

Appeal Case Number 4D06-1883

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IN THE FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

In Re Marriage of

WILLIAM A. CABANA

Appellant, *pro se*

v.

SHARON ANN MAYO

Appellee

Fifteenth Judicial Circuit Court of Florida

Case Number 501971DR004137XXDIFD

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FOURTH DISTRICT

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**APPELLANT'S JURISDICTIONAL BRIEF**

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### Jurisdiction Is Proper for This Appeal

On July 13, 2006 this court issued an opportunity to the Appellant to be heard on why it should not dismiss this appeal for lack of jurisdiction. (Notice to Show Cause for Dismissal For Lack of Appellate Jurisdiction Order.)

The Appellant argues below that the order appealed, is based on a Fl. Rules of Civ. Proc Rule 1.540 and Fl. Family Law Rule of Proc. Rule 12.540, and as such is a reviewable non-final order under Fl. Rules App. Proc. Rule 9.130 (a) (5).

In the alternative the Appellant also argues that this court should assume its granted jurisdiction to hear this appeal as a common law certiorari request under Fl. Rules App. Proc. Rule 9.030 (b)(2)(A). This case fulfills the *Belair v Drew*, 770 So.2d 1164 (Fla. 2000) elements for such jurisdiction.

## Order Appealed is a Reviewable Non Final Order

### Brief Statement of the Case and Facts

Thirty-four years after an eleven year marriage the Appellant's final order of dissolution of marriage was entered mandating a lifetime of alimony payments of \$25 a week. (Final Order of Dissolution July 28, 1972)

With the Appellant indigent, owning no assets, and living on an income below the poverty the level the former wife nonetheless filed contempt proceedings during which the her counsel presented bank accounts with the Appellant's name as POD (Payable on Death) for the account of his Mother. Appellee's counsel also misrepresented other facts as to the Appellant's assets, income and present ability to pay a purge amount. The trial court was misled as to accounts and assets accessible to the Appellant to secure purge monies and ordered him immediately incarcerated with purge amounts totaling of \$8830. The two commitment orders were rendered January 6, 2006.

The Appellant was immediately jailed and nineteen days later after borrowing the purge amount was freed on January 25, 2006.

The Appellant faxed a notice of Appeal to the Clerk of the Fifteenth Circuit Court of Florida on February 10, 2006 (DE 330) This court denied the appeal (Case Number 4D06-594) as untimely filed.

The Appellant filed a Motion to Vacate the Contempt/ Commitment order of January 6, 2006 based on material misrepresentation pursuant to Fl. Rules Civ. Proc Rule 1.540 After a hearing the motion to vacate was denied. (R Court Order April 17, 2006 (DE 360) denying Motion to Vacate) As part of the proceedings the Appellant again unsuccessfully raised the constitutionality of the alimony statutes.

This Appeal of the Order rendered on his Motion to Vacate was timely and properly filed May 8, 2006 (DE 368) by the Appellant. On May 16, 2006, the trial court granted Appellant's Motion to Proceed Without Prepayment of Fees to the 4<sup>th</sup> District Court of Appeals. An initial Appellant's brief was filed.

### **Proper Statutory Interpretation of Florida Court Rules**

If this court agrees with Judge Farmer's concurring opinion in *Goldman v. Campbell*, 920 So.2d 1264 (Fla. App. 4 Dist. 2006) it will interpret the rules of appellate procedure in a manner to accept jurisdiction on either of the jurisdictional grounds submitted, i.e. the order appealed is an appealable non-final order or accept appellate jurisdiction based on requested common law certiorari.

Judge Farmer has properly noted that the Florida Rules of Court

“... shall be construed to secure the *just*, speedy, and inexpensive determination of every action.” [e.s.] Fla.R.Civ.P. 1.010. The commentary to rule 1.010 explains:

"The direction that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action' has two courses. It is, first, a direction that if a rule needs interpretation, *the stated objective is the guide*. The direction recognizes that *procedural law is not an end in itself; it is only the means to an end*. And that end is the proper administration of the substantive law. Procedural law fulfils its purpose if the substantive law is thereby administered in a 'just, speedy, and inexpensive' manner. . . . It is, next, a direction that each rule shall be applied with that objective in mind, especially where the court may exercise a judicial discretion." [e.s.]  
30 FLA. STAT. ANN. 11 (1985)."

Accepting jurisdiction here will achieve those goals. Denying jurisdiction will be counter to the intent of the rules.

### Issues in the Appeal

The issues raised in this appeal are profound constitutional issues effecting the liberty interest and fundamental rights of the Appellant, who has diminishing years of life, as well as tens of thousand of Floridians. The issues here will continue to be raised by the Appellant in any further court proceeding and undoubtedly by others. This proper challenge to the constitutionality of the Florida permanent alimony statute is gaining widespread recognition and the Florida courts though failing in over seventeen proceedings will, sooner or later, render a reasoned opinion on the issues presented here. Now is proper.

## Fl. Rules of Appellate Court Rule 9.130 (a) (5)

Rule 9.130 (a.) (5) Orders entered on motions filed under *Florida Rule of Civil Procedure 1.540*, Small Claims Rule 7.190, Rule of Juvenile Procedure 8.270, and *Florida Family Law Rule of Procedure 12.540* are reviewable by the method prescribed by this rule.

Commentary to the rule states,

Subdivision (a) (5) grants a right of review of orders on motions seeking relief from a previous court order on the grounds of mistake, fraud, satisfaction of judgment, or other grounds listed in Florida Rule of Civil Procedure 1.540.

As noted above, and as the trial court record reflects, the order entered was based on a motion contained in Rule 9.130 (a) (5) and is reviewable.

The Appellant followed the method in the rule.

### **Common Law Certiorari**

This court should consider accepting jurisdiction under the common law certiorari doctrine, Fl. Rules App. Proc. Rule 9.030 (b)(2)(A). This Appeal fulfills the common law certiorari elements noted in *Belair v. Drew*, 770 So.2d 1164 (Fla. 2000) and *Fassy v. Crowley*, 884 So.2d 359. 362 (Fla. App. 2 Dist. 2004) "A petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on post-judgment appeal." *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So.2d 646, 648 (Fla. 2d DCA 1995)

Working backward as did the *Fassy* 884 So.2d court,

### **Post-Judgment Appeal Of No Avail**

The Appellant was already once removed directly from the trial court proceedings and incarcerated because of his alimony arrearages. If the trial court again misconstrues the evidence of his inability to pay he will again be incarcerated and an appeal will be of no avail. The current situation the Appellant now finds himself...attempting appeal after having been improperly incarcerated is likely to repeat itself.

### **Material Injury For Future Trial Court Proceedings**

The Argument above applies to this element also. The Appellant is now before a magistrate on a hearing August 2, 2006 as to whether he is in contempt for non payment of attorney fees levied against him in the same trial court order appealed. He has little faith that the magistrate will conclude his indigent status and inability to pay.

### **Departure From The Essential Requirements Of Law**

The Appellant requests this court follow the Florida Supreme Court analysis in *Belair* 779 So.2d and of *Williams v. Spears*, 719 So.2d 1236 (Fla. 1st DCA 1998). The Florida Supreme Court ruled that the district court of appeal should undertake the constitutional analysis of the statute in each of those cases and concluded that common law certiorari must be granted by

the district court under those circumstances...circumstances similar to these where the constitutionality of a state statute will effect a fundamental constitutional right and liberty interest.

“...if the statute under which Spears seeks visitation with her granddaughter is unconstitutional as applied to the parents in this case, the court has no authority to proceed with this litigation...” *Belair* 779 So.2d at 1166

“In *Williams*, the District Court granted certiorari because the parents' constitutional right to privacy was affected "by the very continuance" of the proceedings in the trial court, and any infringement during those proceedings could not be remedied upon appeal after the conclusion of the proceedings. In support of its conclusion, the district court relied on *Joseph v. State*, 642 So.2d 613 (Fla. 4th DCA 1994), *Clear Channel Communications, Inc. v. Murray*, 636 So.2d 818 (Fla. 1st DCA 1994), and *Saracusa v. State*, 528 So.2d 520 (Fla. 4th DCA 1988). In each of those cases it had also been determined that no adequate remedy would exist upon final appeal for an alleged continuing violation of constitutional rights during the trial proceedings.” *Belair* 779 So. 2d 1167

“We agree with the holding of the court in *Williams*, and therefore conclude that the district court erred in not granting certiorari review to petitioner and addressing the challenged statute.: Id

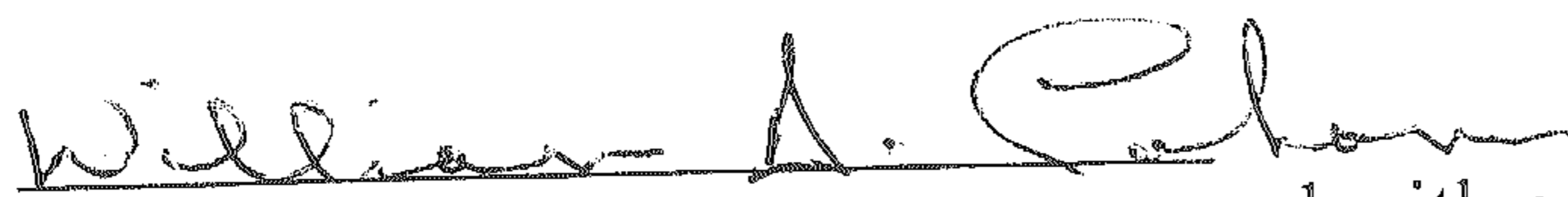
For the above reasons it is proper to grant common law certiorari and for this court to review this appeal.

### **Conclusion**

This appeal is reviewable under Fl. Rules App. Proc. Rule 9.130 (a) (5) and under common law certiorari, Fl. Rules App. Proc. Rule 9.030



(b)(2)(A). The Constitutional issues as well as the impropriety of incarceration (civil contempt enforcement) of alimony and alimony arrearages are questions of great public importance. Not to mention that the Appellant is at immediate and continued risk of loss of liberty.



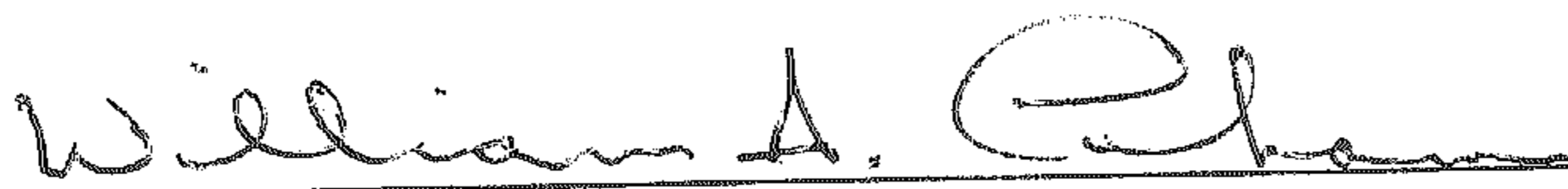
William A. Cabana, *pro se*, prepared with assistance of counsel  
August 2, 2006

#### Certificate of Service

I hereby certify that on this 2nd day of August, 2006, I caused a true and accurate copy of this Appellant's Initial Brief to be sent by U.S. mail to:

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