (1998); *City of Chicago et al. v. International College of Surgeons*, 522 U.S. 156 (1996).

Res judicata is only applicable if the parties had a fair and full litigation with a judgment on the merits. Here the merits were never litigated nor a judgment entered on the merits.

## **ARGUMENT**

### **A. Introduction**

For almost two years and through over eight proceedings in four different court the Appellant has simply tried to have a court of competent

jurisdiction rule on the constitutionality of the Georgia alimony statutes and whether they impermissibly infringe the federal 14<sup>th</sup> amendment right of privacy in the privacy protected zone of personal decisions relating to marriage, equal protection and 13<sup>th</sup> amendment ban on involuntary servitude as well as similar state law claims relating to the right of privacy, equal protection and ban on involuntary servitude contained in the Georgia Constitution.

**B. District Court Order: Collateral Estoppel and Res Judicata**

The district court order at issue here remanded based on collateral estoppel preclusion of jurisdiction as it found it had no original jurisdiction. It also remanded based on res judicata precluding re-litigation of the same cause of action between the same parties. The Appellant will argue the res judicata remand first after a request for judicial notice.

**C. Judicial Notice of State Court Orders After First Removal and Before Remand--and After the Remand Order Here Appealed**

Pursuant to Fed Rules of Evid 201 (f) the Appellant requests this court take judicial notice of filings in and orders of the state court occurring after proper first removal and before remand in violation of 28 U.S.C. § 1446 (d).

(State court documents between June 24, 2005 and November 15, 2005)

*Green v. Warden*, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983)]; *E.I.*

*du Pont de Nemours & Co. Inc. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986)

(Courts routinely take judicial notice of pleadings, records and judgments in other court cases).

The Appellant requests this Court take judicial notice of his state court Motion for Declaratory Judgment containing the upfront *England* reservation for his federal claims and the state court's order demonstrating no litigation or adjudication of those claims.

He also requests this court take judicial notice of state court ex parte proceedings that occurred after the remand of this case while this appeal is ongoing. (State Court documents after June 14, 2005)

The Appellant requests this court take judicial notice that the state court has entered a final decree of divorce and awarded alimony against the Appellant in an Order entered August 3, 2005.

Finally, the Appellant requests this court take judicial notice of the state court transcript of March 8, 2005 for the period of silence that occurs therein for an off the record remark by the state court judge.

**D. Res judicata of the Same Cause of Action**

The district court erred by basing its remand on res judicata as preclusive of re-litigating the same cause of action because the claims were never fairly and fully litigated and there was no judgment on the merits.

*Christopher v. Stanley Bostitch, Inc.*, 240 F.3d 95, 100 (1st Cir. 2001) ("When a federal court concludes that it lacks subject matter jurisdiction over a case, it is precluded from rendering any judgments on the merits of the case.").

However, "ordinarily a judgment dismissing an action or otherwise denying relief for want of jurisdiction, venue, or related reasons does not preclude a subsequent action in a court of competent jurisdiction on the merits of the cause of action originally involved." 1B James W. Moore, et al., *Moore's Federal Practice* ¶ 0.405[5] (2d ed. 1996); see also *American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1535-36 (11th Cir.1983) (determining previous action dismissed for want of subject matter jurisdiction had no *res judicata* effect). If the court in which an action is brought has no jurisdiction of the subject matter, the suit must be dismissed; "[i]n such cases, the dismissal is not a determination of the claim, but rather a refusal to hear it, and the plaintiff is free to pursue it in an appropriate forum." 1B *Moore's Federal Practice*, *supra* at ¶ 0.409[1.-2].

*Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999) citing *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501 (11th Cir.1990) states,

“Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases.”

“Thus, under the doctrine of res judicata, a judgment ‘on the merits’ in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action.” [Emphasis in the original] *Lawlor v. National Screen Service*, 349 U.S. 322, 326 (1955).

There never was a judgment on the merits of the Appellant’s 28 U.S.C. § 1331 or 42 U.S.C. § 1983 federal claims in any of the prior state or federal proceedings involving the Appellant.

Also, the Appellee was not a party to federal district court Case No. 6:04-CV-19 (HL) dismissed based on *Younger* abstention therefore res judicata cannot apply based on that case because both parties were not part of that case.

The purpose behind the doctrine of res judicata is that the "full and fair opportunity to litigate protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and

fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Ragsdale* 193 F.3d at 1239 citing *Montana v. United States*, 440 U.S. 147, (1979). Because of the lower courts' remand for lack of subject matter jurisdiction and dismissal for *Younger* abstention there never was an opportunity for full and fair proceedings not a judgment on the merits.

A dismissal for lack of subject matter jurisdiction is not a judgment on the merits. If a court finds that it lacks subject matter jurisdiction, the court has not decided the case on the merits. *Ray v. Eyster* (In re Orthopedic "Bone Screw" Prods. Liab. Litig.), 132 F.3d 152, 155 (3d Cir. 1997) ("If a court [ ] determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits."); *Verret v. Elliot Equip. Corp.*, 734 F.2d 235, 238 (5th Cir. 1984) ("it would be inappropriate to enter any judgment on the merits when the dismissal is based on lack of subject matter jurisdiction"); *Wages v. I.R.S.*, 915 F.2d 1230, 1234 (9th Cir. 1990) ("[W]e have held that a judge ordering a dismissal based upon lack of subject matter jurisdiction retains no power to make judgments relating to the merits of the case."); *Figueroa v. Buccaneer Hotel, Inc.*, 188 F.3d 172, 182 (3rd Cir. 1999) (holding claims dismissed for lack of jurisdiction should be dismissed

without prejudice even if litigant may not later pursue those claims in federal court).

Absent a full and fair opportunity to litigate on the merits res judicata is inapplicable. The Appellee's cannot have it both ways. On the one hand they repeatedly successfully thwarted attempts to full and fair litigation and a judgment on the merits by arguing abstention doctrine to deny the district courts' subject matter jurisdiction. When their arguments prevail and proper removal is again effected because of material changed circumstances they now want to claim the claims were litigated a judgment on the merits was entered and now the claims are precluded. (*Benson*, 188 F.3d ). This never happened.

The Appellant's first removed case (Case No. 6:04-CV-30 (WLS)) was remanded for lack of subject matter jurisdiction, *Ankenbrandt* abstention. Therefore there was never an opportunity for full and fair litigation or a judgment on the merits.

**E. Collateral Estoppel of Jurisdictional Issues**

“To be sure, the general rule of finality of jurisdictional determinations is not without exceptions.” *Durfee v. Duke*, 375 U.S. 106, 114 (1963 ).

“*Durfee* is simply an application of the normal rules of collateral estoppel to jurisdictional determinations. The *England* procedure meets precisely the situation here, or alternatively is a clear exception to the ‘general rule’ stated in *Durfee*.” *Key v Wise*, 454 U.S. 1103 (1981) Justices Brennan, Marshall, Blackmun dissenting over declining Writ of Certiorari.

Likewise here *England* is the exception to the district court’s application of collateral estoppel. Collateral estoppel of a jurisdictional issue is not a bar to a procedurally correct *England* Reservation.

A party is precluded from relitigating an issue under the doctrine of collateral estoppel unless he lacked a full and fair opportunity to litigate the issue in the first action or *other circumstances justify* affording him an opportunity to relitigate the issue. [Emphasis added] *Restatement (Second) of Judgments* § 29 (1982).

In determining whether a full and fair opportunity to litigate was present, one factor to be considered is "other compelling circumstances." *Restatement (Second) of Judgments* § 29(8) (1982).

The “other circumstances” here is the federal court directive in Case No. 6:04-CV-19 (HL) sending the Appellant back to state court to have his federal and state law claims adjudicated and his proper invocation of the

*England* reservation of his federal claims in state court to now return to federal court.

The Appellant is simply returning to the district court to have his federal claims adjudicated per *England* 375 U.S., *Fields* 953 F.2d and *Jennings* 531 F.2d. Collateral estoppel of a jurisdictional issue is not a bar to a procedurally correct *England* Reservation.

*San Remo Hotel, LP, et al. v. City and County of San Francisco, et al.*, \_\_\_U.S.\_\_\_ 04-340 (June 20, 2005) states,

“‘Typical’ *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. In such cases, the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy. See 375 U. S., at 416-417, and n. 7.<sup>21</sup>

### **Footnote 21**

As we explained in *Allen*, 449 U. S., at 101-102, n. 17, ‘[t]he holding in *England* depended entirely on this Court’s view of the purpose of abstention in such a case: Where a plaintiff *properly invokes* federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk

of a federal court's erroneous construction of state law.’  
(Emphasis added and citations omitted.)”

Albeit *San Remo* \_ U.S., and *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, (2d Cir. 2003) are in the context of takings law the same carve out exception to preclusive doctrine apply here as they did in *England*, 275 U.S., , in this court in *Fields*, 953 F.2d. and in. *Santini*, 342 F.3d states,

The [United States Supreme Court in *England*, 375 U.S. ] Court stated, “There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court’s determination of those claims.” *Id.* at 415. The Court held that “if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court.” *Id.* at 419. The Court also held that “a party may readily forestall any conclusion that he has elected not to return to the District Court” by “inform[ing] the state courts that he is exposing his federal claims there only for [a limited] purpose . . . , and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.” *Id.* at 421.

Although *Santini* initiated his action in state court, he was not in state court voluntarily. See *Fields*, 953 F.2d at 1306 (holding that “would-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are ‘involuntarily’ in the state courts, and therefore qualify for the exception to generally applicable *res judicata* principles”).

Wright & Miller have articulated the essence of *England*'s promise of a right to return to federal court "in all events":

A party who clearly reserves federal questions following "Pullman" abstention for state-court resolution of state-law issues can return to federal court for decision of the federal issues, *free of preclusion*. (Emphasis added).

18B Wright & Miller, *Federal Practice & Procedure* § 4471 p. 247 (2d ed. 1988). That same freedom from preclusion is equally essential here.

When the Appellant, at the direction of the federal court in both Case No. 6:04-CV-19 (HL) and Case No. 6:04-CV-30 (WLS), returned to state court all his predicted fears befell him. The state court promptly denied without reasoned opinion his declaratory judgment state law constitutional statutory challenges and in the same breath awarded alimony against him. The Georgia Supreme Court had full Georgia Constitutional jurisdiction to review on appeal the ruling but declined to accept the Appellant's appeal.

The Appellant's injuries were further compounded when the state court judge requested to go off the record to make a threat of jailing the Appellant if he again removed his case. A review of the transcript will indicate the period of record silence requested by the state court judge.

The Appellee is responsible for the circuitous course of legal proceedings for their repeated attempt to deny a full and fair hearing on the

merits. The Appellant accepts the Appellee's legal arguments as good faith attempts to prevail in litigation, but the Appellant in no way should be penalized for his likewise good faith attempts to get an adjudication on the merits, or raise colorable arguments to change existing law and notably, to appeal in good faith when district court rulings are erroneous.

**F. Severability of Federal Question Claim from Divorce Decree**

The presence in the action of a request for a divorce and alimony decree is no bar to this court hearing the federal questions inherent in the pleadings, i.e. the constitutional challenge to the Georgia alimony statutes and the 42 U.S.C. § 1983 issues.

In the Appellant's Notice of Removal he offered case law to support his argument that the district court had authority to sever the removed proceeding, retain the federal questions expressed in the Notice of Removal and simply enter a partial remand to the state court to enter a divorce decree.

This case presents a substantial federal question pursuant to 28 U.S.C. § 1331 that transcends the family law issue. Elk Grove Unified School District v. Newdow, 124 S. CT. 2301 (2004).

"The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U. S. C. §1332, which "divests the federal courts of power to issue

divorce, alimony, and child custody decrees," Ankenbrandt, 504 U. S., at 703...

The Court [here in Elk Grove v Newdow] cites Palmore v. Sidoti, 466 U. S. 429 (1984), as an example of the exceptional case where a "substantial federal question that transcends or exists apart from the family law issue" makes the exercise of our jurisdiction appropriate... In Palmore, we granted certiorari to review a child custody decision, and reversed the state court's decision because... the alleged constitutional violation, while clearly involving a 'substantial federal question,' did not 'transcend or exist apart from the family law issue,' ante, at 9; it had everything to do with the domestic relationship--[w]e granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child,' 466 U. S., at 430" Elk Grove Unified School District v. Newdow, 124 S. CT. 2301 (2004)

The Appellant further offered the district court in his Notice of Removal support for partial remand to state court, i.e. *Wisconsin Dept. of Corrections v. Schacht*, 97 S. Ct. 461 (1998) (rejects the argument that if subject matter jurisdiction is lacking over one claim in a multi-claim case, the entire case must be remanded under § 1447(c)).

For these reasons the district court did have subject matter jurisdiction to hear the claims and issues and still does. The district court erred in its order because no impediments to subject matter jurisdiction existed then or now.

**G. General (facial) Constitutional Statutory Challenge**

In all federal proceedings the Appellant has raised a general (facial) constitutional challenge to the Georgia Alimony statutes. In all federal proceedings the general challenge should have survived all abstention doctrine. *Exxon Mobil v. Saudi Basic Industries*, 544 US \_\_\_\_ (2005) (*Rooker-Feldman* is inapplicable to general constitutional challenges.) In all the federal proceedings, though called to their attention, none of the federal courts ruled on the general challenge.

**H. 42 U.S.C. § 1983 Claim**

The district court overlooks the 42 U.S.C. § 1983 claim expressed in the Appellant's Notice of Removal. The claim is adequately expressed and as a 28 U.S.C. § 1331 federal question original jurisdiction claim provides adequate jurisdiction which the district court must assume.

It is a general rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989).

More importantly, as this court is aware, if original jurisdiction is present in the removal jurisdiction as the action is removed then the federal court must assume its jurisdiction absent an expressed Congressional statutory act.

Federal courts must exercise removal jurisdiction within the context of original jurisdiction “except as otherwise expressly provided for by Act of Congress...” *Breuer v. Jim's Concrete of Brevard Inc.*, 292 F.3d 1308 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 816, affirmed 123 S.Ct. 1882 (2003).

The district court erred by not taking jurisdiction over the 42 U.S.C. § 1983 issues in the removal.

### **CONCLUSION**

The *England* reservation properly provided to the state court in this case preserved the Appellant’s opportunity to return to federal court to have his federal and state constitutional statutory challenges to the Georgia alimony statute heard on the merits. The *England* reservation is a proper exception to collateral estoppel of a jurisdictional issue.

The Appellant never had a fair and full litigation on the merits nor a judgment on the merits entered related to his claims and therefore res judicata was an erroneous order entered by the district court. The Appellant is entitled to have his federal question claims fairly and fully litigated in the district court.

The Appellant, at the direction of two district courts, returned to state court and exhausted all his remedies to adjudicate his constitutional challenge to the Georgia alimony statute without avail. In state court he suffered all the injuries he anticipated and had informed the district court were likely to happen. Now that the injuries have happened and he properly reserved his federal claims he must not be denied the opportunity to fully litigate his claims on the merits.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that this petition with the type-volume limitation set forth in F.R.A.P. 32 9 (a)(7)(B). This petition contains 6,154 words as computed by Word word processing system, and contains Times new Roman, 14-point typeface. The undersigned has also prepared to download the file to the Eleventh Circuit Court of Appeals when permission is received from the Court.

## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Appellant's Initial Brief has been served via U.S. mail on this 30<sup>th</sup> day of August, 2005 to

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