

NO. 05-10187-F

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

STEWART GREENBERG,
Plaintiff/appellant,

v.

**JAMES ZINGALE,
FLORIDA DEPARTMENT OF REVENUE, and
FIFTEENTH JUDICIAL CIRCUIT,**
Defendants/appellees.

**On Appeal from the United States District Court
for the Southern District of Florida
Case No. 04-80443-CV-KLR**

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

The Appellant, Stewart Greenberg, was the *pro se* plaintiff in the district court. The Appellees have properly stated the relevant facts of the case, which are essentially limited exclusively to the pleadings filed therein, and the orders of the magistrate judge and district court. (R1:1, 23, 24, 31). It should be noted that there were no facts adduced from an evidentiary hearing, and that the only facts relevant to this appeal were established from a verified complaint filed by Appellant.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Erred in Granting Appellees' Motion to Dismiss the Complaint With Prejudice Where It Failed to Hold an Evidentiary Hearing on Critical Issues Dispositive of the Case

Appellees have argued generally in their Brief that the Motion to Dismiss was properly granted because “the alleged facts were insufficient to have created an genuine issue.” (Appellee Br., p. 10). Hence, Appellees argued that an evidentiary hearing was not required because there were not sufficient facts alleged in the pleadings to trigger an evidentiary hearing regarding any challenge to the constitutionality of the alimony statutes, and precisely a facial challenge.

First and foremost, this Court should recognize that Appellant was a *pro se* litigant. This Court noted in *Somerville v. Hall*, 2 F.3d 1563, 1564 (11th Cir. 1993) and *Johnson v. Pullman*, 845 F.2d 911, 914 (11th Cir. 1988), that there should be “special care with which *pro se* litigants must be treated [because they] occupy a position significantly different from that of litigants represented by counsel.” Appellant argues that this is should be especially true at the motion to dismiss stage. Contrary to Appellees’ position, there is no heightened pleading standard for a basic constitutional challenge to a state statute, and certainly any heightened pleading requirements are relaxed for *pro se* litigants. Thus, contrary to Appellees’ position that there were not sufficient facts to trigger an “as applied” challenge, the district court should have given Appellant an opportunity to develop a record with more detailed facts, so that a proper “as applied” challenge could be developed for summary judgment purposes.

However, even the facts alleged in the verified complaint, viewed in the light most favorable to Appellant, are sufficient to determine that Appellant was making both an “as applied” challenge to the alimony statutes, because of how he couched the issues in terms of his own Florida alimony dispute, as well as a “facial challenge.”¹

¹ Without belaboring the point, this Court is aware that a complaint should not be dismissed unless it appears *beyond doubt* that the plaintiff can prove no set of facts that would entitle him or her to relief. *Mahon v. City of Largo, Fla.*, 829

(R1:1). Because the verified complaint sufficiently alleged facts which should have triggered the district court to proceed to summary judgment, requiring that an evidentiary record be established, and set a scheduling deadline for the same, the motion to dismiss was imprudently granted.

Appellees cite no authority for the proposition that a district court can make factual findings in an order *without* holding an evidentiary hearing. However, the district court did exactly that in this case in its orders an. (R1: 31). For example, as cited by Appellees, the magistrate judge made the broad assertion that “the alimony statutes do not interfere with a person’s decision to exit a marriage.” (R1:24).² In another broad stroke, the district court asserted, without any evidence whatsoever, that “permanent alimony furthers the purpose of providing for the needs and the necessities of life to a former spouse,” and that “rehabilitative alimony, on the other hand, is to establish the capacity for self-support of the receiving spouse, either through the redevelopment of previous skills or provision of the training necessary to development potential supportive skills.” (R1:31).

It is apparent that the district court extensively borrowed phrases from a 1980 Florida Supreme Court case, *Canakaris v. Canakaris*, 382 So.2d 1197, 1201 (Fla.

F.Supp. 377, 381 (M.D. Fla. 1993), *citing Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957).

1980), which did not involve a similar constitutional challenge to the alimony statutes. More importantly, the district court borrowed these phrases and made them appear to be factual assertions relating to Appellant, but in reality, these assertions are nothing more than dicta from a 25-year old Florida Supreme Court case. There was no record evidence that Appellant's former spouse required alimony for her "needs and necessities of life," or that she had the need to have "self-support," or that Appellant's decision to exit his marriage was not affected by the imposition of court-ordered alimony. Rather, the allegations in the verified complaint, which are to be accepted as true, stated that the State of Florida improvidently imposed alimony on Appellant.

In a nutshell, the district court made *factual* findings about Florida's alimony statutory scheme, without any record evidence, other than citations from Florida cases. These facts were used to determine whether the alimony statutes were constitutionally valid on their face. This case should be reversed and remanded with directions to the district court to proceed to summary judgment so that the appropriate record evidence can be formulated in the scope of summary judgment proceedings or the like.

II. The District Court Erred in Granting the Motion to Dismiss With Prejudice By Not Applying the Appropriate Strict Scrutiny Analysis to Determine the Constitutionality of Florida’s Permanent Alimony Statutes.

Appellees have argued that first and foremost, the strict scrutiny analysis is not applicable to alimony statutes, and secondly, if it is applicable, Florida’s alimony scheme *would* still pass a “strict scrutiny, compelling state interest” analysis. (Appellees’ Br., 14). Appellant has asserted that the district court erred when it neglected to require the Appellees to produce any evidence of a state interest to justify the alimony statutes, and that certainly there was no record evidence of a compelling state interest. The district court opined, without record evidence, that the statutes passed the rational basis analysis – although the district court recognized that alimony invokes privacy protections.

As argued in Point I, *supra.*, this Court need not address whether the Florida alimony scheme *would* pass any type of analysis, because the district court had no facts upon which to base its own analysis of a State interest – whether employing a rational basis or strict scrutiny test. Instead, the district court improperly dismissed the case without giving Appellant an opportunity to develop the appropriate facts through discovery and an evidentiary hearing to dispute the state’s interest in perpetuating the alimony statutes, which would have been more appropriate in a

summary judgement proceeding. Elementary to any type of constitutional analysis is the requirement that a court determine evidence of the “State’s interest” in justifying a law which touches upon privacy interests. The State’s interest cannot be inferred merely from the language of the statute, or from dicta taken from state supreme court cases interpreting the application of the statutes, or from bare legal conclusions by a magistrate judge or district court judge. Although Appellees may have argued a “State interest” in its Answer Brief, this Court should disregard it to the extent that the issue was not properly addressed in the district court, and to the extent that such evidence of a “State interest” is totally lacking in the Record before this Court. Therefore, because the district court did not conduct an evidentiary hearing to determine facts to support its constitutional analysis, this Court has difficulty conducting any type of constitutional analysis.³

Should this Court determine that a constitutional analysis can be conducted based on the record evidence in this case, which was established only from initial pleadings leading up to the dismissal, then this Court must first decide what type of constitutional analysis is appropriate. Appellees suggest that because the “purposes of the alimony statutes are to mitigate the potential harm to the spouses and their

³ Appellant suggests that any State “interest” must be based on facts, placed into evidence, by representatives of the state, which justify why the alimony statutes serve that State interest.

children caused by the process of legal dissolution of marriage, . . . and to do equity between the parties to a marriage during the dissolution thereof,” it can be assumed that the State has “important state interests.” (Appellees’ Br., p. 19-20). Appellees further suggest that the “interest burdened is to dissolve a marriage.” *Id.* Appellees also argue that the right to dissolve a marriage without application of the alimony statutes “would not appear to have a stronger constitutional basis than education, so rational relationship is the appropriate test . . .” (Appellees’ Br., 16).

Appellees have totally failed to digest why application of Florida’s alimony statutes, and on their face or as applied to Appellant, require a strict scrutiny review. Appellees would prefer that the rational basis test apply, because this test has traditionally been easy to meet. However, under strict scrutiny review, an act is presumptively unconstitutional unless proved valid by the State because it is well settled that if a law “impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.” *Harris v. McRae*, 448 U.S. 297, 312 (1980).⁴ Instead, Appellees equate alimony and marital decisions to “education,” which clearly does not invoke notions of privacy. But even the district

⁴ “It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’” *Harris v. McRae*, 448 U.S. 297, 312 (1980), quoting *City of Mobile v. Bolden*, 466 U.S. 55, 76 (1980).

court found that the challenged permanent alimony sections were encompassed by the umbrella of the Fourteenth Amendment's right of privacy, which protects the zone of personal decisions relating to marriage, i.e. divorce. (R1-24, R1-31). The district court found support for the recognition of privacy interests in *Zablocki v. Redhail*, 434 US 374, 384-385 (1978) (citing *Cleveland v Board of Education*, 414, U.S. 632, 639-640, (1974)); *Littlejohn v. Rose*, 786 F.2d 785, 786 (6th Cir. 1985); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); and *Carey v. Population Serv. Int 'l.*, 431 U.S. 678, 684-685 (1977).

Indeed, the U.S. Supreme Court re-emphasized privacy and liberty interests go hand-in-hand, and that the strict scrutiny analysis must apply where the interests are implicated. For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the U.S. Supreme Court reiterated that constitutional privacy principles applied to sodomy laws, and that there was a "tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships." *Williams v. Attorney General of Alabama*, --- F.3d ----, 18 Fla. L. Weekly Fed. C 355 (Barkett, J., dissenting). Indeed, the U.S. Supreme Court has found that some decisions are so fundamental and central to human liberty that they are protected as part of a right to privacy under the Due Process Clause, and the government may constitutionally restrict these decisions only

if it has *more* than an ordinary run-of-the-mill governmental purpose. *Id.* In this case, Appellees would have had to show proof of more than a run-of-the-mill governmental purpose for enforcing Florida’s alimony scheme. When a court subjects governmental restrictions to a heightened scrutiny, requiring that legislation be “narrowly drawn” to achieve a “compelling state interest,” then the burden is on the State to produce the appropriate evidence of its interest in the legislation. Appellant was prepared to rebut that evidence, but was not given a chance to do so. The Supreme Court has explained that it was strict scrutiny that recognized the ability of adults to make decisions relating to the right to abortion, *Roe v. Wade*, 410 U.S. 113, 139 (1973); contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965); marriage, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967); family relationships, *Prince v. Massachusetts*, 321 U.S. 158 (1944); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).⁵

Accordingly, applying the analytical framework of *Lawrence* compels the conclusion that the Due Process Clause protects a right to privacy in the arena of

⁵ Indeed, recently this Court held in *Cooper v. Dillon*, F.3d ----, 18 Fla. L. Weekly Fed. C 355 (11th Cir. March 22, 2005), that the application of a strict scrutiny analysis requires the district court to carefully review facts in the context of a summary judgement motion.

choosing to divorce an individual. *Lawrence* reiterated that its prior fundamental rights cases protected individual choices “concerning the intimacies of [a] physical relationship.” *Lawrence*, at 123 S.Ct. at 1243. Because of this precedent, the *Lawrence* Court overruled *Bowers*, concluding that *Bowers* had "misapprehended the claim of liberty there presented" as involving a particular sexual act rather than the broader right of adult sexual privacy. Hence, “personal decisions related to marriage” are afforded the fundamental protection of privacy. *Carey v. Population Services Intl.*, 431 U.S. 678 (1977), and because dissolution of marriage is a personal decision clearly related to marriage, the alimony resulting therefrom deserves strict scrutiny review.

Further, strict scrutiny is the proper analysis because Florida’s alimony scheme, in a real sense, involves a claim of liberty regarding personal decisions in one’s own marital relations and the State’s ability to govern the way a marriage is to be dissolved. In essence, the “balancing of the equities” under the Florida alimony scheme is a prime example of the State’s interference in decisions made during the marriage, and the financial repercussions imposed by the State upon dissolution of that marriage. Liberty to do something, particularly that which is intimate, is the very essence of our legal system, the purpose of our society, and the principle to be applied to the alimony privacy amendment issue. The district court failed to address the liberty issue inherent

in the privacy amendment analysis as it pertains to court-ordered alimony. More importantly, the U.S. Supreme Court in *Lawrence* made it clear that its own earlier precedent (*Bowers v. Hardwick*) had to be abrogated in order to provide a more concise view of privacy and liberty. See, e.g., Justice Barkett's dissent in *Williams v. Attorney General of Alabama*, --- F.3d ----, 18 Fla. L. Weekly Fed. C 355. Surely any legal challenge to *Bowers* would have, at first glance, seemed frivolous and futile, given its long-standing precedence. Perhaps the same seems true for alimony statutes. The *Lawrence* decision, however, affirmed that the constitutional analyses of liberty and privacy can change, do change, and should change.⁶ Because the Supreme Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Zablocki v. Redhail*, 434 U.S. 374, this Court should recognize that even if the district court did properly review the facts of the case, strict scrutiny was the appropriate avenue of review for Appellant's

⁶ Florida's alimony scheme is clearly statutory, as reiterated in *Pacheco v. Pacheco* 246 So.2d 778, 780 (Fla.1971), wherein the Florida Supreme Court affirmed that there is no common law right to alimony: "[a]t common law there was no right to alimony at all... We are not here confronted by a statutory deprivation of a common law right. The so-called 'right' to alimony does not exist as an incident to divorce *A vinculo* unless it is granted by statute."

constitutional claim. Further, given the “associational interests that surround the establishment and dissolution of [the marital] relationship,” such “adjustments” as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. *Zablocki*, 434 U.S. at 385.

Finally, Appellees have argued that Florida’s alimony scheme *would* still pass a “strict scrutiny, compelling state interest” analysis, even if this Court were to determine that this was the proper constitutional analysis. (Appellees’ Br., 14). This assertion is not based in fact. In the district court, Appellees offered no State interest in their pleadings, let alone a compelling state interest, to justify Florida’s alimony scheme. (R1:13). The Appellees’ silence in the district court regarding evidence of any State interest indicates that whatever interest they may now offer is not a compelling one. Indeed, how can the State really show that by balancing the equities, it has a compelling state interest in the interference of marital relations and the way that persons live their lives during the marriage, and settle their differences thereafter.⁷ Of course, this Court must acknowledge that, in a sense, the way a person interacts in the marriage will determine, in some part, the amount of alimony award by a state court because of the application of “equities.” The district court, however, opined that

⁷ Indeed, under Florida law, a “court may impute income to a spouse who is earning less than she could with the use of her best efforts.” *Ritter v. Ritter*, 690 So. 2d 1372, 1374 (Fla. 2d DCA 1997).

“[t]he alimony statutes do interfere with one’s decision to exit a marriage...” acknowledging the infringement of the statute on the fundamental liberty interest and right of privacy. Yet, the district court erred, due to a lack of a proper constitutional analysis, by surmising that “... such interference does not rise to a constitutional violation.” (R1:31). The district court had no basis for this assertion.⁸

The district court, although having acknowledged the right of privacy, failed to apply the strict scrutiny standard to the statute, and failed to make factual findings justifying a compelling state interest. Therefore, this case should be remanded with directions to the district court to make the appropriate findings regarding its assertion that Florida’s alimony statutes pass constitutional muster.

CONCLUSION

Based on the foregoing facts and argument, it is clear that the district court imprudently granted the motion to dismiss, and should have instead given Appellant the opportunity to establish a factual record, and should have required that the Appellees provide a compelling state interest justifying the imposing of the Florida alimony statutes, and should have analyzed the facts of the case in that light.

⁸ For example, under Florida law, “[t]o impute income to a former spouse, the trial court must find that the unemployment is voluntary, and resulted from either the spouse’s pursuit of his or her own interests, or a less than diligent and bona fide effort to find employment paying at a level equal to that formerly enjoyed.” *Ensley v. Ensley*, 578 So. 2d 497(Fla. 5 DCA 1991).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in F.R.C.P. 32(a)(7)(B). This brief contains 3,605 words, as computed by the Corel WordPerfect 2000 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 upon conversion of the file.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Initial Brief was served by mail this ____ day of April, 2005, to:

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