

No. 05-10668-DD

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

MICHAEL S. GOGOLA,
Plaintiff/appellant,

v.

JAMES ZINGALE,
FLORIDA DEPARTMENT OF REVENUE, and
TWENTIETH JUDICIAL CIRCUIT,
Defendants/appellees,

On Appeal from the United States District Court
For the Middle District of Florida, Fort Myers Division
Case No. 2:2004-CV-00417

APPELLANT'S INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Gogola v. Zingale, et al.
Case No. 05-10668-DD

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

Charlie Crist	Attorney General's Office (Florida)
Sandra Lee Gogola	Former Spouse of Appellant
Michael S. Gogola	Appellant/Plaintiff
Joseph H. Lee	Attorney General's Office (Florida)
Honorable John E. Steele	United States District Judge
James Zingale	Defendant (Florida Department of Revenue)

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

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

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, Michael S. Gogola, submits that oral argument is not necessary to properly address the constitutional issues briefed in this appeal. As such issues rest squarely on an interpretation of the U.S. Constitution, based on well-established precedent, and thus such argument may not ultimately aid the court in the decision-making process. If the Appellees, or this court, request oral argument, the Appellant will appear.

STATEMENT OF JURISDICTION

The District Court had jurisdiction of this case pursuant to 28.U.S.C. § 1291, to review this appeal from the final judgment entered by the district court on January 21, 2005. (R1:34). Appellant timely filed his Notice of Appeal.

STATEMENT OF THE ISSUES

- I. Whether the district court erred by dismissing with prejudice a general constitutional challenge to a state statute because it concluded the Appellant lacked standing to make the general challenge pursuant to *Doe v Pryor* , 344 F. 3d 1282 (6th Cir. 1985).

- II. Whether the district court erred by dismissing the Appellant's constitutional challenge to a state statute under the Rooker Feldman doctrine because it concluded the claims presented were inextricably intertwined with a prior state judgment.

STATEMENT OF THE CASE

The Appellant, Michael S. Gogola, was the *pro se* plaintiff in the district court and will be referred to by name, or as Appellant. The Appellee, James Zingale, in his official capacity as Executive Director of the Florida Department of Revenue and the Florida Department of Revenue will be referred to as Defendants. The record will be noted by the reference to the volume number, document number, and page number(s) of the Record on Appeal as prescribed by the rules of this court. At the time of this appeal, the Clerk of the Court had not divided the record into volumes, so the undersigned has referred to the entire record as one volume. There was no evidentiary hearing, so there is no transcript in the Record.

A. Course of Proceedings Below

On September 2, 2004, in response to state contempt proceedings, the Appellant filed a Verified Complaint in the United States District Court, in the Middle District of Florida, Fort Myers Division, which sought a constitutional challenge to Florida's permanent alimony statutes, enumerated in Section 61.08, Florida Statutes, and sought such relief against the Appellees, whom he alleged were designated to enforce the aforementioned alimony statutes. (R1:1). Attached to the Complaint were two Exhibits; 1) Chapter 61, Florida Statutes and 2) the Final Judgment of Dissolution of Marriage. (R1:1:Exhibits). The Defendant filed

a Motion to Dismiss the Verified Complaint, arguing that Appellant had failed to bear his jurisdictional burden. (R 1:15).

The initial Verified complaint had erroneously named the District Court Judge as a Defendant. The Appellant timely filed a Motion to Dismiss the District Court Judge and an identical Amended Complaint with only the Appellee as Defendant. (R1:17).

The District Court entered a ruling that the Appellant's claims were dismissed with prejudice under the principles of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) as they were inextricably intertwined with a state court judgment and that he lacked standing to make a general statutory constitutional challenge. (R1:25). The Appellant requested reconsideration, and the district court denied. (R1:34).

Appellant notes that this Court may certify to the Florida Supreme Court any constitutional claims relating to state law in this case, pursuant to Article V Section 3 (b) (6), Florida Constitution, and the mandate in *Mosher v Speedstar Div. Of AMCA Internat'l Inc.*, 52 F. 3d 913, 916-917 (11th Cir. 1995) as the state law claims are determinative of the cause and because there is no controlling precedent of the Supreme Court of Florida. Further, the issues raised are of great importance to the citizens of Florida.

B. Statement of Facts

The material facts are clearly recited in the Verified Complaint, and the Orders entered by the district court. (R1:1, 25:34). Appellant, Michael S. Gogola, is a 56 year old in good health who is now a resident of Waycross Georgia .(R1:1:¶C 80). The former wife, Sandra L. Gogola is a healthy 56 year-old living in Fort Myers, Florida (R1:1:¶ 81,87).

On November 6, 1969, Michael S. Gogola, and Sandra L. Gogola were married in Kenosha Wisconsin. Children born of the marriage are Mike Jr., age 34, Pete, age 25 and Steve, age 23, all gainfully employed in good health. (R1:1:¶ 82) . In December, 1998 the parties made the personal decision to dissolve their marriage.

On May 7, 1999, a Final Order of Dissolution was entered by the 20th Judicial Circuit Court of Florida granting the dissolution and applying § 61.08 against the Appellant by awarding permanent alimony from him to Sandra L. Gogola until he or she dies or she remarries. (R1:1:¶ 83,84,85,86). Appellant continues subject to the challenged Florida divorce alimony statutes requiring him to make substantial alimony payments. (R1:1:Exhibit Final Order of Dissolution). Michael S. Gogola fulfilled the court order of alimony payment to the best of his physical, mental and emotional capacity. (R1:1:¶ 91). This fact has never been challenged.

On October 15, 2004, civil contempt proceedings based on the final judgment of dissolution that contained the F.S. § 61.08 permanent alimony provision were held by the Georgia Superior Court of Ware County for the Appellant's alimony arrearages. That state Case Number is 03V-0776.

C. Standard of Review

The constitutional issues raised in Points I and II are legal issues ordinarily subject to *de novo* review. The standard of review of a motion to dismiss is also *de novo*. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F. 3d 1183, 1887 (11th Cir. 2004); *Elder v. Holloway*, 510 U.S. 510, 516 (1994)

SUMMARY OF THE ARGUMENT

I. The Appellant fulfilled all criteria to have standing to make a general constitutional challenge to a state statute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) is controlling. *Doe v Pryor* , 344 F. 3d 1282 (6th Cir. 1985) is inapposite.

II. The district court, in applying the Rooker Feldman doctrine to the as applied claims, erred by misrelating these federal claims to the state final judgment of dissolution of marriage order and not properly to the state contempt proceeding. The claims raised relate to a state statute challenged for constitutional infringement as the statute is applied in a state enforcement proceeding. Claims raised in conjunction with an enforcement proceeding are not inextricably intertwined with

a state court judgment. *Texaco Inc. v. Pennzoil Co.*, 481 U.S. 1 (1987); *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1170 (10th Cir. 1998)

ARGUMENT AND CITATION OF AUTHORITIES

Our law affords constitutional protection to *personal decisions relating to marriage*, procreation, contraception, family relationships, child rearing, and education.Our precedents ‘have respected the private realm of family life which the state cannot enter.’ These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. (Emphasis Supplied)

Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992)

I. Whether the district court erred by dismissing with prejudice a general constitutional challenge to a state statute because it concluded the Appellant lacked standing to make the general challenge pursuant to *Doe v Pryor* , 344 F. 3d 1282 (6th Cir. 1985)

An exception to the Rooker Feldman doctrine is that where a claim represents a “general challenge . . . to a state law implicated” in the state decision, the federal courts have jurisdiction over that general challenge. *Catz v. Chalker*, 142 F.3d 279, 294-95 (6th Cir. 1998); see also *Feldman*, 460 U.S. at 482-83 “To the extent that Hickey and Feldman mounted a general challenge to the

constitutionality of Rule 46I(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints.”

A. Doe v. Pryor

The district court’s reliance upon *Doe v Pryor* , 344 F. 3d 1282 (6th Cir. 1985) is misplaced. The district court concluded that the general Right of Privacy claim failed because the Appellant lacked standing to raise the claim. It founded, or looked for guidance, for its legal conclusion to *Doe* at 344. The circumstances, facts, legal proceedings and legal conclusion of *Doe* at 344 are all readily distinguishable from those of the Appellant and case here.

The claimant in *Doe* at 344 had already received several reasoned opinions written by the Alabama Appellate and Supreme Court on the issue raised in his federal separate lawsuit.

Here the Appellant has received no reasoned opinion by either the state circuit court or state appellate court in Florida.

The *Doe* claimant, in the district court, sued the Alabama Attorney General. This court (11th Federal Circuit) found the *Doe* Defendant did not harm the Claimant. This Court concluded the wrong Defendant was named and used this as a basis for finding no standing for the claimant.

Here the Appellees are the Director of the Department of Revenue, and the Department of Revenue as the state official designated to enforce the statute. (R1:1:¶Complaint at 29). Here the Appellees (Defendants) are proper.

The *Doe* claimant's relief sought was for the district court to issue an order binding the Alabama state court on a custody ruling.

Here the Appellant specifically pled he does not want a state court order modified, altered, or overruled. (R1:1:¶16).

In *Doe* at 344 the issue presented to the district court had already been decided in a U.S. Supreme Court ruling and by a concession by the Alabama Attorney General in such a way that already granted *Doe* the relief he sought.

Here there are no other existing rulings upon which the Appellant can rely for the relief he seeks. His only hope is before this court to have the opportunity to argue the federal question statutory constitutional challenge issues.

In *Doe* at 344 the district court felt there was no injury to the claimant to grant him standing.

Here the pleadings are replete with past, current and future injuries to the plaintiff to afford him standing to make a general federal statutory constitutional challenge. The Appellant not only has been threatened with enforcement over the challenged statute but has been subjected to enforcement proceedings over the challenged statute. (R1:1:¶39, 85, 91)

In *Doe* at 344 the district court felt there was no threat of enforcement of the statute.

Here the statute was enforced against the Appellant.

B. Lujan v. Defenders of Wildlife

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) is the controlling case on standing. *Doe at 344* also acknowledges this.

The Appellant meets all of requirement of *Lujan* at 504 and therefore has standing to make a general (facial) statutory constitutional challenge.

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations, footnote, and some internal marks omitted).”
Doe at 344

1. injury in fact

The Appellant’s injury is concrete, actual, and particularized. He has had his money and earnings taken. (R1:1:¶3) He continues to wear the yoke of alimony today and forever...until he or his former spouse dies or she remarries. (R1:1:¶ 89)

He has had enforcement and contempt proceedings instituted against him because of the statute. (R1:1:¶3)

2. causal connection ... the injury/the conduct complained of

All of Appellant's injuries are, and continue, simply because he exercised his fundamental right of privacy, i.e. a personal decision relating to marriage to dissolve it. As a result he was forced to choose between incurring further burdensome court costs and attorney fees with the inevitable outcome of court ordered alimony or to minimize his monetary losses by agreeing to an alimony amount in mandatory mediation.

There was no real free voluntary choice to evade the statute and its subsequent enforcement. The state circuit court forced mediation and the agreement that resulted therefrom occurred only because of the challenged statute. The statute has been enforced and the Appellant is at risk of loss of personal freedom with a bodily commitment order.

3. likely the injury will be redressed by a favorable decision

This court's declaring the Dissolution of Marriage alimony section impermissibly infringes a liberty interest and fundamental right without a compelling state interest minimally applied will prevent the further enforcement of the statute against all Floridians and the Appellant. There is no speculation about this result.

II. Whether the district court erred by dismissing the Appellant’s constitutional challenge to a state statute under the Rooker Feldman doctrine because it concluded the claims presented were inextricably intertwined with a prior state judgment.

Edwards v. Illinois Bd. of Admissions to Bar, 261 F.3d 723, 729 (7th Cir. 2001) “When the litigant is challenging the constitutionality of a rule that was applied to him, but is not asking to correct or revise the determination that he violated the rule, *Rooker-Feldman* is no obstacle to the maintenance of the suit.” (internal quotation marks omitted).

“The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.” *GASH Assoc. v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir. 1993)

The district court erred when it perceived this action as a family law action. This is a constitutional and civil rights action based on the state court enforcement proceeding of a property stripping statute written within the U.S. Constitution 14th Amendment substantive due process liberty interest, fundamental Right of Privacy personal decisions relating to marriage protected zone. It is also a federal question

as to whether § 61.08 impermissibly infringes the U.S. Constitution 13th Amendment ban on involuntary servitude as determined in *United States v. Kozminski*, 487 U.S. 931 (1988)

The gravamen and purpose of the Appellant's action is the loss of his liberty interests and fundamental rights in the state court enforcement contempt proceedings. (R1:1:¶3).

Appellant pled that in an enforcement proceeding he has been found in contempt for noncompliance with a court order predicated on the challenged statute.

The Appellant pled he was not seeking to overturn, alter, modify or enter a state court judgment. (R1:1:¶16).

Pennzoil v. Texaco Inc., 481 U.S. 1 (1987) represents the U.S. Supreme Court's view that Rooker-Feldman is inapplicable to a constitutional challenge arising from a post judgment enforcement action. The issues in the enforcement proceeding are not inextricably intertwined with the state court judgment.

The Supreme Court's reasoning in *Pennzoil* indicates that if the purpose of a federal action is 'separable from and collateral to' a state court judgment, then the claim is not 'inextricably intertwined' merely because the action necessitates *some* consideration of the merits of the state court judgment. Moreover, on its facts, *Pennzoil* demonstrates that asking a federal court to enjoin post-judgment collection procedures that allegedly violate a party's federal rights is distinguishable from asking a federal court to review the merits of the underlying judgment.

Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163, 1170 (10th Cir. 1998) (Emphasis not added)

In *Pennzoil* at 481, Texaco filed a federal lawsuit challenging the Texas lien and bond statute which was to be applied against it when it lost a jury verdict to Pennzoil in a state court action. The U.S. Supreme Court held that the Younger abstention applied. (With dissenting opinion). More importantly, the Second Circuit Court as well as Justices Powell, Scalia, O'Connor, Brennan, Marshall and Blackmun, all of whom specifically wrote, concluded that the Rooker Feldman doctrine was inapplicable. *Pennzoil* at 481, 8, 17, 21, Footnote 3. See also *District of Columbia Court of Appeals v. Feldman*, at 483, n. 16

In determining the applicability of the Rooker-Feldman doctrine, federal courts “cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff’s complaint,” but instead “must pay close attention to the *relief* sought by the federal-court plaintiff.” *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003) (quoting *Kenmen Eng’g v. City of Union*, 314 F.3d 468, 476 (10th Cir. 2002) Here the Appellants’ pleadings and relief sought do not request altering the state court final judgment or interacting with the state court judgment.

Additionally for Rooker-Feldman the Appellant must have had a reasonable opportunity to have his federal claims reviewed in state court. *Powell v. Powell*, 80 F 3d 464, 467 (11th Cir. 1996) The Appellant’s repeated failed attempts to have a

state court provide a reasoned opinion on his state law claims similar to his federal claims here is an indication to support the inference he lacked, and still lacks, a reasonable opportunity to have these federal claims adjudicated with a reasoned opinion in state court.

Also, this court has an unflagging obligation to exercise the jurisdiction given it. "...virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) Further, "[T]he courts of the United States are bound to proceed to judgment and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Id.*

In light of that mandate, "abstention . . . is the exception, not the rule." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) Indeed, abstention is "an *extraordinary* and *narrow* exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River* at 424, 813 (emphasis included). "Abstention 'is the exception, not the rule.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) "Abstention is, of course, the exception and not the rule." *City of Houston*, 482 U.S. 451, 467 (1987) See also 28 U.S.C. § 1334(c).

Finally, judicial economy mitigates against abstention. If this court applies Rooker Feldman abstention, *England v Medical Examiners*, 375 U.S. 411 (1964) will permit the Appellant to have his state claims adjudicated again in state court and with a proper reservation of his federal claims return to this court if the state court rules adversely on his state claims. *England* 375, *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1303 (11th Cir. 1992); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976)

The history of the state circuit and appellate courts simply denying without reasoned opinion and sanctioning attorneys for making these same state law claims before them is an indicator of the likelihood of an adverse ruling for the state law claims in state Court. (See R1:1:¶ 76-81 sanctions in *Barna v. Barna*, 850 So.2d 603 (Fla. 4th DCA 2003); *Barna v. Barna*, Case No. 4D02-3332 (Fla. 4th DCA August 14, 2003) (order denying rehearing); *Barna v. Barna*, Case No. CD-00-534 F2 (August 14, 2003); *Barna v. Barna*, Case No. SC 03-1596 (Fla. March 2, 2004) (order declining to accept jurisdiction).)¹

Because of state court sanctions related to the state law claims the Appellant will not be able to obtain legal counsel for state court proceedings.

With an almost assured adverse state court ruling on these state claims and possible sanctions, the Appellant will find himself returning to this court for

adjudication of these federal constitutional claims. In the interim all parties will have incurred needless delay and significant costs. *England* at 375, 418.

Edwards v. Illinois Bd. of Admissions to Bar, 261 F.3d 723, 729 (7th Cir. 2001) “When the litigant is challenging the constitutionality of a rule that was applied to him, but is not asking to correct or revise the determination that he violated the rule, *Rooker-Feldman* is no obstacle to the maintenance of the suit.” (internal quotation marks omitted).

Accordingly, this court should reverse and either review the statutory constitutional claims de novo or remand this case to give the Appellant the opportunity to proceed to summary judgment on the merits of the claims.

CONCLUSION

The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.
Casey at 505, 896

Based on the forgoing facts and argument the district court imprudently granted the motion to dismiss and should have instead accepted jurisdiction. It should have permitted the Appellant to offer facts and legal argument addressing impermissible constitutional infringement of Florida’s alimony statute, §61.08 on

¹ Writ of certiorari to the U.S. Supreme Court containing all state circuit court and appellate court orders in *Barna* readily available at <http://www.cflap.org/dl/case-law/barna-barna-writ-of-certiorari.pdf>

the U.S. Constitution 14th Amendment Right of Privacy, equal protection and U.S. Constitution 13th Amendment ban on involuntary servitude as well as required the Defendants to provide a compelling state interest, minimally applied, to permit the above infringement of liberties.

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Dated March 12, 2005

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). This brief contains 3,503 words in 17 pages, as computed by the 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 on this 12th day of March 2005 a true and correct copy of the foregoing Initial Appellant's Brief has been served via U.S. mail to

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