

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

CASE NUMBER 05-10668-DD

MICHAEL S. GOGOLA,

Appellant/Plaintiff,

v.

JAMES ZINGALE, et. al.,

Appellees/Defendants.

**On Appeal from the United States District Court
For the Middle District of Florida
Fort Myers Division**

**ANSWER BRIEF OF
APPELLEES/DEFENDANTS
JAMES ZINGALE, EXECUTIVE DIRECTOR FOR
THE FLORIDA DEPARTMENT OF REVENUE and
THE FLORIDA DEPARTMENT OF REVENUE**

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

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case.

JUDGES

- 1. Steele, John E.: United States District Court Judge;

ATTORNEYS

- 1. Lee, Joseph H., Assistant Attorney General: district court counsel and appellate counsel for Defendants/Appellees, James Zingale and the Florida Department of Revenue;

PARTIES and AFFILIATES

- 1. Fawcett, Patricia C.: United States District Court Judge and former Defendant;
- 2. Florida Department of Revenue: Defendant/Appellee;
- 3. Gogola, Michael S.: Plaintiff/Appellant pro se;
- 4. Hayes, Hugh D.: Circuit Court Judge for the Twentieth Judicial Circuit, in and for Lee County, Florida, and former Defendant;

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- 5. United States District Court, Middle District of Florida: former Defendant;
- 6. Zingale, James: Defendant/Appellee.

MISCELLANEOUS

- 1. Gogola, Sandra Lee: former spouse to Plaintiff/Appellant.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Defendants/Appellees, James Zingale, Executive Director for the Florida Department of Revenue, and the Florida Department of Revenue, the Office of the Attorney General for the State of Florida, does not request oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

The Office of the Attorney General for the State of Florida hereby certifies that this brief was typed in 14 point and CG Times (W1) type, complying with FRAP 32(A)(7)(b), containing less than 4,500 words.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court, Middle District of Florida, has jurisdiction to determine whether a Plaintiff has proper standing to advance a general challenge as to the Constitutionality of a state statute in federal court. The United States District Court, Middle District of Florida, further has initial jurisdiction to determine whether its has subject matter jurisdiction over a Constitutional challenge against a state statute, pursuant to the Rooker-Feldman doctrine.

This Honorable Court has jurisdiction to decide the merits of an appeal from a final order dismissing an action with prejudice.

STATEMENT OF THE ISSUE (restated and reorganized)¹

WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE SUBJECT ACTION WITH PREJUDICE?

¹ Plaintiff/Appellant presents two issues on appeal, the first challenging the District Court's determination that Plaintiff/Appellant lacked standing to present a general challenge against the Constitutionality of a statute, and the second challenging the District Court's determination that it lacked subject matter jurisdiction pursuant to the Rooker-Feldman doctrine. Both of Plaintiff/Appellant's issues will be addressed in the Answer Brief, under the single issue as stated.

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE:

As relevant to the subject appeal, the posture of the case is as follows. On or about September 29, 2004, Plaintiff/Appellant, Michael S. Gogola (hereinafter, "Gogola"), filed his Amended Verified Complaint. In the Amended Verified Complaint, Gogola advanced numerous claims maintaining that Chapter 61, Fla.Stat., as relevant to alimony, was unconstitutional under the federal Constitution, as invading Gogola's right of privacy under the Fourteenth Amendment (Count I), as violating the Equal Protection provision of the Fourteenth Amendment (Count II), and as violating the Thirteenth Amendment's prohibition against involuntary servitude (Count III). Gogola further contended that Chapter 61, Fla.Stat., as relevant to alimony, was unconstitutional, under the Florida Constitution, as violating the right of privacy (Count IV), as violating equal protection (Count V), and as violating inalienable basic rights (Count VI). Gogola further claimed that Chapter 61, Fla.Stat., as relevant to alimony, violated Florida Supreme Court precedent and public policy (Count VII). See R-11. The suit was initially brought against the subject Defendants/Appellees, James Zingale (hereinafter, "Zingale") and the Florida Department of Revenue ("hereinafter

DOR”), as well as Patricia C. Fawcett, United States District Court Judge, the United States District Court, Middle District of Florida, and Hugh D. Hays, Circuit Court Judge for the Twentieth Judicial Circuit, in and for Lee County, Florida, though Gogola voluntarily dismissed the latter parties. See R-17, 18, 21.

On or about October 13, 2004, Zingale and DOR submitted their Motion to Dismiss Amended Verified Complaint. In said motion, Zingale and DOR argued: (1) dismissal was proper pursuant to the Rooker-Feldman doctrine; (2) in the alternative, abstention was proper; (3) regardless, the District Court should certify the state law claims to the Florida Supreme Court; and (4) regardless, the claims were without merit. See R-13. Gogola responded to the motion to dismiss on or about October 25, 2004. See R-16.

The District Court, on or about December 16, 2004, dismissed the subject action, pursuant to the Rooker-Feldman doctrine. In so ruling, the District Court reasoned that: (1) not only were Gogola’s claims “inextricably intertwined” with the state court dissolution judgment, the proceedings for which Gogola did or could have raised the challenges raised in federal court, such that the Rooker-Feldman doctrine would apply, (2) but that Gogola lacked standing to present a “general challenge” against the Constitutionality of the alimony statute, pursuant to Doe v.

Pryor, 344 F. 3d 1282, 1286-87 (11th Cir. 2003). See R-25.

On or about January 3, 2005, Gogola filed a Motion for Reconsideration, R-31, responded to on or about January 10, 2005, R-32, and denied by the District Court on or about January 21, 2005, R-34. Gogola further filed his Notice of Appeal on or about January 3, 2005. (R-30).

B. FACTS:

As alleged in the Amended Verified Complaint, the facts are as follows.

On November 6, 1969, Gogola and Sandra S. Gogola were married, and three children came from the marriage. At some unspecified time, Gogola and Sandra S. Gogola moved to Florida. On May 9, 1999, a Final Judgment of Dissolution of Marriage was entered by the state circuit court in the Twentieth Judicial Circuit. Pursuant to Chapter 61, Fla.Stat., the state court conducted an equitable distribution of property, and further ordered Gogola to pay alimony to Sandra S. Gogola until one of the parties dies, or until Sandra S. Gogola remarries.

Periodic orders of contempt have been entered for Gogola's failure to make such alimony payments, from time to time. See R-11.

C. STANDARD OF REVIEW

The standard of review, in examining the dismissal of an action with prejudice, pursuant to a motion to dismiss, is de novo. This Court, in this regard, is bound, for the purposes of this review, to take the well-pleaded factual allegations in the complaint as true. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) *quoted in Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985) (*en banc*). In making this determination, the court must view the allegations of the complaint in the light most favorable to the plaintiff. Sofarelli v. Pinellas County, 931 F.2d 718, 721 (11th Cir. 1991). A motion to dismiss will be denied unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Luckey v. Harris, 860 F.2d 1012, 1016 (11th Cir. 1988), *reh. denied en banc*, 896 F.2d 479 (11th Cir. 1989), *cert. denied*, 495 U.S. 957 (1990).

Although this Court must take all the factual allegations in the Complaint as true, this Court is not bound to accept as true a legal conclusion couched as a factual allegation. See, e.g., Beck v. Interstate Brands Corp., 953 F.2d 1275, 1276 (11th Cir. 1992). "Although the court must take the allegations of the Complaint as true when reviewing motions to dismiss, [the court is] not permitted to read into the Complaint facts that are not there." Papasan v. Allain, 478 U.S. 265, 286 (1986).

SUMMARY OF THE ARGUMENT

WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE SUBJECT ACTION WITH PREJUDICE?

The District Court properly dismissed the subject action with prejudice, based on the Rooker-Feldman doctrine. In the alternative, the District Court properly dismissed the subject action with prejudice, in addition to and/or for reasons other than the Rooker-Feldman doctrine.

ARGUMENT AND CITATIONS OF AUTHORITY

WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE SUBJECT ACTION WITH PREJUDICE?

Gogola argues herein that: (1) the District Court erred in finding that Gogola lacked standing to advance a "general challenge" against the Constitutionality of a statute; and (2) the District Court erred in finding that the Rooker-Feldman doctrine applied vis-a-vis the District Court's determination that the federal challenges were "inextricably intertwined" with the state court dissolution judgment. See Appellant's Brief at p. 6-10; 11-16. Zingale and DOR will address each of Gogola's arguments, and show that an affirmance is proper herein.

A. Whether Plaintiff had standing to advance a "general challenge" below.

As properly reasoned by the District Court, Gogola lacked standing to advance a "general challenge" against the Constitutionality of Florida's alimony statute, pursuant to Doe v. Pryor, 344 F. 3d 1282, 1286-87 (11th Cir. 2003). See R-25. In this regard, a plaintiff lacks standing to advance a general challenge against the Constitutionality of a state statute in federal court, unless the federal court has the authority to bind the state courts in its determination as to the Constitutionality of the statute. See Doe, 344 F. 3d at 1286. The law is clearly established, however, that a federal court, other than the United States Supreme

Court, lacks the ability to bind the state courts to decide cases in accordance with the federal ruling. Id. As such, and as in Doe, Gogola lacks standing to present a “general challenge” against the Constitutionality of a state statute in federal court, especially where the state statute involves a uniquely state law matter, to wit, family law proceedings. See id.; see also Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930) (family law is a matter uniquely of state law).

An affirmance is proper.

Gogola attempts to distinguish Doe, however, by arguing that: (1) the plaintiffs in Doe had reasoned opinions from the Alabama appellate courts on the same matter as in federal court, allegedly absent sub judice; (2) improper defendants were named in Doe; (3) the relief sought in Doe was to overturn a state court order, though Gogola does not seek such relief herein (notwithstanding that a binding determination that Section 61.08, Fla.Stat. (2004) is unconstitutional would, in effect, overturn the award of permanent alimony for Sandra Gogola, to the relief of Gogola); (4) Doe involved a statute which was found unconstitutional by the United States Supreme Court; (5) no injury may have been present for the plaintiffs in Doe; and (6) there was little threat of enforcement of the statute in Doe. See Appellant’s Brief at p.7-9. Gogola’s attempts to distinguish Doe are patently without merit, and fail to recognize the basis of the Doe decision: that any decision of the District Court

and/or Eleventh Circuit as to the Constitutionality or unconstitutionality of Section 61.08, Fla.Stat. (2004), would not bind the state courts to follow its determination. Such attempts at distinguishing Doe, then, are distinctions without a difference.

B. Whether the Rooker-Feldman doctrine applies herein.

The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, lack jurisdiction to review the final judgments of state courts, if the following criteria are met: (1) the Plaintiff was a party in the state court proceedings; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceedings; and (4) the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment. See Amos v. Glynn County Bd. of Tax Assessors, 347 F. 3d 1249, 1265 n. 11(11th Cir. 2003). Sub judice, all of the criteria are met: (1) Gogola was a primary party to the prior state court dissolution of marriage proceedings; (2) the Final Judgment of Dissolution of Marriage was a final judgment on the merits of all related issues, including alimony; (3) Gogola did or had the opportunity to raise the federal challenges in state court, from the time of dissolution throughout subsequent proceedings, involving, for example, Gogola's Motion for Declaratory Judgment and Injunctive Relief that Chapter 61, Fla. Stat.,

Post-dissolution Permanent Spousal Provisions Violate the Florida Constitution, see R-11, Exhibit 3, and, indeed, Gogola argued at least some of the federal claims herein in the state court proceedings, see R-11, Exhibit 3; and (4) the state court adjudicated the issues before the federal court, or the issues were inextricably intertwined with the state court's judgment as to the dissolution or marriage, or in subsequent orders directly relevant thereto, see R-11, Exhibit 3.

Gogola argues herein, however, that the Rooker-Feldman doctrine does not apply, because: (1) his action is a Constitutional civil rights action, and not one in family law; (2) Gogola does not seek to overturn a state court judgment; (3) Gogola lacked reasonable opportunity to raise the federal claims in state court; and (4) judicial economy. See Appellant's Brief at p.11-16. Gogola's arguments are utterly meritless, especially when considering that Gogola, in effect, is seeking to overturn the state dissolution judgment vis-a-vis a Constitutional challenge against Section 61.08, Fla.Stat. (2004), and Gogola did or had the opportunity to raise the federal claims in state court, but is simply dissatisfied with the results and/or perceives the state courts to have failed to provide sufficient reasoning.

An affirmance is mandated herein.

C. Other grounds exist to affirm the District Court's decision.

In addition and/or in the alternative, and even if error is assumed in the

reasoning of the District Court's dismissal herein, an affirmance is proper, based on the established proposition of appellate law that an affirmance is proper, where the lower court reached the right result, though not necessarily for the right reason. See, e.g., Davis v. Liberty Mutual Ins. Co., 525 F. 2d 1204, 1207 (11th Cir. 1976).

In this regard, the District Court, in addition to and/or in the alternative to finding that it lacked subject matter jurisdiction under the Rooker-Feldman doctrine, could have properly dismissed the case vis-a-vis abstention, since the state court continues in presiding over dissolution of marriage proceedings, including, for example, modifications of alimony or support or contempt for failure to pay court ordered alimony or support payments. See Ankenbrandt v. Richards, 504 U.S. 689, 704-05 (1992).

Moreover, and on the merits, Section 61.08, Fla.Stat. (2004), survives Constitutional challenge. In reviewing and addressing all of Gogola's challenges in the Amended Verified Complaint, none withstand scrutiny. As Chapter 61, Fla.Stat., is gender neutral, as to the award of alimony, the federal and state Constitutional challenges herein, based on equal protection, are baseless. See In Re Crist, 632 F. 2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) and cert. denied, 454 U.S. 819 (1981). Moreover, no reasonable view of court ordered alimony suggests even a possible violation of the due process rights of privacy,

under the federal and state Constitutions, since dissolution proceedings do not invoke the right to marry; that is, Gogola's view, to wit, that a dissolution of marriage, because it involves the termination of a marriage, invokes the same Constitutionally protected right as marriage, is fatally flawed. Similarly, the federal Constitution's prohibition against involuntary servitude, by and through the Thirteenth Amendment, is not even remotely invoked, simply because a possibility exists that an ex-spouse has to work to pay the court ordered payments. Finally, Chapter 61, Fla.Stat., does not violate public policy or prior case law, since the award of alimony may be proper, in given instances, and indeed, required by equity.

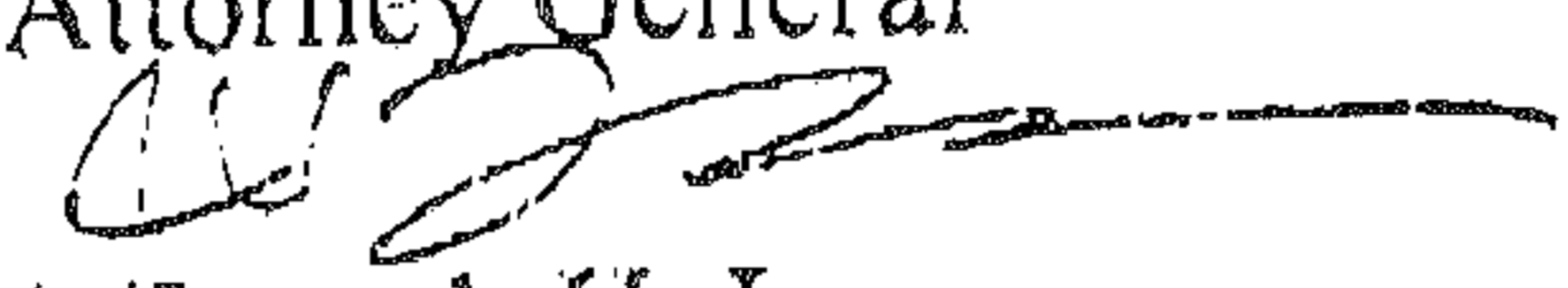
An affirmance is proper. Cf. Pacheco v. Pacheco, 246 So. 2d 778, 782 (Fla.) Section 61.08, Fla.Stat. is a valid exercise of the State's police power and does not contravene Constitutional assurances of due process and equal protection), appeal dismissed, 404 U.S. 804 (1971); Barna v. Barna, 850 So. 2d 603 (Fla. 4th DCA 2003) (award of fees and costs proper against party who challenged Constitutionality of alimony statute, as such a challenge is without basis in fact or law), rev. denied, 870 So. 2d 820 (Fla.), and cert. denied, 125 S. Ct. 53 (2004).

CONCLUSION

For the foregoing reasons, Defendants/Appellees, Zingale and DOR, request this Honorable Court to affirm the District Court's dismissal of the action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, was furnished via U.S. Mail to Michael S. Gogola, 2154 Wallace Drive, Waycross, Georgia 31503, on this the 8th day of April 2005.


/s/ Joseph H. Lee
Joseph H. Lee
Assistant Attorney General