IN THE SUPREME COURT OF FLORIDA

Case Number: SC07-1024

In Re Marriage of	:
WILLIAM A. CABANA	:
Appellant, *pro se*	:
	: Case Number: 4D06-1883
and	: Lower Tribunal 4th DCA
	:
SHARON ANN MAYO	:
Appellee.	:

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FLORIDA FOURTH DISTRICT COURT OF APPEALS

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE AND OF THE FACTS 3

ARGUMENT AND JURISDICTIONAL STATEMENT 5

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *FLORIDA DEP'T OF TRANSP. V. JULIANO*, 801 SO. 2D 101 (FLA. 2001); *STATE V. MCBRIDE*, 848 SO. 2D 287 (FLA. 2003), *TOPPS V. STATE*, 800 SO. 2D 617 (FLA. 2001) 5

A. Jurisdiction 6

B. Argument (Res Judicata) 6

C. Argument (Issues of First Impression) 7

D. Argument (Declaratory Judgment) 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF FONT 10

TABLE OF AUTHORITIES

Cases

Bush v. Schiavo, 885 So.2d 321 (Fla. 2004) 1

Canakaris v. Canakaris, 383 So.2d 1197 (Fla.1980) 1

Connor v. Southwest Florida Regional Medical Center, Inc., 668 So.2d 175 (Fla. 1995) 1, 4

Fishman v. Fishman, 656 So.2d 1250 (Fla. 1995) 7

Florida Dep't of Transp. v. Juliano, 801 So. 2d 101 (Fla. 2001) .... ii, 5

Gates v. Foley, 247 So.2d 40 (Fla. 1971) 9

Phelan v. Phelan 12 Fla 449 (1868) 4, 7

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 1

State v. McBride, 848 So. 2d 287 (Fla. 2003) .... ii, 5, 6

Topps v. State, 800 So. 2d 617 (Fla. 2001) .... ii, 5, 6

Statutes

§ 61.08 Fla. Stat 1, 2, 7

§ 61.08 (2), Fla. Stat. 4

Chapter 86 Fla. Stat. 8

Other Authorities

Gender Bias—Then and Now, Continuing Challenges in the Legal System, The Report of the Gender Bias Study Implementation Commission (1996) 8

O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)........1

Report of the Florida Supreme Court Gender Bias Study Commission (1990)...7

Rules

Fla. R. App. P. 9.030(a)(2)(A)(iv)..5

Constitutional Provisions

Art. I Sec 11, Fla. Const..7

Art. I Sec 23 Fla. Const.. 1, 4, 7

Art. III Sec 3 Fla. Const.. 1, 4, 7

Art. V, § 3(b)(3)...5

Treatises

O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)........1

INTRODUCTION

> "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." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992)

The Alimony statute (§ 61.08 Fla. Stat) must be revisited by this court. It is over a quarter of a century since this court had a comprehensive look at the alimony statute (*Canakaris v. Canakaris,* 383 So.2d 1197 (Fla.1980). Since then, there have been sea changes in Florida Law that directly impact the statute, i.e. Art. I Sec 23 Fla. Const. Right of Privacy (1980), abrogation of the doctrine of necessaries (*Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So.2d 175 (Fla. 1995) and the failure of the legislature to reinstate it in a gender neutral mode in 1996); and the current appreciation of Art. III Section 3 Fla.. Const. Separation of Powers as this court illuminated it in *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004); as well as the shocking revelations of the two Gender Bias Reports (1990, 1996) commissioned by this court that point out the inability to implement the flawed statute.

Multiple attempts to seek judicial review of the impact of new law on the alimony statute have resulted in attorney and party sanctions, as well as former husbands being assessed fees and costs for making constitutional challenges to the statute --and, for various reasons, about fifteen courts declining to give

reasoned opinions.[1]

One of the last things this court may wish to do is review and offer another tutorial on the proper application of res judicata. Nonetheless, it should. The reviewable component of the order is its misapplication of res judicata in the family law context to deny the Petitioner review of the constitutionality of the alimony statute issues raised on appeal. Instead, the effect of the order is to continue to misapply the alimony statute against the Petitioner thirty-five (35) years after he exercised his fundamental right to alter his associational interest. Thirty-five (35) years later his personal freedom, liberty interest, property rights, and the remaining days of his life continue to be under the control of the Florida judiciary.

The Petitioner's fundamental rights are inextricably intertwined with the district court's misapplication of res judicata when it chooses to deny a reasoned opinion on the constitutionality of § 61.08 Fla. Stat. Unless this court exercises

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[1] See e.g. Barna v. Barna, 850 So.2d 603 (Fla.App. 4 Dist. 2003) cert denied Florida Supreme Court; Blanchard v. Blanchard, 844 So.2d 805 (Fla.App. 4 Dist. 2003); Martyak v. Martyak, 881 So.2d 48 (Fla.App. 4 Dist. 2004); Martyak v. Martyak, 873 So.2d 405 (Fla.App. 4 Dist. 2004); Gogola v. Gogola, Case No. 98-8094 CA C 20th Judicial Circuit Court; Gogola v. Gogola, 837 So.2d 975 (Fla.App. 2 Dist. 2003); Johnson v. Johnson Case No. 80-1004 CA 15th Judicial Circuit Court; Alliance for Freedom from Alimony, Inc and Richard Lindsey v. Butterworth, Zingale, Case No. 4D02-2288; Greenberg v. Greenberg, 862 So.2d 806 (Fla.App. 4 Dist. 2003), Cabana v. Mayo, 4D05-3906 (Fla.App. 4 Dist. 1-12-2006); Cabana v. Mayo, Case No. 4D06-594 (Fla.App. 4 Dist. 3-8-2006); Cabana v. Zingale, 2D06-5577 (Fla.App. 2 Dist. 5-25-2007); Cabana v. Mayo, 4D06-1883 (Fla.App. 4 Dist. 3-7-2007), Martyak v. Martyak, 4D06-4069 (Fla.App. 4 Dist. 4-11-2007); Radloff v. Radloff, Case Number: 5D06-1998 (Fla.App. 5 Dist. 5-17-2007)

its discretionary jurisdiction to once again address the misapplication of res judicata the Florida judiciary will have again denied the Petitioner and all Floridians a reasoned opinion on the constitutionality of the alimony statute. This reasoned analysis with written opinion is critical to the liberty interests of Floridians in light of intervening constitutional amendments and caselaw since this court's last review of the alimony statute.

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, after an eleven-year marriage, was divorced in 1972 and ordered to pay $25 per week alimony—forever—without any terms of termination. No minor children are at issue now in this case. Thirty-five (35) years later, with the alimony yoke still around his neck, he is still subject to Florida court jurisdiction and its enforcement authority.

The Petitioner, whose income is below the poverty level and who has no assets, paid alimony for about thirty years. Afterward arrearages developed in his alimony payments. The former wife filed a motion for contempt and commitment. The trial court, on January 6, 2006, concluded he had an ability to purge and incarcerated him. (At hearing the trial judge stated he would terminate future alimony obligations but in his order he did not. The trial judge denied a motion to amend the final order to include termination.)

After nineteen days incarceration, the Petitioner borrowed the purge amount and was released. He filed an appeal February 10, 2006. The Fourth

District Court of Appeals denied his appeal as untimely.

The Petitioner had filed in the trial court a Motion to Vacate the Contempt Commitment Order of January 6, 2006 based on misrepresentation of his assets by opposing counsel. As part of the proceedings the Appellant again unsuccessfully raised the constitutionality of the alimony statutes as the Motion was denied April 19, 2006. The denial of the motion to vacate was timely appealed May 8, 2006 to the Fourth District Court of Appeals.

The Appeal before the Fourth District Court of Appeals raised the issues of whether the alimony statute, § 61.08, impermissibly infringed Art. I Sec. 23, Fla. Const., Right of Privacy, in the privacy protected zone of "personal decisions related to marriage"; impermissibly infringed Art. III Sec 3 Fla. Const, Separation of Powers as impermissibly delegated exclusive legislative law making power (§ 61.08 (2), Fla. Stat.); as contrary to public policy effected in the abrogation of the doctrine of necessaries in *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So.2d 175 (Fla. 1995); and the impermissible use of incarceration as an enforcement for alimony because it is based on an erroneous caselaw interpretation that alimony is a duty and not a debt contained in *Phelan v. Phelan* 12 Fla. 449 (1868)

The Fourth District Court of Appeals denied review of the constitutional challenge issues because of res judicata. The order here appealed further stated that even if the alimony statute violated the fundamental right of privacy the alimony arrearages were vested and as vested would not be effected by an

unconstitutional declaration of the statute. This ruling overlooked the rule that a statute that impermissibly infringes a fundamental right is void ab initio and cannot create any rights.

A motion for rehearing and rehearing en banc was denied May 8, 2007. The appeal to this court was timely filed May 31, 2007.

SUMMARY OF ARGUMENT

> "The right of the State to regulate the institution of marriage under its police power is unquestioned where it does not infringe on fundamental rights. *Zablocki v. Redhail*, 434 U.S. 374, 396 (1978) (Powell, J., concurring).

The Fourth District Court's denial of the appealed constitutional challenges to the alimony statutes is grounded in res judicata.

The Petitioner has not been involved in any other state action in which the issues were raised or could have been raised. The instant ruling conflicts with three rulings by this court on res judicata being applicable to deny claims raised in a second lawsuit that were or could have been raised and adjudicated in a prior lawsuit. There was no prior lawsuit between the parties.

Conflict directly and expressly exists with *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101 (Fla. 2001); *State v. McBride*, 848 So. 2d 287 (Fla. 2003); *Topps v. State*, 800 So. 2d 617 (Fla. 2001)

ARGUMENT AND JURISDICTIONAL STATEMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS

WITH THE DECISIONS OF THIS COURT IN *FLORIDA DEP'T OF TRANSP. V. JULIANO*, 801 SO. 2D 101 (FLA. 2001); *STATE V. MCBRIDE*, 848 SO. 2D 287 (FLA. 2003), *TOPPS V. STATE*, 800 SO. 2D 617 (FLA. 2001)

A. Jurisdiction

This Court has authority to exercise its discretionary review of any decision of a district court that expressly and directly conflicts with a decision of this court on the same question of law. Art. V, § 3(b)(3), Florida Constitution; Fla. R. App. P. 9.030(a)(2)(A)(iv). The decision of the district court directly and expressly conflicts with this court's decision in *Juliano, McBride* and *Topps* with respect to the application of res judicata.

B. Argument (Res Judicata)

This Court should exercise its jurisdiction because the Fourth District's decision conflicts with this court's application of res judicata.

This court three times opined that res judicata is applicable to foreclose claims in a second lawsuit that were raised or could have been raised in a prior lawsuit between the same parties in privity. In this case there has not been a prior lawsuit. There has been only one lawsuit between the parties-albeit a lawsuit that began over thirty-five (35) years ago, therefore res judicata cannot apply and the district court order conflicts with *Juliano, McBride and Topps*.

State v. McBride, 848 So. 2d 287 (Fla. 2003),

> "A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the

claim, but as to every other matter which might with propriety have been litigated and determined in that action. Juliano, 801 So.2d at 105 (quoting Kimbrell v. Paige, 448 So.2d 1009, 1012 (Fla. 1984))." [Emphasis in the original]

Topps v. State, 800 So. 2d 617 (Fla. 2001) (wherein a writ was deemed a separation action thus triggering res judicata),

"The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. See Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001)." [Emphasis added]

C. Argument (Issues of First Impression)

This case also presents the first opportunity for this Court to interpret the constitutionality of § 61.08 Fla. Stat. as impermissibly infringing Art. I Sec 23, Fla. Const. Right of Privacy; impermissibly infringing Art. III Sec 3, Fla. Const., Separation of Powers; impermissibly conflicting with the public policy initiated by this court's abrogation of the doctrine of necessaries in *Connor v. Southwest* 778 So. 2d. and established when the legislature failed to pass a gender neutral doctrine of necessaries[2]; and that incarceration is impermissible to enforce alimony payments because the concept that alimony is a duty not a debt has erroneously risen to a precedential doctrine based on misciting of *Phelan v. Phelan* 12 Fla. 449 (1868) in rulings such as *Fishman v. Fishman*, 656 So.2d 1250 (Fla. 1995) --when in fact alimony is a debt for which incarceration is impermissible under Art. I Sec 11, Fla. Const.

[2] See Fla. HB 1211 (1996); Fla. SB 906 (1996).

This appeal also provides this court the opportunity to address distressing findings as to the implementation of the alimony statute noted in the Report of the Florida Supreme Court Gender Bias Study Commission (1990) such as,

> "Apparently, most judges really do not want to hear family law matters and it shows…It cannot be comforting to find that the one who holds the future of your access to your children and your financial future in his or her hands has, at best, little interest in that role, or, at worst, a distaste for it." (page 54)
>
> Most of Florida's circuit court judges dislike dealing with family law matters. This attitude can affect the outcome of cases." (page 6)

…and Gender Bias—Then and Now, Continuing Challenges in the Legal System, The Report of the Gender Bias Study Implementation Commission (1996), such as,

> "…. However, it is not clear, based on appellate decisions, whether a trial judge must consider all the statutory factors and give equal weight to all, or just the relevant ones….
>
> …Section 61.08 requires the trial judge to make a laundry list of fact-findings when alimony is asked for and either awarded or denied. It is not clear whether all the statutory factors must be considered, or only relevant ones, and whether or not there is any factor or factors which should be given more weight than others." (page 7)

D. Argument (Declaratory Judgment)

The Petitioner wishes to notice this court that he filed a separate Chapter 86 Fla. Stat. Declaratory Judgment lawsuit in the Twelfth Circuit Court challenging the constitutionality of § 61.08 on the grounds noted above. The trial court dismissed the constitutional challenge without a written opinion. His

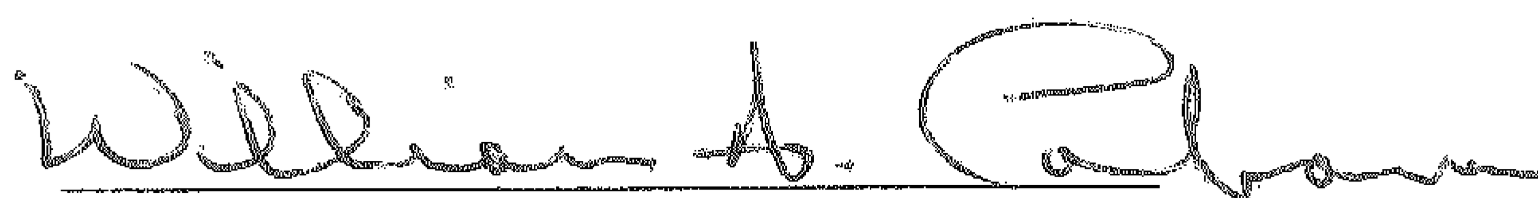
appeal to the Second District Court of Appeals was denied per curiam without written opinion.[3]

CONCLUSION

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)

> "The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed." Atkins in *Gates v. Foley*, 247 So.2d 40 (Fla. 1971)

This court has discretionary jurisdiction to review the decision below, and this court should exercise that jurisdiction to consider the merits of the petitioner's argument.

 June 20, 2007

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[3] Cabana v Zingale, Case Number: 06-CA-5063-SC 12th Circuit court; Case Number: 2D06-5577 2nd DCA May 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2007, I caused a true and accurate copy of this Petitioner's Brief on Jurisdiction to be sent by prepaid U.S. mail to:

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Assistant Attorney General,
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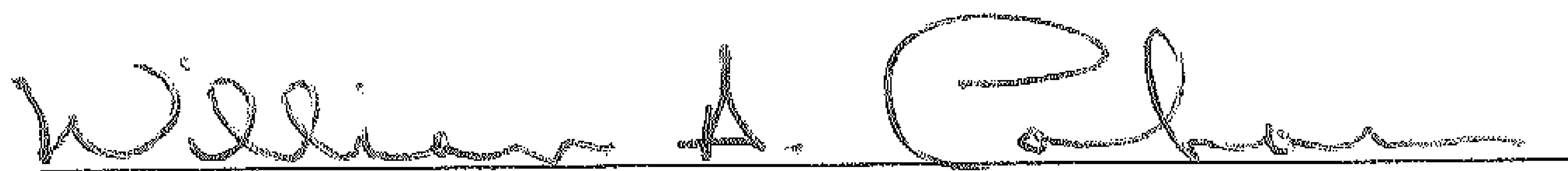
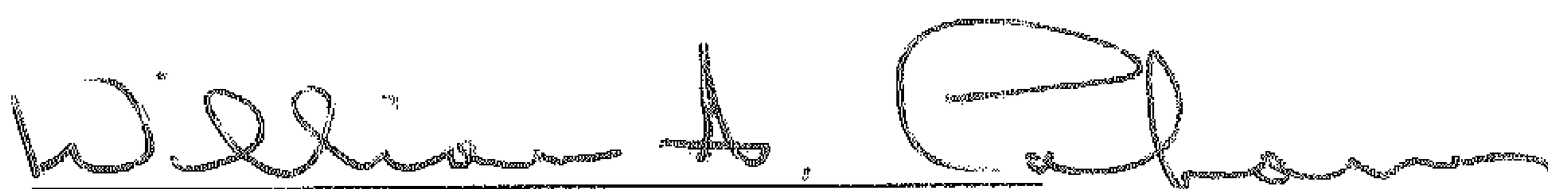


William A. Cabana, *pro se*, prepared with assistance of counsel

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is proportionally spaced 14 point Times New Roman.



William A. Cabana, *pro se*, prepared with assistance of counsel

Appendix

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2007

WILLIAM A. CABANA,
Appellant,

v.

SHARON ANN MAYO,
Appellee.

No. 4D06-1883

[March 7, 2007]

PER CURIAM.

Appellant was held in contempt for failure to pay alimony and appeals, arguing that Florida's alimony statute, section 61.08, violates the right to privacy provided in Article I, section 23 of the Florida Constitution, and the separation of powers provision contained in Article II, section 3 of the Florida Constitution. We affirm.

Appellant's marriage was dissolved in 1972, and he was ordered to pay twenty-five dollars a week in alimony. He was found to be in arrears in 1986 and 1991 and appeals a recent order finding him in contempt. Any arguments appellant has as to the constitutionality of section 61.08, under which he was required to pay alimony, were waived when he failed to raise these issues in the original dissolution proceeding. *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970); *Gilbertson v. Boggs*, 743 So. 2d 123 (Fla. 4th DCA 1999) (res judicata precluded paternity claim, which had been litigated in prior case and not appealed); *Johnson v. Women's Health Ctr.*, 714 So. 2d 580 (Fla. 5th DCA 1998) (same).

Appellant points out that the right to privacy provided in Article I, section 23, had not been in our constitution until the amendment of it, several years after the dissolution of his marriage. Even if section 61.08 violated the right to privacy, it would not relieve appellant of liability for his alimony arrearages, because they have become vested. *Boyer v. Andrews*, 143 Fla. 462 (Fla. 1940); *McArthur v. McArthur*, 106 So. 2d 73 (Fla. 1958).

Affirmed.

KLEIN, HAZOURI and MAY, JJ., concur.

*   *   *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Martin H. Colin, Judge; L.T. Case No. 501971DR004137XXDIFD.

William A. Cabana, Venice, pro se.

No brief filed for appellee.

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEALS OF FLORIDA
FOURTH DISTRICT

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DISTRICT COURT OF APPEAL
FOURTH DISTRICT

In Re Marriage of
WILLIAM A. CABANA
Appellant, *pro se*

Case Number: 4D06-1883

and

SHARON ANN MAYO
Appellee.

MOTION FOR REHEARING OR REHEARING EN BANC

The Appellant (former husband), *pro se* with assistance of counsel, pursuant to Fl. Rules App. Proc., Rule 9.330 requests this court to rehear this appeal because its order rendered March 7 2007 overlooked and misapprehended the following,

A. The order rendered misapprehended the doctrine of res judicata it chose to apply to deny the Appellant standing to challenge the constitutionality of the alimony statutes. Other misapprehensions exist.

B. The order rendered overlooked two issues. No order is rendered on the two issues. These issues are reachable despite this court's order denying standing to the appellant to challenge the constitutionality of the alimony statute.

The Appellant requests an en banc rehearing pursuant to Fl. Rules of App. Proc., Rule 9.331, because the case is of exceptional importance, i.e. applicability of res judicata to a single cause of action with a modifiable court order of final judgment based on equity effecting future alimony liabilities; the constitutionality

of the alimony statutes; whether the alimony statute conflicts with public policy; and whether incarceration for alimony and alimony arrearages is permissible.

MEMORANDUM OF LAW

Introduction

The first theme of this appeal was whether Florida's permanent alimony statute is no longer valid because it impermissibly infringes two state constitutional provisions as well as public policy initiated by the Florida Supreme Court ruling in *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So. 2d 175 (Fla. 1995) (abrogation of the doctrine of necessaries) and solidified by the legislature's twice failed attempts create a gender equal doctrine of necessaries. (Fla. HB 1211 (1996); Fla. SB 906 (1996)).

The second theme was that incarceration (civil contempt power) is no longer proper enforcement of alimony because there is no public policy of a doctrine of necessaries (i.e. spousal duty of support). It is improper also because the judicial caselaw creating an alleged duty to his wife and society of a "husband" to support his "wife". Incarceration as an enforcement remedy has been misapprehended and misapplied by courts allegedly originating in a holding of *Phelan v. Phelan,* 12 Fla. 449 (1868).

MISAPPREHENDED LAW

A. Res Judicata

This court's rendered order misapprehended res judicata. The doctrine applies to preclude a *second* action between the parties on the same issue. In this Appeal there has been only one action, albeit ongoing and open for over thirty years.

State v. McBride, 848 So. 2d 287 (Fla. 2003),

> "A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. Juliano, 801 So.2d at 105 (quoting Kimbrell v. Paige, 448 So.2d 1009, 1012 (Fla. 1984))." [Emphasis in the original]

Further evidence of the requirement of a distinct two actions for the applicability of res judicata is evident in *Topps v. State*, 800 So. 2d 617 (Fla. 2001) (wherein a writ was deemed a separation action thus triggering res judicata),

> "The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. See Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001)." [Emphasis added]

The lack of applicability of res judicata to this appeal renders reviewable the Appellant's constitutional challenge issues in this appeal.

B. Modifiability of Alimony creates lack of finality in Final Judgment of Dissolution

The caselaw cited in this court's order discusses the unique modifiability of the alimony portion of a final judgment. This future alterability of the alimony judgment creates issues as to enforceability. Florida courts uniquely in marriage dissolution retain eternal jurisdiction and particularly to adjust future alimony liabilities and interests. This continued openness of the alimony issue should afford a citizen with a future alimony liability the opportunity to challenge that liability based upon new law that ensues after the rendering of a Final Judgment of Dissolution of Marriage. Part of this appeal, overlooked, deals with the enforcement of not only past but future alimony liabilities.

Modification of the alimony judgment is permitted based on new facts…there is nothing to preclude it being permitted based on new law.

C. Enforcement of Judgment via Incarceration

The Appellant has sought a ruling on relief from incarceration (civil contempt power) as the enforcement mechanism for alimony arrearages. This issue in the appeal was not addressed by the court. It has profound consequences for the Appellant and all of Florida's alimony payers. It is also of exceptional importance.

D. Relief from Liability of Alimony Arrearages v. Future Alimony Obligations

No final order terminating the alimony obligation exists in this action. A ruling on the constitutionality of the alimony statute and a ruling on its conflicting with the public policy of an alleged spousal duty of support will effect non-vested future alimony liabilities that burden the Appellant. It is thus proper to render such a ruling in this appeal.

Conclusion

This court must rehear this appeal,

Because res judicata does not bar review;

Because the Appellant has not been relieved of future alimony liabilities by a trial court order the issues raised are not a bar to relief from ongoing and future liabilities;

Because of the unique ongoing jurisdiction of the Florida courts to modify the alimony portion of a Final Order of Dissolution, under principles of equity, as public policy and constitutional amendments change a party may properly request the new law be reviewed in the context of the fundamental issue of the judgment to properly effect future liabilities;

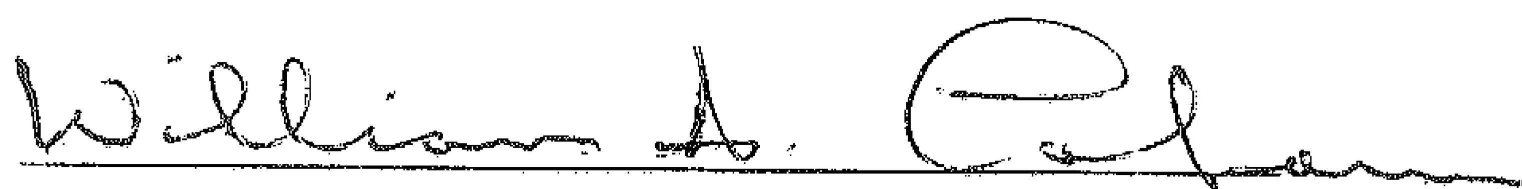
Because the alimony portion of the judgment is modifiable, i.e. alterable, new law that impacts that portion of the judgment may be incorporated in the action, as the new law will affect future liabilities;

Because two issues were not reviewed by this court and are reachable they must be reviewed;

Because incarceration as an enforcement is the deprivation of a state and federal liberty interest and fundamental right whether it is proper must be reviewed.

Rehearing en banc is proper because of the exceptional importance of the case and the issues in this appeal.

Respectfully submitted,



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March 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2005, I caused a true and accurate copy of this Motion for Rehearing or Rehearing En Banc to be sent by U.S. mail to:

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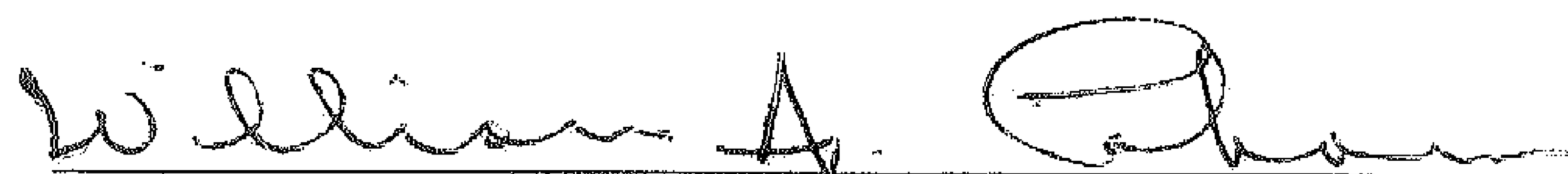

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

May 8, 2007

CASE NO.: 4D06-1883
L.T. No. : 501971DR004137XXDIF
D

WILLIAM A. CABANA v. SHARON ANN MAYO F/K/A SHARON ANN CABANA

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed March 13, 2007, and amended motion filed April 16, 2007, for rehearing or rehearing en banc is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

William A. Cabana David J. Glantz Cathy L. Kamber

ct

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal