

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

CIRCUIT CIVIL

MICHAEL SCHIAVO, as Guardian of
the Person of THERESA MARIE SCHIAVO,

Petitioner,

vs.

CASE NO. 03-008212-CI-20

JEB BUSH, Governor of the State of Florida,
and CHARLIE CRIST, Attorney General
of the State of Florida,

Respondents.

**MOTION OF RESPONDENT JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA
FOR DISQUALIFICATION OF JUDGE**

Respondent, JEB BUSH, Governor of the State of Florida, (the "Governor") pursuant to Rule 2.160, Florida Rules of Judicial Administration and § 38.10, Florida Statutes (2003), hereby moves to disqualify the Honorable W. Douglas Baird as presiding judge in this action. The specific grounds in support of this motion are described below.

Preliminary Statement

This Motion is filed by the Governor with great reluctance and regret. Nevertheless, our constitution guarantees that all persons, whether named individually or in a representative capacity as defendants or respondents in a civil, criminal or administrative action, must be afforded due process of law. Elected officials, such as the Governor, who represent the interests of the public, are not second class citizens and are no less entitled than other litigants to the same due process protections.

This court has, in the short time that this case has been pending, made it clear that the Governor cannot be afforded a fair and impartial forum for the resolution of the issues raised against him in the instant Petition. This court has evidenced its bias, its inability to be fair and impartial, and its predilection for predetermining the outcome of the Petition without the benefit of legal argument or evidence. On November 14, 2003, the trial court made it manifestly clear to the Governor that the trial court had determined to prejudge the issues, accept Petitioner's hearsay facts, and create new legal presumptions in favor of unconstitutionality, such that the Governor cannot receive a fair trial or hearing. In the Governor's view, the findings as to the merits already made by Judge Baird regarding the matters before him seem strangely reminiscent of the trial recounted in the Lewis Carroll fairy tale, Alice in Wonderland, wherein the Knave was accused of stealing tarts belonging to the Queen of Hearts. After much furious (and spurious) argument, the following colloquy occurred amongst the King, the Queen, and Alice:

"Let the jury consider their verdict," the King said for about the twentieth time that day.

"No, no!" said the Queen. "**Sentence first – verdict afterwards.**"

"**Stuff and nonsense!**" said Alice loudly. "**The idea of having the sentence first!**"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

"Off with her head!" the Queen shouted at the top of her voice. Nobody moved.¹

The Governor affirms the notion that a trial should precede any rendition of judgment by the court.

¹ Carroll, Lewis, Alice's Adventures in Wonderland, The Easton Press, Norwalk Connecticut, 1977, p.

Procedural Background

1. On October 21, 2003 Petitioner filed his Petition for Declaratory Judgment and Request for Temporary Injunction (“Petition”) in the Circuit Court of the Sixth Judicial Circuit, Pinellas County. Petitioner filed the instant action for temporary injunctive relief and declaratory relief for the purpose of challenging the constitutionality of Chapter 2003-418, Laws of Florida, which Petitioner asserts is unconstitutional on its face and as applied in the instant case. Petitioner, having named the Governor as a party Respondent, was obviously required to serve Respondent with process in accordance with Chapter 48 of the Florida Statutes and Rule 1.070 of the Florida Rules of Civil Procedure. However, as of this date, almost one month after the filing of the Petition, Petitioner has still not served the Governor in this cause.

2. Although Respondent had not yet been served with a Summons and the Petition, Petitioner did provide the Governor’s legal office with a faxed copy of the Petition on October 21, 2003, with a Notice of Hearing to be held later that same date. As a courtesy to the court and counsel, the Governor’s counsel attended the hearing by telephone. No evidence was introduced at the hearing and the Governor’s counsel sought no affirmative relief.

3. On November 4, 2003, Respondent, the Governor, moved to dismiss the Petition on the grounds that (i) there was a lack of service of process and the Court therefore lacks personal jurisdiction over the Governor; (ii) the Petition failed to state a cause of action for declaratory judgment and fails to comply with the requirements of Rules 1.110 (b), 1.140(c), 1.510, and 1.610, of the Florida Rules of Civil Procedure; (iii) the Petition relied upon legal conclusions and “borrowed facts” gleaned from legal proceedings to which the Governor was neither a party nor a participant and thus had no opportunity to cross examine witnesses; (iv) the request for temporary injunctive relief was moot; and (v) venue was improperly laid in Pinellas

County.

4. Although a hearing on his motion to dismiss had been requested by the Governor, no hearing was granted on the motion. On November 7, 2003, the lower court entered an order denying the Governor's motion to dismiss, in which the court found that the Governor's counsel's telephonic appearance at the temporary injunction hearing on October 21, 2003, constituted a general appearance for purposes of personal jurisdiction. The Order failed to take note that objections to the procedural process, including failure of service, were raised by counsel at the hearing, and that the Governor's counsel did not seek affirmative relief at the hearing. In the Order, the court also found that the "sword wielder doctrine" applied to divest the Governor of his right to maintain venue of this cause in Leon County.

6. Notwithstanding that there was no dispute that the Governor has never been served in this cause the trial court ordered the parties to provide him with "briefs on the issues" by 5:00 pm on November 10, 2003.

7. On November 10, 2003, pursuant to Rules 9.130(a)(3)(A) and 9.130(a)(3)(C)(i) of the Florida Rules of Appellate Procedure, Respondent filed a Notice of Appeal of the Order, contesting the lower court's findings regarding personal jurisdiction and venue. On that same date, Appellant also filed a Notice of Automatic Stay advising the trial court and all interested parties that an automatic stay was in effect, pursuant to Rule 9.310(b) of the Florida Rules of Appellate Procedure.

8. On November 12, 2003, Petitioner filed a Motion to Vacate Stay.

9. The court unilaterally set a hearing on this motion for 10:00am on Friday, November 14, 2003.

10. Prior to hearing argument, Judge Baird had already prepared an extensive written

comment which he read during the hearing. In those comments, the judge stated his position that the statute in question is “presumptively unconstitutional,” and granted the motion to vacate the automatic stay. These comments were then substantially transferred to the court’s written Order Granting Motion to Vacate Automatic Stay. The court did not consider evidence at the hearing, as none was offered by Petitioner.

11. The court’s comments and the subsequent order reveal that the court had already determined to vacate the stay prior to the hearing and without any evidence being presented to show compelling circumstances. Specifically, the Order lifting the stay stated that “the State of Florida, through the actions of its legislature and Governor are currently depriving Theresa Schiavo of her constitutional right to privacy, which has been previously specifically and conclusively established as a matter of law.” (*Order Granting Petitioner’s Motion to Vacate Automatic Stay, November 14, 2003*).

12. On the afternoon of November 14, 2003, the Governor sought and received an emergency stay of proceedings from the Second District Court of Appeal. After receiving a response from Petitioner, the Second District lifted the emergency stay on November 18, 2003 at approximately 4:00 pm. At 4:05 pm, the Governor’s attorney’s office received a call from Judge Baird’s office advising that the judge expected to see the Governor’s “brief” the next day. This phone call was followed up by a 5:00 pm facsimile from Judge Baird’s office confirming that the judge was ordering the Governor to submit a “brief” to him by 5:00 pm on November 19, 2003. (*A copy of the facsimile confirmation is attached as Exhibit 1*).

13. On November 19, 2003, the Governor filed his Answer, Affirmative Defenses, and Demand for Jury Trial, his Motion to Strike Portions of Petitioner’s Brief, and, under protest, the requested brief.

The Motion for Disqualification is Legally Sufficient

14. It has become apparent that Judge W. Douglas Baird will not be able to preside over these proceedings without bias and prejudice.

15. Pursuant to §38.10, Florida Statutes (2003), Respondent has a **substantive legal right** to seek the disqualification of Judge W. Douglas Baird in this matter. The statute provides that:

“Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, **the judge shall proceed no further**, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists.”

16. Florida Rule of Judicial Administration 2.160(c-d) sets forth the **only** procedural requirements for a motion to disqualify:

(c) **Motion.** A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client’s statements are made in good faith.

(d) **Grounds.** A motion to disqualify shall show: (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;

17. Rule 2.160(f) proscribes the extremely narrow task of the Court upon being presented with a motion to disqualify:

(f) **Determination – Initial Motion.** The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed **shall determine only the legal sufficiency** of the motion and **shall not pass on the truth of the facts alleged**. If the motion is

legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. (*emphasis added*)

18. In discussing the procedural requirements of a motion to disqualify, the Florida Supreme Court held that “the facts alleged in the motion need only show that the party making it has a well grounded fear that he will not receive a fair trial at the hands of the judge.” *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983). The question facing the Court in ruling on this motion is not whether the judge actually holds the bias or prejudice alleged, but whether the facts which suggest the prejudice or bias are sufficient, *in the movant’s mind*, to justify a reasonable apprehension that he will not receive an impartial hearing of his cause. *Id.* Stated otherwise, “the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge.” *Brofman v. Florida Hearing Care Center, Inc.*, 703 So.2d 1191, 1192 (Fla. 4th DCA 1997).

19. Respondent submits the instant motion in compliance with the requirements of Rule 2.160(c-d) as set forth below, and also submits the Affidavit of Jeb Bush, Governor of the State of Florida (copy attached hereto, original to be filed upon receipt), as well as the good faith certification of Respondent’s counsel as contained below.

20. This motion and the accompanying affidavits set forth the specifically described prejudice and bias of Judge Baird which, pursuant to the affidavit of Governor Bush, has placed the Governor in substantial and reasonable fear that his cause will not be heard fairly and with the impartiality to which he is entitled under the law. The bases for this motion are Judge Baird’s bias, prejudice, and advocacy for the Petitioner as manifested by Judge Baird’s comments, actions and orders described herein.

21. Judge Baird has exhibited bias and prejudice against Respondent, as evidenced by

his comments at various hearings and in his written orders. Each of these comments and statements have caused the Governor to conclude that he cannot receive a fair and impartial trial or hearing before Judge Baird.

22. The prejudice as observed by the Governor is summarized in the paragraphs which follow, is supported by the attached affidavit of Governor Jeb Bush, and resulted in the instant Respondent's development of a fear of being prejudiced by Judge Baird's continuing prejudice.

23. Judge Baird's prejudicial conduct towards Respondent includes, but is not limited to, making statements and rendering orders which indisputably demonstrate that not only does the judge have a personal bias in this matter, but he has also unquestionably prejudged the merits of this cause, again without due consideration for the rights of the Respondent.

24. This motion is timely filed within ten (10) days of Respondent becoming aware of the prejudicial actions of the court.

Objective Evidence Demonstrating Judge Baird's Pre-Judgment of the Issues in this Cause

25. Judge Baird's bias and prejudice were exhibited in the context of comments he made during the November 10, 2003 hearing. The transcript of that hearing, attached hereto as Exhibit 2, reveals several such instances.

26. The prejudicial comments made by Judge Baird at the hearing were substantially repeated when the order was reduced to writing later on the same date. For example, **the Order**, a copy of which is attached as Exhibit 3, **recited the following:**

a. "There is no question that Mrs. Schiavo's right to privacy in this regard has been finally and completely determined. In so doing, the court confirmed that Mrs. Schiavo is and has been in a persistent vegetative state for more than twelve years and that there is no

medical hope for her recovery. It was further finally determined by clear and convincing evidence that it was her desire, not her husband's or her parent's or the court's, but her desire that she not be maintained by life-prolonging procedures. The issue of the determination of her desire to exercise her constitutional right of privacy in order to avoid continued life prolonging procedures was fully and vigorously litigated for over six years...For all practical and legal purposes, Theresa's desire to no longer be subjected to life-prolonging procedures has been finally and conclusively established as a matter of law." (Order at paragraph 3).

b. **"The legislative enactment of HB 35-E and the Governor's Executive Order issued pursuant to its authority have unquestionably interfered with and intruded upon Theresa Schiavo's constitutional right of privacy. Of that fact, there is no doubt."** (Order at paragraph 4).

c. "In this litigation regarding interference with Mrs. Schiavo's right of privacy the burden is upon the respondents to prove the existence of a compelling state interest that would justify such an intrusion." (Order at paragraph 4).

d. "Instead of receiving a brief defending the constitutionality of the legislative enactment that was the basis of his interference with the privacy rights of Theresa Schiavo, the Governor moved for dismissal of the action on procedural grounds." (Order at paragraph 6).

e. **"...the State of Florida, through the actions of its legislature and Governor are currently depriving Theresa Schiavo of her constitutional right to privacy, which has been previously specifically and conclusively established as a matter of law. Each hour, each day, each week that goes by since the Governor required the reinsertion of her artificial support, Mrs. Schiavo is being prevented from exercising her constitutionally**

guaranteed and judicially confirmed desire to be free of a continued existence by life prolonging procedures. The deprivation of this right is immediate, ongoing, and presumptively unconstitutional.” (Order at paragraph 7A).

f. “Prolonging the inevitable analysis of the substantive legal issues in order to appeal procedural matters is an insufficient justification for the continued violation of Mrs. Schiavo’s right to privacy by a presumptively unconstitutional act.” (Order at paragraph 7B).

27. Clear evidence that the Governor’s fears of prejudice are reasonable is found in the media reports of Judge Baird’s rulings in this matter. These reports unquestionably demonstrate that even the media perceives the judge to have already prejudged the issues.

28. In a November 14, 2003 Associated Press story, reporter Mitch Stacy included a quote by Howard Simon, the executive director of the ACLU of Florida and co-counsel for Michael Schiavo, wherein Simon called Baird’s ruling “...as strongly worded a rebuke of the governor that one could imagine.” (*Article attached as Exhibit 4*).

29. On November 15, 2003, the Miami Herald ran a story entitled, “Judge Blasts ‘Terri’s Law,’” which included the following commentary: “A circuit court judge said Friday that a newly-passed law that allows Gov. Jeb Bush to keep Terri Schiavo alive with a feeding tube is depriving the brain damaged woman of her ‘constitutional right to privacy’ – strong language that signals likely legal trouble for the governor’s case.” Further in the article, attorney Pat Anderson is quoted as saying, “The language flatly prejudges the issue.” Howard Simon is also quoted: “‘Could you imagine a stronger rebuke by the court of a sitting governor, ever? Asked Howard Simon, executive director of the ACLU of Florida. The ACLU has joined Michael Schiavo in his challenge. ‘There is only one issue in this case: whether the governor can be permitted to substitute his judgment for six years of litigation.’” (*Article attached as Exhibit 5*).

30. In a November 15, 2003 article in the St. Petersburg Times entitled, "Judge Calls Terri's Law Intrusive," reporter William R. Levesque quoted some of the comments made by Judge Baird during the hearing, including comments that the law "unquestionably interfered with and intruded upon (Mrs. Schiavo's) constitutional right of privacy;" that "Each hour, each day, each week that goes by since the governor required the reinsertion of her artificial (life) support, Mrs. Schiavo is being prevented from exercising her constitutionally guaranteed and judicially confirmed desire to be free of a continued existence by life-prolonging procedures;" that Mrs. Schiavo "should not be forced to receive unwanted life-prolonging procedures for one day more than is reasonably necessary to resolve the legal issue of the state's authority to intrude into her private medical decisions." (*Article attached as Exhibit 6*).

31. On November 15, 2003, the Orlando Sentinel ran an article entitled, "Judge Says 'Terri's Law' Violates Schiavo's Rights." (*Article attached as Exhibit 7*).

32. The November 14, 2003 Associated Press story also provided quotes from George Felos, Michael Schiavo's attorney, which show that not only does he believe the judge has prejudged the issues, but he is also under the impression that Judge Baird is convinced that the Governor's actions in this case have been mere delaying tactics: "Felos also said Bush's appeals were a delaying tactic and Baird's ruling recognized that. 'We're obviously very pleased with the judge's decision to vacate the stay, and not only that but his acknowledgement of the facts in this case.'" (*See Exhibit 4*).

33. Canon 3(B)(5) of the Code of Judicial Conduct requires:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

34. The comment to this Canon specifically notes, “A judge must be alert to avoid behavior that may be **perceived** as prejudicial.” (*Emphasis added*).

35. Canon 3(B)(9), Code of Judicial Conduct, requires as follows: “A Judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing.”

36. The conduct which Judge Baird has demonstrated manifests that the court is unquestionably biased against Respondent’s position and has already pre-judged the merits. Accordingly, this Motion for Disqualification should be granted, or in the alternative the Judge should recuse himself based on what the Judge must, at this point, know is an obvious bias.

37. Respondent reasonably fears that Judge Baird will be incapable of fairly considering the merits of his claims in this cause.

38. As the Florida Supreme Court has observed:

It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can disclaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies--purity and justice. The administration of justice is the most sacred right known to the sound order of a democracy. *State ex rel. Davis v. Parks*, 194 So. 613 (Fla. 1939).

39. In *Livingston*, the Supreme Court acknowledged the “sensitivity and seriousness involved whenever the issue of judicial prejudice is raised” but reiterated the following expectation of the judiciary under such circumstances:

Prejudice of a judge is a delicate question to raise but when raised as a bar

to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

.....
The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

Id. at 1085-86.

40. The conduct and comments of Judge Baird clearly evidence Judge Baird's inability to provide a fair hearing to Respondent and certainly justify the Governor's fear that he will not receive a fair hearing or trial.

41. In *State of Florida ex. Rel. Michael L. Morgan v. W. Douglas Baird, Circuit Court Judge*, 660 So.2d 328 (Fla. 2d DCA 1995), the Second District found that Judge Baird erred when he failed to disqualify himself in that matter. Although the *Morgan* case was a criminal matter, one of the primary issues was Morgan's fear that the court had already determined that he would be habitualized, even prior to the jury verdict. *Id.* (*A copy of the case is attached hereto as Exhibit 7*). Certainly the instant case provides substantially more evidence from which the Governor could develop a reasonable fear of prejudice.

42. As a member of the judiciary, Judge Baird is bound by the Rules of Judicial Administration and the Canons of Judicial Ethics to remain neutral and impartial in presiding over legal matters assigned to him. Judge Baird is required to refrain from utilizing his judicial office as a platform to espouse or promote his personal political or social ideals or agendas, or to prejudge the matters that come before him.

43. To fail to grant this motion would be to deprive Respondent of the substantive legal rights to which he and all other litigants are unquestionably entitled. Such a result would contravene the very purpose of the disqualification statute, which exists to avoid even the

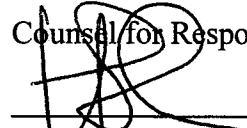
appearance of impropriety.

44. This motion and the accompanying affidavit specifically allege the facts and reasons justifying disqualification. This motion contains the good faith certification of counsel. This motion is legally sufficient, and this court is required to grant the motion.

WHEREFORE, having met the requirements of Florida Rule of Judicial Administration 2.160 and §38.10, Florida Statutes (2003), Respondent respectfully requests that the Honorable Judge W. Douglas Baird recuse himself from further proceedings in the above captioned matter.

Respectfully submitted,

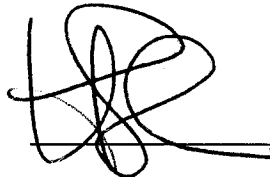
Counsel for Respondent Governor Jeb Bush



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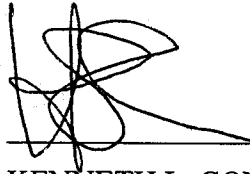
I, Kenneth L. Connor, counsel for Respondent, hereby certify that this Motion and the Affidavit of Jeb Bush, Governor of the State of Florida are made in good faith.



Kenneth L. Connor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery and U.S. Mail to the **Honorable W. Douglas Baird**, Pinellas County Courthouse, St. Petersburg, Florida; to **George J. Felos**, Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; by facsimile and U.S. Mail to **Thomas J. Perrelli, Robert M. Portman, Nicole G. Berner**, Jenner & Block, LLC, 601 13th Street, NW, Suite 1200, Washington, DC; to **Randall C. Marshall**, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd., Suite 340, Miami, Florida, 33137; to **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; and to **David Cortman**, ACLJ, 1000 Hurricane Shoals Road, D-600, Lawrenceville, GA 30043; on this 19th day of November, 2003.

A handwritten signature in black ink, appearing to be 'K. Connor', written over a horizontal line.

KENNETH L. CONNOR

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF LEON

BEFORE ME this day personally appeared JEB BUSH, Governor of the State of Florida, who, upon being duly cautioned and sworn, deposes and states:

1. My name is Jeb Bush, and I am the Governor of the State of Florida.
2. I have been named as Respondent in the matter of MICHAEL

SCHIAVO, as Guardian of the Person of THERESA MARIE SCHIAVO v. JEB BUSH, Governor of the State of Florida, and CHARLIE CRIST, Attorney General of the State of Florida Case number 03-008212-CI-20, pending in the Sixth Judicial Circuit, Pinellas County, Florida.

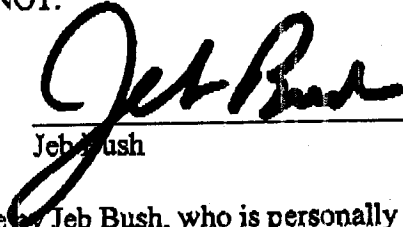
3. I am advised of the contents of Respondent's Motion to Disqualify the Honorable Judge W. Douglas Baird, to be filed in the above described action, and I expressly agree with the statements in the motion and the relief requested therein.

4. I am aware of the orders rendered by Judge Baird in the above described proceedings, and I am aware of Judge Baird's actions throughout the pendency of this matter as further described in the Motion to Disqualify.

5. Based on these actions, comments, and orders, it is apparent to me that Judge Baird has prejudged the merits of this cause and that he has acted, and continues to act, as an advocate for the Petitioner's position in these proceedings. He cannot continue to preside over this matter without being swayed by his own personal biases and prejudices in this case.

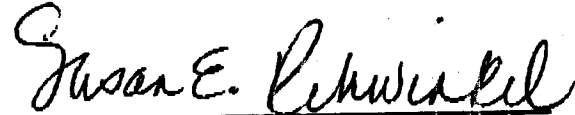
6. For these reasons, I do not believe that my position in this matter has received fair consideration to date and I fear that I will not receive fair consideration in these proceedings, including any hearings or trials herein, if Judge Baird continues to preside over the case.

FURTHER AFFIANT SAYETH NOT.



Jeb Bush

Sworn to and subscribed before me by Jeb Bush, who is personally known to me,
this 19 day of November, 2003.



Notary Public



Susan E. Retwinkel
MY COMMISSION # CC975762 EXPIRES
October 17, 2004
BONDED THROUGH TROY FARM INSURANCE, INC.



**CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
STATE OF FLORIDA**

W. DOUGLAS BAIRD
CIRCUIT JUDGE

CLAUDIA GIBSON
JUDICIAL ASSISTANT

PINELLAS COUNTY COURTHOUSE
315 COURT STREET
CLEARWATER, FLORIDA 33758
TELEPHONE (727) 484-3232

FAX COVER SHEET

TO: George Felos, Esq. **FAX NO. 727-736-5050**
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Randall C. Marshall, Esq. **FAX NO. 305-576-1106**
Christa Calamas, Esq. **FAX NO. 850-488-9810**
Kenneth L. Connor, Esq. **FAX NO. 813-872-1836**
George LeMeux, Esq. **FAX NO. 850-487-2564**

FROM: W. Douglas Baird, Circuit Judge

DATE: November 18, 2003

RE: SCHIAVO vs. BUSH and CRIST
Case No. 03-8212CI-20

No.
of pages: 2 (including this cover sheet)

Hard copy to follow by regular mail.



**CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
STATE OF FLORIDA**

W. DOUGLAS BAIRD
CIRCUIT JUDGE
CLAUDIA GIBSON
JUDICIAL ASSISTANT

PINELLAS COUNTY COURTHOUSE
316 COURT STREET
CLEARWATER, FLORIDA 33756
TELEPHONE (727) 464-3232

MEMORANDUM

DATE: November 18, 2003
TO: Kenneth L. Connor, Esq.
FROM: Claudia Gibson, Judicial Assistant to W. Douglas Baird
RE: SCHIAVO vs. BUSH and CRIST
Case No. 03-8212CI-20

This is to confirm our conversation of this afternoon in which I conveyed to your office Judge Baird's directive that your brief is to be filed in the above referenced case by 5:00 PM on Wednesday, November 19, 2003.

cc: George Felos, Esq.
Thomas J. Perrelli, Esq.
Robert M. Portman, Esq.
Nicole G. Berner, Esq.
Randall C. Marshall, Esq.
Christa Calamas, Esq.
George LeMeiux, Esq.

CYG.

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 03-008212-CI-20**

**MICHAEL SCHIAVO, as Guardian of
the person of THERESA MARIE SCHIAVO,**

Petitioner,

vs.

**JEB BUSH, Governor of the State of Florida,
and CHARLIE CRIST, Attorney General
of the State of Florida,**

Respondents.

**ORDER GRANTING PETITIONER'S MOTION TO VACATE AUTOMATIC
STAY**

THIS CAUSE came before the Court on "Petitioner's Motion to Vacate Automatic Stay," with a certificate of service date of November 12, 2003. The Court, having reviewed the motion, as well as Respondent, Governor Jeb Bush's "Memorandum of Law in Opposition to Petitioner's Motion to Vacate Automatic Stay," and having considered the argument of the attorneys, finds as follows:

1. This action was brought to obtain a declaratory judgment declaring a legislative act designated as HB 35-E (Public Law 03-418) to be unconstitutional, and likewise declaring Executive Order No. 03-201 to be, among numerous other grounds, an unconstitutional violation of the privacy rights of Theresa Schiavo.

2. The Petitioner has asserted, and the respondents have admitted at the initial hearing for temporary relief in this cause, that on October 21, 2003, pursuant to the Governor's Executive Order, Theresa Schiavo was removed from her residence at a local

hospice, without the consent of her husband and duly appointed guardian, and an invasive medical procedure was performed, also without consent of her guardian, that resulted in the reinsertion of an artificial means for nutrition and hydration.

3. Previously, in an opinion of the Second District Court of Appeals dated June 6, 2003, Theresa Schiavo's right to be removed from life prolonging procedures had been confirmed and approved. See *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. 2d DCA 2003). This right, Theresa Schiavo's right, was based upon strict compliance with the provisions of Chapter 765 Florida Statutes and the strong privacy provision of the Florida Constitution. Mrs. Schiavo, along with every other citizen of this state has the right to be left alone in his or her private life by this state's government. The legislature enacted Chapter 765 to specifically provide a procedure by which individuals might have their desires regarding life prolonging procedures determined and confirmed. There is no question that Mrs. Schiavo's right to privacy in this regard has been finally and completely determined. In so doing, the court confirmed that Mrs. Schiavo is and has been in a persistent vegetative state for more than twelve years and that there is no medical hope for her recovery. It further finally determined by clear and convincing evidence that it was her desire, not her husband's or her parent's or the court's, but her desire that she not be maintained by life prolonging procedures. The issue of the determination of her desire to exercise her constitutional right of privacy in order to avoid continued life prolonging procedures was fully and vigorously litigated for over six years. All legal means to contest the final judgment regarding her desires have been exhausted in both the state and federal court systems. For all practical and legal purposes, Theresa's desire to no longer be subjected to life prolonging procedures has been finally and

conclusively established as a matter of law. Her right to act on that desire is guaranteed by the Florida Constitution. The Second District Court of Appeals ordered Judge George Greer to enter an order setting the date for the removal of life prolonging procedures, pursuant to Mrs. Schiavo's right. *Id.* at 187. The order was duly entered by Judge Greer and life prolonging procedures were withdrawn on October 15, 2003.

4. The legislative enactment of HB 35-E and the Governor's Executive Order issued pursuant to its authority have unquestionably interfered with and intruded upon Theresa Schiavo's constitutional right of privacy. Of that fact, there is no doubt. The right of privacy is a fundamental right under the Florida Constitution. Any legislation impinging on that right is subject to strict scrutiny. In fact, any legislation which interferes with Mrs. Schiavo's right of privacy is presumptively unconstitutional. See *North Florida Women's Health and Counseling Services, Inc. v. State*, 28 Fla. L. Weekly S549 (Fla. July 10, 2003). In this litigation regarding interference with Mrs. Schiavo's right of privacy the burden is upon the respondents to prove the existence of a compelling state interest that would justify such an intrusion. *Id.*

5. Immediately, upon the passage of HB 35-E and the Governor's issuance of the Executive Order, this action was brought. Although there was a strong legal basis for the immediate issuance of a temporary injunction to enjoin this presumptively unconstitutional legislative and executive action, this court, in deference to the other two branches of government, declined to act until the respondents had been given a full and fair opportunity to brief the issue of constitutionality. This court anticipated that upon receipt of the respondent's brief an explanation of the compelling state interest justifying the interference with Theresa's right of privacy would be revealed. The issue of the

existence or non-existence of that compelling state interest might thereafter require that this court conduct an evidentiary hearing, but at the very least the respondents must first respond to the complaint and articulate a legally viable position regarding this legislation. The timetable for the submission of the respondent's briefs was suggested by counsel for respondents and approved by this court at the initial hearing for temporary relief.

6. Instead of receiving a brief defending the constitutionality of the legislative enactment that was the basis of his interference with the privacy rights of Theresa Schiavo, the Governor moved for dismissal of the action on procedural grounds. That is certainly his right, just as it is his right to appeal this court's denial of that motion. During the pendency of his appeal, the respondents have chosen to avail themselves of the automatic stay provided for in Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure. The petitioner, on behalf of Theresa Schiavo, has sought to vacate the stay.

7. Vacating a stay is normally within the sound discretion of the court. *City of Sarasota v. AFSCME Council '79*, 563 So. 2d 830 (Fla. 1st DCA 1990). The rationale behind the automatic stay is set out in *St. Lucie County v. North Palm Development Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984) wherein the court indicated that the automatic stay "involves the fact that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally." That rationale does not apply in this case, since the effective ability of the Governor to act regarding anyone other than Mrs. Schiavo has now expired. However, when a state agency or officer chooses to invoke the right to an automatic stay, that stay

may only be vacated under the most compelling of circumstances. The court believes that those circumstances exist in this case.

A. First, as previously described, the State of Florida, through the actions of its legislature and Governor are currently depriving Theresa Schiavo of her constitutional right to privacy, which has been previously specifically and conclusively established as a matter of law. Each hour, each day, each week that goes by since the Governor required the reinsertion of her artificial support, Mrs. Schiavo is being prevented from exercising her constitutionally guaranteed and judicially confirmed desire to be free of a continued existence by life prolonging procedures. The deprivation of this right is immediate, ongoing and presumptively unconstitutional. Therefore, the urgency of a final determination of the constitutionality of the legislature's and Governor's actions is compelling. Theresa Schiavo should not be forced to receive unwanted life prolonging procedures for one day more than is reasonably necessary to resolve the legal issue of the state's authority to intrude into her private medical decisions.

B. Secondly, there are no significant adverse consequences to the respondents that will result from a lifting of the stay. At this point, all that this court has required is the filing of a response brief defending the constitutionality of the legislature's enactment. That will eventually have to be done in whatever court this case ultimately resides. Prolonging the inevitable analysis of the substantive legal issues in order to appeal procedural matters is an insufficient justification for the continued violation of Mrs. Schiavo's right to privacy by a presumptively unconstitutional act.

C. Finally, as suggested by the petitioner, if this court lifts the stay and at some subsequent date, prior to the resolution of the procedural issues currently

being appealed, this court finds that temporary injunctive relief is appropriate, any resulting order will be subject to appellate review and the same automatic stay. In short, the respondents in this case will suffer no adverse consequences as a result of the lifting of the stay, and may in fact advance the final resolution of the constitutional viability of their actions for the benefit of all citizens of this state, but most particularly for Theresa Schiavo.

ACCORDINGLY,

IT IS HEREBY ORDERED AND ADJUDGED that:

Petitioner's Motion to Vacate Automatic Stay is **GRANTED**. The Respondents shall file their briefs on the constitutionality of the subject act on or before Monday, November 17, 2003. In doing so, this court emphasizes that the ultimate issue of the constitutionality of HB 35-E and Executive Order No. 03-201 has yet to be determined and that the findings of the court herein should not be interpreted to suggest otherwise.

DONE AND ORDERED at Clearwater, Pinellas County, Florida this ____ day of November 2003.

TRUE COPY
Original Signed
NOV 14 2003
W. DOUGLAS BAIRD
Circuit Judge
Circuit Court Judge

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Yahoo! News Wed, Nov 19, 2003

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Fla. Court Lifts Stay on Schiavo Fight

Wed Nov 19, 12:44 AM ET

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By MITCH STACY, Associated Press Writer

TAMPA, Fla. - An appeals court on Tuesday lifted a stay that blocked a man's fight with Gov. Jeb Bush over a hastily passed law that restored a feeding tube to the man's brain-damaged wife.



AP Photo

The ruling by the 2nd District Court of Appeal is a victory for Michael Schiavo, who has spent years in court for the right to remove the tube, saying his wife Terri would not be kept alive artificially.

"I think it's an indication that the court recognizes that fundamental human rights are at stake," said lawyer George Felos, who represents Michael Schiavo.

[Slideshow: Terri Schiavo](#)

Bush spokeswoman Alia Faraj said the governor's office was "disappointed by the ruling."

"This is a very important case that deals with a life or death decision and one where we can't make mistakes," Faraj said. Bush's lawyers have until 5 p.m. Wednesday to file papers with their arguments on the constitutionality of the new law. Faraj said the governor is "fully prepared" to do.

Circuit Judge W. Douglas Baird issued an order Friday to let the lawsuit move ahead, but the appeals court issued a stay later on Bush's appeal.

Felos asked the appellate panel Monday to let Michael Schiavo's constitutional challenge move ahead while Bush's appeal is pending, with failing to be served with a formal notice of the lawsuit.

The three-judge appellate panel agreed, and denied a motion filed Friday by Bush's lawyers asking that all proceedings in the case be stopped.

"It's very bad news for Terri and good news for the voices of death," said Pat Anderson, a lawyer for Bob and Mary Schiavo, the parents of Terri Schiavo.

Schiavo had his wife's feeding tube removed last month after years of legal battles with her parents, but the governor's office said the tube was reinserted six days later.

Terri Schiavo suffered severe brain damage in 1990 when her heart temporarily stopped, cutting off oxygen to her brain. Doctors have said she is in a persistent vegetative state, but her parents believe her condition could improve.

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4



Posted on Sat, Nov. 15, 2003

TERRI SCHIAVO CASE

Judge blasts 'Terri's Law'

A circuit judge refuses the governor's request to delay a challenge to the law keeping a brain-damaged woman alive; an appeal court later overturns the ruling.

By PHIL LONG
plong@herald.com

A circuit court judge said Friday that a newly passed law that allows Gov. Jeb Bush to keep Terri Schiavo alive with a feeding tube is depriving the brain-damaged woman of her "constitutional right to privacy" -- strong language that signals likely legal trouble for the governor's case.

Pinellas County Circuit Judge W. Douglas Baird made that comment in a ruling that refused Bush's request to delay a legal challenge to the so-called "Terri's Law." By the end of the day, Bush's office said an appeal court in Lakeland had overturned Baird on procedural grounds and allowed the delay. But Baird still will make the first decision on the law's constitutionality.

DEPRIVED OF RIGHTS

"The state of Florida, through the actions of its Legislature and the governor, are currently depriving Schiavo of her constitutional right to privacy, which has been specifically and conclusively established as a matter of law," Baird ruled following a short court hearing.

"Each hour, each day, each week that goes by since the governor required the reinsertion of her feeding tube, Mrs. Schiavo is being prevented from exercising her constitutionally guaranteed and judicially confirmed desire to be free of a continued existence by life-prolonging procedures," he wrote.

ONGOING 'DEPRAVATION'

"The deprivation of this right is immediate, ongoing and presumptively unconstitutional. . . . Theresa Schiavo should not be forced to receive unwanted life-prolonging procedures for one day more than is reasonably necessary to resolve the legal issues of the state's authority to intrude into her private medical decisions."

Responding to Baird's ruling, Bush told reporters in Tallahassee, "I'm going to follow the rule of law as I have to. But we will defend vigorously the constitutionality of the law."

Schiavo, 39, suffered a heart attack that put her in a coma in 1990. About five years ago, her husband, Michael, began a legal battle to have her feeding tube removed, saying he was responding to her wishes not to be kept alive artificially. He has consistently been upheld in court.

The tube was taken out under court order Oct. 21, but Terri Schiavo's parents convinced the Legislature to pass a law that allowed Bush to order the feeding tube reinserted six days later. They believe her condition would improve with therapy, while Michael Schiavo believes her case is hopeless.

Michael Schiavo has challenged the law in court, saying that the Legislature and governor have no right to set aside court action that upholds his wife's right to die.

The judge's ruling was another legal victory for Michael Schiavo.

1986 APPOINTMENT

Baird was first appointed to the county court bench in 1986 by then-Gov. Bob Graham, a Democrat, and two years later was appointed circuit judge by Gov. Bob Martinez, a Republican. He has since been reelected twice.

The lawyer for Terri Schiavo's parents said Baird's ruling is troubling.

"The language flatly prejudices the issue," said attorney Pat Anderson, who represents Terri Schiavo's parents, Bob and Mary Schindler. "It is of great concern that Judge Baird dwells on the constitutional right of privacy without taking into account her constitutional right to live and her constitutional right to be free of discrimination based on disability."

'VERY PLEASED'

George Felos, Michael Schiavo's attorney, told The Associated Press, "We're obviously very pleased with the judge's decision to vacate the stay, and not only that but his acknowledgment of the facts in this case." His comments came before the appeals ruling.

The leader of the state's ACLU also welcomed Baird's ruling.

"Could you imagine a stronger rebuke by the court of a sitting governor, ever?" asked Howard Simon, executive director of the ACLU of Florida. The ACLU has joined Michael Schiavo in his challenge. "There is only one issue in this case: whether the governor can be permitted to substitute his judgment for six years of litigation."

5

Orlando Sentinel

<http://www.orlandosentinel.com/news/local/state/orl-asecschiavo15111503nov15,1,5543091.story>

Judge says 'Terri's Law' violates Schiavo's rights

By Sean Mussenden
Sentinel Staff Writer

November 15, 2003

Gov. Jeb Bush is violating Terri Schiavo's constitutional rights by preventing her from dying, a judge said Friday in ordering the governor to return to court next week to defend his actions.

"The deprivation of this right is immediate, ongoing and presumptively unconstitutional," Pinellas Circuit Judge W. Douglas Baird said in Clearwater during a hearing in the nationally watched right-to-die case.

Bush quickly won a delay of the order from an appeals court, postponing a legal showdown over "Terri's Law," the measure that allowed the governor to restore the brain-damaged woman's feeding tube last month.

In his order, Baird made clear he was not making a final ruling on the constitutionality of the law, which Florida lawmakers passed after Schiavo's husband, Michael, won court permission to discontinue the feedings that have kept his wife alive 13 years.

A lawyer for Bush said he hoped Baird's comments did not signal he had made up his mind about the law before the governor can make his case. Legal experts said the order was well within legal grounds, however, steeped in long-established concerns about the government's right to deny a person's constitutional rights.

Terri Schiavo, 39, has been in a persistent vegetative state since 1990 when her heart stopped, cutting off oxygen to her brain. Her parents, Bob and Mary Schindler, turned to Bush and the Legislature after failing in court to prevent their son-in-law from removing the feeding tube Oct. 15.

On Friday, Baird reminded lawyers for the governor that courts repeatedly have found that Terri Schiavo did not want to be kept alive artificially.

Rejecting Bush's effort to postpone his legal defense of "Terri's Law," Baird said that continued delays in fulfilling her wishes violate her right to privacy, which includes the right to forgo medical care.

The question of Terri Schiavo's rights stands at the center of a lawsuit against the governor brought by her husband, who is her legal guardian. Bush's attorneys asked Baird last week to throw out the complaint on procedural grounds.

Baird refused. That decision was on appeal Friday when lawyers for the governor argued that they should not have to defend the constitutionality of "Terri's Law" until those technical matters are settled.

The judge disagreed, saying that each time Bush puts off defending the law and keeps the tube in, he only violates Terri Schiavo's rights further. He ordered the governor to submit his defense of the law by

Monday afternoon.

Bush immediately turned to the 2nd District Court of Appeal in Lakeland, which put the case on hold indefinitely. Lawyers for the governor argued that Baird abused his authority by attempting to move ahead.

The governor told reporters in Boca Raton that the case involved questions that should not be rushed.

"I think when we're dealing with life-or-death issues, we should be deliberative. We should make sure that all the facts are explored," he said. "We do it for death-row inmates. . . . And we should do so in this case, as well."

Ken Connor, the right-to-life activist whom Bush tapped to defend Terri's Law, did not attend the Friday hearing but said: "My hope would be that no prejudgment has been made about this statute, and that Judge Baird will await a briefing on both sides."

Michael Allen, a constitutional law professor at Stetson University College of Law, said that in cases such as Schiavo's there is a presumption that the state is violating someone's rights, and the burden is on the state to prove otherwise.

By ordering Bush to submit arguments, Baird is simply asking the governor to do what the law requires, Allen said.

Attorneys for Michael Schiavo, who are working with the American Civil Liberties Union of Florida, have argued that Bush is playing a delaying game designed to mask that he has no valid legal arguments for why the law should be upheld.

"I think the governor has pushed the courts here to the point of exasperation," said Howard Simon, ACLU of Florida's executive director.

Bush's attorneys argue that the governor was not properly served with the lawsuit and it was improperly filed in Pinellas County. He wants to move the case to Tallahassee, where the law was passed.

Allen said that such arguments are part of any normal civil case but that delays would suit Bush, Terri Schiavo's parents and other supporters who hope to keep the woman alive.

"It's not a 100 percent correct analogy, but if you're appealing a death-row case, each day a decision is delayed you are successful. If you're arguing it's a bad thing to remove the feeding tube, then each day the tube stays in is a success," he said.

Terri's Law also required that an independent, court-appointed guardian review Terri Schiavo's case, and evaluate her ability to be rehabilitated. Schiavo's parents and their doctors have insisted she can be helped by therapy, despite findings by other doctors and a judge that she cannot recover.

Allen said Bush might be trying to put off any court decision until the guardian, University of South Florida Professor Jay Wolfson, makes his report, giving him more ammunition to keep her alive should the law be found unconstitutional.

The Associated Press contributed to this report. Jennifer Pelz of the South Florida Sun-Sentinel also contributed. Sean Mussenden can be reached at smussenden@orlandosentinel.com or 407-650-6361.

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St. Petersburg Times

Judge calls Terri's Law intrusive:[SOUTH PINELLAS Edition]

WILLIAM R. LEVESQUE. *St. Petersburg Times*. St. Petersburg, Fla.: Nov 15, 2003. pg. 1.B

Abstract (Article Summary)

Mrs. Schiavo's mother, Mary Schindler, appeared via satellite on the Oprah Winfrey Show on Friday with Mrs. Schiavo's brother and sister to say Mrs. Schiavo isn't brain-dead.

[Jeb Bush]'s lawyers asked [Douglas Baird] to dismiss [Michael Schiavo]'s challenge of Terri's Law on procedural grounds last week. Baird refused.

Pinellas-Pasco Circuit Judge Douglas Baird ordered lawyers for Gov. Jeb Bush to submit legal arguments defending Terri's Law., (ran CITY & STATE, METRO & STATE); [Terri Schiavo]'s mother, Mary Schindler, appears on Oprah Friday., (ran CITY & STATE,; METRO & STATE); Photo: PHOTO, Associated Press; PHOTO, Oprah Winfrey Show

Full Text (1095 words)

Copyright Times Publishing Co. Nov 15, 2003

A judge Friday harshly criticized Terri's Law as a violation of Terri Schiavo's constitutional right to make her own medical decisions.

"Mrs. Schiavo, along with every other citizen of this state, has the right to be left alone in his or her private life by this state's government," said Pinellas-Pasco Circuit Judge Douglas Baird.

The law "unquestionably interfered with and intruded upon (Mrs. Schiavo's) constitutional right of privacy," he said.

His remarks came during a hearing on a lawsuit, filed by Mrs. Schiavo's husband, challenging Terri's Law. Baird cautioned that he has not decided whether he ultimately will declare the law unconstitutional.

But in his ruling Friday, he ordered lawyers for Gov. Jeb Bush to quickly submit legal arguments defending the law, suggesting he is poised to strike it down unless Bush lawyers can change his mind.

After the hearing, the legal and public relations battle over the right-to-die case continued:

Mrs. Schiavo's mother, Mary Schindler, appeared via satellite on the Oprah Winfrey Show on Friday with Mrs. Schiavo's brother and sister to say Mrs. Schiavo isn't brain-dead.

Attorney George Felos, representing Mrs. Schiavo's husband, Michael Schiavo, debated the case at the Tiger Bay Club of Tampa with the head of a disability rights group.

Bush met with a guardian ad litem, whose appointment in the case was mandated by Terri's Law.

But Bush refused to release details of the meeting.

Terri's Law, adopted by state lawmakers on Oct. 21, allowed Bush to force doctors to reinsert Mrs. Schiavo's feeding tube after she went six days without food and water. The law has forced a constitutional showdown between Bush and the courts.

Any ruling by Baird is certain to be appealed, eventually to the Florida Supreme Court.

Baird, a registered Republican, said six years of litigation and appeal have determined that Mrs. Schiavo did not want to be kept alive by artificial means.

"Each hour, each day, each week that goes by since the governor required the reinsertion of her artificial (life) support, Mrs. Schiavo is being prevented from exercising her constitutionally guaranteed and judicially confirmed desire to be free of a continued existence by life-prolonging procedures," Baird said.

Mrs. Schiavo "should not be forced to receive unwanted life- prolonging procedures for one day more than is reasonably necessary to resolve the legal issue of the state's authority to intrude into her private medical decisions," Baird said.

When Felos filed the lawsuit on Oct. 21, Baird said a "strong legal basis" existed to issue an immediate temporary injunction to block the "presumptively unconstitutional legislation and executive action."

But the judge said he declined to immediately act "in deference to the other two branches of government" so they might file legal briefs defending the law.

Baird's order left little doubt the governor may face a difficult legal battle defending the law.

"We're obviously very pleased," said Felos, who was surprised by the directness of the judge's words at a brief hearing and in a later order. "I really hope the governor takes some time to consider the remarks of the court and abandon the game of procedural delay."

Howard Simon, executive director of the ACLU of Florida, a group working with Felos on the suit, called Baird's ruling "as strongly worded a rebuke of the governor that one could imagine."

Jill Bratina, Bush's spokeswoman, said the governor's lawyers filed an appeal Friday with the 2nd District Court of Appeal, objecting to Baird's refusal to halt proceedings in the lawsuit.

"We still believe everyone involved in this case ought to abide by legal rules to ensure an orderly process resulting in a decision that fully considers all relevant facts, rather than a rush to judgment that serves no one well," Bratina said in a statement. "This case has life or death consequences, and mistakes are not correctable."

Bush's lawyers asked Baird to dismiss Michael Schiavo's challenge of Terri's Law on procedural grounds last week. Baird refused.

Bush then appealed that decision to the 2nd District Court of Appeal, and the lawsuit before Baird was put on automatic hold until that appeal was decided.

But Baird said Friday that there was no compelling state interest to freeze proceedings and ordered the state to submit legal arguments by Monday, allowing the lawsuit to proceed even as appeals are pending.

Mrs. Schiavo, who is severely brain damaged, has been kept alive by a feeding tube for more than 13 years. Many doctors say she is in a persistent vegetative state and cannot recover. Her parents disagree with that diagnosis.

In the Oprah appearance, Mary Schindler said she remains convinced her daughter still has consciousness.

"She changes from day to day," Schindler said after viewers were shown videos of Mrs. Schiavo. "She cries. She laughs. She follows me around the room. She laughs at her dad's jokes."

At Tiger Bay, Felos criticized Florida lawmakers for their intervention in the Schiavo case "without the Legislature even bothering to read the judicial opinions."

He said the governor's stay, issued on "on whim, on caprice," flouted the Constitution and violated the doctrine of the separation of powers. It was "a frightening action in a free society."

Felos debated a representative of Not Dead Yet, a disability rights group that objects to Mrs. Schiavo's life being ended.

Diane Coleman, president of Not Dead Yet, criticized "the medical killing of people who didn't ask for it." She bemoaned what she characterized as a notion among bioethicists that "the risk of error should be reversed to favor death over life" in disputed cases.

An appearance on Larry King Live by Mrs. Schiavo's parents was canceled Friday by show producers. A family spokeswoman said they hoped a new date could be scheduled soon.

- Times staff writers Christopher Goffard and Alisa Ulferts contributed to this report, which includes information from the Associated Press.

What they said

JUDGE DOUGLAS BAIRD: "Mrs. Schiavo, along with every other citizen of this state has the right to be left alone in his or her private life by this state's government . . . "

MARY SCHINDLER, ON 'OPRAH': "She changes from day to day. She cries. She laughs. She follows me around the room. She laughs at her dad's jokes."

GEORGE FELOS, at Tiger Bay: The governor's stay was "a frightening action in a free society."

[Illustration]

Caption: Pinellas-Pasco Circuit Judge Douglas Baird ordered lawyers for Gov. Jeb Bush to submit legal arguments defending Terri's Law., (ran CITY & STATE, METRO & STATE); Terri Schiavo's mother, Mary Schindler, appears on Oprah Friday., (ran CITY & STATE,; METRO & STATE); Photo: PHOTO, Associated Press; PHOTO, Oprah Winfrey Show

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People: Schiavo, Terri, Baird, Douglas, Bush, Jeb, Schindler, Mary, Felos, George

Dateline: CLEARWATER

Text Word Count 1095

IN THE CIRCUIT COURT IN AND FOR THE SIXTH JUDICIAL CIRCUIT
 PINELLAS COUNTY, FLORIDA
 CASE NO. 03-008212-CI-20

MICHAEL SCHIAVO, Guardian)
 of THERESA SCHIAVO,)

PETITIONER,)

VS.)

JEB BUSH, Governor of the)
 State of Florida, and)
 CHARLIE CRIST, Attorney)
 General of the State)
 of Florida,)

DEFENDANT.)

BEFORE: Honorable W. Douglas Baird

PLACE: Pinellas County Courthouse
 Clearwater, Florida

DATE: November 14, 2003

TIME: 10:00 a.m.

REPORTER: Shelly M. Flaherty
 Sixth Judicial Circuit
 Court Reporter

 MOTION TO VACATE AUTOMATIC STAY

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APPEARANCES

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Attorney for the Respondents

1 THE COURT: All right. We're here this morning on
2 the Petitioner's Motion To Vacate Automatic Stay. If
3 you would like to proceed.

4 MR. FELOS: Thank you, Your Honor. If it pleases
5 the Court, I am not going to make extensive argument
6 this morning.

7 The basis for the Motion To Vacate Automatic Stay
8 is well set forth in the written motion. I also
9 received this morning a fax that came to my office
10 after 5:00 p.m. yesterday, which is the Governor's
11 Memorandum of Law in Opposition.

12 Your Honor, as the Court knows, Appellate Rule
13 9.310(B)2, which is the automatic stay provision for
14 public officials, permits this Court to vacate or
15 modify the automatic stay. So the authority for this
16 Court is set forth in that rule.

17 There are only three cases, Your Honor, that I
18 located that specifically address situations in which
19 the automatic stay was sought to be vacated in the
20 State of Florida. They are cited in our motion and the
21 governor's memorandum.

22 The first one is the St. Lucie County vs. North
23 Palm Development Corporation. The case is cited in our
24 motion at 444 So. 2nd 1133. Your Honor, that was an
25 appeal from a final judgment which the trial court

1 overturned some municipal planning zonings, which
2 allowed immediate development on environmentally-sensitive
3 land. The Court found, if not stayed, that the final
4 judgment would harm the public generally. They use
5 language in this case to say that, where the public
6 would be harmed generally, compelling reasons justify
7 vacating the stay. Of course we point out in our
8 motion that standard would not apply here because
9 there is no allegation of general public harm.

10 The St. Lucie County case was then cited in the
11 State versus Pringle case, which is cited in the
12 governor's memorandum. That cite is 707 So. 2nd 387.
13 Your Honor, that case was a situation regarding a suit
14 over bans on certain types of fishing nets. The basis
15 for questioning the vacation of the stay was that the
16 fisherman in the local community would not observe the
17 court orders, and there was a threat of a breach of
18 the peace. Evidence presented to the Court was an
19 affidavit from the sheriff saying, in his view, unless
20 the stay was overturned, there might be a breach of
21 the peace. The appellate court said, "That's not
22 sufficient grounds. We're not going to vacate the stay
23 because of threat of force by unhappy litigants." That
24 was the factual situation behind that case.

25 The last case is State vs. Mitchell, 848 So. 2nd

1 1209, which dealt with the same appellate rule. They
2 don't cite either the St. Lucie Case or the State
3 versus Pringle case.

4 The standard looked at is the traditional
5 standard, whether there is a likelihood of success on
6 the merits of the appeal and a question whether there
7 is balancing of any harm to the parties and the
8 general public if the stay is kept in place. I think
9 that is the standard that this Court should look at,
10 Your Honor, in looking at the relative harm between
11 the parties in this case. The only harm -- I wouldn't
12 even use the word "harm"; I would say "inconvenience"

13 -- on the part of the governor is defending this
14 case on the merits and submitting a brief, which the
15 governor first proposed and proposed as to filing,
16 accessing, and suggesting the briefing schedule.

17 Contrasting that is the harm to the ward, who has
18 already had an adjudication of her constitutional
19 rights through six years of litigation in many courts,
20 many judges, whose artificial life support was removed
21 as implementation of her constitutional rights. So
22 each day this proceeding continues is another day in
23 which her adjudicated constitutional rights are being
24 violated.

25 If you measure the degree of harm between the

1 Petitioner in this case and the Defendant, I think the
2 harm to the Petitioner greatly outweighs that.

3 Also, Your Honor, there is a consideration that
4 must be given to the public harm or public good in
5 these type of situations. I would submit, the harm to
6 the public in delaying this case, as the Second
7 District considers the procedural issues of the
8 governor, are great.

9 I want to cite a portion of the article by Vickie
10 Chachere of the Associated Press, which was published
11 October 31st in the Orlando Sentinel. The title
12 is, "Factions weigh in on Schiavo Case":

13 "Howard Tuch, a board member and director of
14 long-term care programs at Hospice of the Florida
15 Suncoast in Sarasota said the new law already had
16 affected the family of an Alzheimer's disease patient
17 who had lost the ability to swallow food and who had an
18 advanced directive specifying no artificial life support.
19 While the family was, at first, comfortable with their
20 decision not to have a feeding tube inserted, the
21 massive publicity surrounding the governor's
22 intervention in the Schiavo case and claims that the
23 death would be a painful one, caused them to order a
24 tube be inserted. The patient died within 48 hours,
25 but Tuch said the case illustrates how distraught

1 families and medical professionals have become about
2 such decisions."

3 I read that to the Court to say this is just not
4 specific. The citizens of this state are being affected
5 on a daily basis as they make medical treatment decisions
6 or enter into making such difficult decisions. This
7 is a situation of a gentleman who had a written advance
8 directive whose wishes were disregarded. He died with
9 life support in place, which he didn't want because of
10 the family's concern over what happened in this case.
11 That's why this case is of such compelling interest
12 and importance, and not just to Ms. Schiavo, but the
13 citizens of this state. So the degree of harm not only
14 transcends to the litigant, but the citizens of this
15 state.

16 We would hope that the governor's position would
17 be to recognize the great, compelling public interest
18 and proceed with adjudication of the merits, rather
19 than pursuing these delay tactics. We ask the Court
20 not to delay this further and therefore lift the stay.

21 As to timing, Your Honor, as to the governor's
22 brief, I had just heard a press report -- of course
23 the governor's counsel can correct me -- I heard the
24 governor's brief is ready and was ready on Monday to
25 be filed. I don't know if that is the fact, but if

1 that is the case, and if the Court does lift the stay,
2 we'd ask the governor's brief be filed today. Thank
3 you.

4 MS. QUEZON: May I please the Court, counsel.
5 Counsel is correct in his citation of three of the
6 main cases that directly apply when and if a Court may
7 consider a Motion To Vacate Automatic Stay. That is,
8 in affect, pursuant to 9.310(B)2.

9 However, counsel is incorrect in the burden or
10 the standard that he asks the Court to apply in
11 determining whether to vacate the automatic stay.

12 In the St. Lucie County versus North Palm
13 Development case, 444 So. 2nd 1133, although the case
14 does say that the Court is given discretion to vacate
15 a stay when circumstances require it, the Court goes
16 on to state in this case that a stay should only be
17 vacated under the most compelling circumstances. And I
18 don't know if the Court has a copy of that case. May I
19 approach?

20 THE COURT: Well, I've seen it, yes.

21 MS. QUEZON: That case is cited again in the Pringle
22 case, which, for the record, is 707 So. 2nd 387. In
23 that case, as Mr. Felos correctly pointed out, there
24 was very little evidence that had been presented by
25 the movant, the litigant, that wanted the stay. It was

1 a proffer of testimony to support the compelling
2 circumstances that was necessary for the Court to
3 find.

4 In the Pringle case, the Court held, with regard
5 to the appellate procedure rule providing for an
6 automatic stay, when a public body seeks review, the
7 burden is on the party seeking it to establish an
8 evidentiary basis for the existence of those
9 compelling circumstances.

10 The Petitioner's motion, Your Honor, is lacking
11 completely in any evidentiary basis for the Court to
12 find the compelling circumstances necessary to vacate
13 this stay. There has been no testimony. There are no
14 affidavits. There is nothing other than an article
15 that was read to the Court this morning and argument
16 of counsel that there are any compelling circumstances
17 whatsoever.

18 At this point in time, the burden that is on the
19 Petitioner, the Plaintiff, to show these compelling
20 circumstances in evidence is simply not there.

21 The Court cannot, at this point in time, vacate
22 the stay pursuant to the law cited by Mr. Felos and
23 the governor. Your Honor, there are procedural issues.

24 Although Mr. Felos made comments that this is a
25 delay tactic, as the Court knows, the governor has a

1 right to procedural due process. There are ways for
2 the Petitioner to proceed, such as a declaratory
3 judgment could have been filed and could have been
4 served. That would have been appropriate, but it was
5 not.

6 The governor has chosen to take an appeal, by
7 right, to the District Court of Appeals to make the
8 decision as to whether or not the procedural due
9 process that was due to the governor was met in this
10 case.

11 At this juncture, the Motion To Vacate is lacking
12 completely in any of the evidentiary basis that the
13 Court must have pursuant to the law to find the
14 compelling circumstances necessary to vacate the
15 automatic stay.

16 I would ask that the Court deny the Plaintiff's
17 Motion To Vacate and allow the District Court of
18 Appeals to make the decisions as to whether the
19 governor's procedural due process rights were met.

20 Thank you.

21 MR. FELOS: Response, Your Honor? Opposing counsel
22 is incorrect in stating no affidavit is filed. There
23 is an affidavit filed in this case by Mr. Schiavo
24 verifying the allegations in the complaint. And the
25 sworn allegations in the complaint certainly are a

1 factual basis, if any are needed, Your Honor.

2 In this case we have a situation where the
3 adjudicated constitutional rights of the ward are a
4 matter of public record and judicial notice for the
5 Second Court of Appeals and, as well, the decision of
6 the trial court here in Pinellas County, which this
7 Court is well aware of.

8 Just as to any standard, Your Honor, even if this
9 Court were to imply a standard, it is compelling in
10 this case. The Port St. Lucie case was a case after
11 final judgment. If the stay was vacated, the bulldozer
12 would have been in the ground and the parcel of land
13 would have been destroyed. That's not the case here.
14 All the governor is going to have to do is defend this
15 case and file a brief.

16 If this Court should enter a temporary injunction,
17 which it may do, in favor of the Petitioner, that is
18 subject to appeal. That is subject to an automatic
19 stay, and we may be back here at some point in the
20 future visiting that question.

21 Until that question, until that point in time
22 occurs, there is no reason why we can't proceed on the
23 merits of this case.

24 On the schedule that the governor set forth, I
25 think, Your Honor, it is disingenuous for the governor

1 to proclaim his procedural and due process rights were
2 not met when they are the ones that suggested briefing
3 and suggested their own time period for filing their
4 own brief. Thank you.

5 THE COURT: Mr. Felos, you cited the Port St.
6 Lucie case and the Pringle case. There is one other
7 case that you cited that I didn't see. What page was
8 that?

9 MR. FELOS: The Mitchell case, 848 So. 2nd 1209.

10 MS. QUEZON: If I may approach, I have a copy of
11 that.

12 THE COURT: Thank you very much.

13 MS. QUEZON: You're welcome.

14 THE COURT: I want to read that. The Court is
15 going to take a short break here and I will return and
16 see what we can do.

17 (THEREUPON A BRIEF RECESS WAS HAD.)

18 (PROCEEDINGS THEN RESUMED.)

19 THE COURT: This action was brought to obtain a
20 declaratory judgment declaring a legislative act,
21 designated as House Bill 35-E, also known as Public
22 Law 03-418, to be unconstitutional and, likewise,
23 declaring Executive Order, which is Number 03-201, to
24 be, among other numerous grounds, an unconstitutional
25 violation of Terry Schiavo. The Petitioner has

1 asserted, and the Respondents have admitted, at the
2 initial hearing for temporary relief in this cause
3 that on October 21, 2003, pursuant to the Governor's
4 Executive Order, Theresa Schiavo was removed from her
5 residence from a local hospice without the consent of
6 her husband and duly appointed guardian, and an
7 evasive medical procedure was performed without the
8 consent of her guardian that resulted in the
9 reinsertion of the artificial means for nutrition and
10 hydration.

11 Previously, in an opinion of the Second District
12 Court of Appeals, dated June 6, 2003, Theresa
13 Schiavo's right to be removed from life-prolonging
14 procedures had been confirmed and approved. This
15 right, Theresa Schiavo's right, was based upon strict
16 compliance with the provisions of Chapter 765 in the
17 Florida Statutes and the strong privacy provision of
18 the Florida Constitution.

19 Ms. Schiavo, along with other citizens of this
20 state, has the right to be left alone in his or her
21 private life by the state's government. The
22 legislature enacted Chapter 765 to specifically
23 provide for a procedure by which individuals may have
24 their desires regarding life-prolonging procedures be
25 determined and/or confirmed.

1 There is no question Ms. Schiavo's right to
2 privacy in this regard has been finally, completely
3 determined. In doing so, the Court confirmed Ms.
4 Schiavo has been in a consistent vegetative state for
5 more than 12 years and there is no medical hope for
6 her recovery.

7 It is finally determined by clear and convincing
8 evidence it was her desire -- not her husband's, not
9 her parent's, not the Court's -- but her desire that
10 she not be maintained by life-prolonging procedures.

11 The issue of the determination of her desire to
12 exercise her constitutional right of privacy in order
13 to avoid life-prolonging procedures was fully
14 litigated over six years. All legal means to contest
15 the final judgment regarding her desires have been
16 exhausted in both the state and federal court system.
17 For all purposes, Theresa Schiavo's desire to no
18 longer be subjected to life-prolonging procedures has
19 been finally and conclusively established by a matter
20 of law. Her right to act on that desire is guaranteed
21 by the Florida Consitution.

22 The Second District Court of Appeals ordered
23 Judge Greer enter an order setting the date for
24 removal of life-prolonging procedures. The order was
25 duly entered by Judge Greer, and life-prolonging

1 procedures were withdrawn October 15, 2003.

2 The legislative enactment of House Bill 35-E and
3 the Governor's Executive Order, issued pursuant to its
4 authority, have unquestionably interfered with and
5 intruded upon Theresa Schiavo's constitutional right
6 to privacy. Of that fact, there is no doubt the right
7 of privacy is a fundamental right under the Florida
8 Constitution. Any legislation impinging on that right
9 is subject to strict scrutiny. In fact, any
10 legislation which interferes with Ms. Schiavo's right
11 to privacy is presumptively unconstitutional.

12 This litigation regarding interference with Ms.
13 Schiavo's right to privacy, the burden is for the
14 Respondent to prove the existence of compelling state
15 interest that would justify such a state intrusion.

16 Immediately upon the passage of House Bill 35-E
17 and the governor's issuance of the Governor's Order,
18 this action was brought. Although there was a strong
19 legal basis for the immediate issuance of a temporary
20 injunction to join this presumptively unconstitutional
21 legislative action, this Court declines to act until
22 the Respondents have been given a full and fair
23 opportunity to brief the issue of constitutionality.

24 This Court anticipated that, upon receipt of the
25 Respondents' brief, an explanation of the compelling

1 state interest justifying the interference with
2 Theresa Schiavo's right to privacy would be revealed.

3 The issue of the existence or nonexistence of
4 that compelling state interest may thereafter require
5 that this Court conduct an evidentiary hearing. But,
6 at the very least, the Respondents must first respond
7 to the compliance and articulate a legal viable
8 position regarding this legislative position.

9 The timetable for the submission of the
10 Respondents' briefs was suggested by counsel for the
11 Respondents and approved by this Court at the initial
12 hearing for temporary relief.

13 Instead of receiving a brief defending the
14 constitutionality of the legislative enactment that
15 was the basis of his interference with the privacy
16 rights of Theresa Schiavo, the governor moved for
17 dismissal of the action on procedural grounds. That is
18 certainly his right, just as it is his right to appeal
19 this Court's denial of that motion.

20 During the pendency of his appeal, the Respondents
21 have chosen to avail themselves of the automatic stay
22 provided for in Rule 9.310(B)2. The Petitioner, of
23 course, on behalf of Theresa Schiavo, has sought to
24 vacate that stay.

25 Vacating a stay is normally within the sound

1 discretion of the Court. The rationale behind the
2 automatic stay that is offered by the rules to appeal
3 by government agency, as set out in the St. Lucie case
4 that was previously cited by counsel, wherein the
5 Court indicated that the automatic stay "involves the
6 fact that planning-level decisions are made in the
7 public interest and should be accorded a commensurate
8 degree of deference and that any adverse consequences
9 realized from proceeding under an erroneous judgment
10 harm the public." That rationale does not apply in
11 this case, since the effective ability of the
12 government to act, regarding anyone other than Ms.
13 Schiavo, has now expired. However, when a state agency
14 or officer chooses to invoke the right to an automatic
15 stay, that stay may only be vacated under the most
16 compelling circumstances. The Court believes those
17 circumstances exist in this case.

18 First, as previously described, the State of
19 Florida, through the actions of the legislature and
20 governor, are currently depriving Theresa Schiavo of
21 her constitutional right to privacy, which has
22 previously, specifically, and conclusively been
23 established as a matter of law. Each hour, each day,
24 each week that goes by since the governor required the
25 re-assertion of her artificial support, she is

1 prevented from exercising her constitutionally
2 guaranteed and continuously confirmed desire to be
3 free from life-prolonging procedures. The deprivation
4 of this right is immediate, ongoing and presumptively
5 unconstitutional.

6 Therefore, the urgency of a final determination
7 of the constitutionality of the legislature's and the
8 governor's actions is compelling. Theresa Schiavo
9 should not be forced to receive unwanted life-prolonging
10 procedures for one day more than is necessary to
11 resolve the legal issue of the state's authority to
12 intrude into her private medical decisions.

13 Secondly, there is no significant adverse
14 consequences to the Respondents that will result from
15 the lifting of this stay. At this point, all that the
16 Court has required is the filing of a response brief
17 defending the constitutionality of the legislature's
18 enactment that will eventually have to be done in
19 whatever court ultimately decides this case.

20 Prolonging the inevitable analysis of the legal
21 issues in order to appeal procedural matters is an
22 insufficient justification for the continued violation
23 of Ms. Schiavo's right to privacy by a presumptively
24 unconstitutional act.

25 Finally, as suggested by the Petitioner, if this

1 Court lifts the stay and at some subsequent date,
2 prior to the resolution of the procedural issues
3 currently being appealed, this Court finds that
4 temporary injunctive relief is appropriate, any
5 resulting order will be subject to appellate review
6 and the same automatic stay. In short, the Respondents
7 in this case will suffer no adverse consequences as a
8 result of lifting the stay and may, in fact, advance
9 the final resolution of the constitutional viability
10 of their actions for the benefit of all the citizens
11 of this state, but most specifically, for Theresa
12 Schiavo.

13 For the above reasons, therefore the Court will
14 enter the order lifting the automatic stay and require
15 the Respondents to file their brief on the
16 constitutionality on the subject act on or before
17 November 17, 2003. In doing so, this Court emphasizes
18 that the ultimate issue of the constitutionality of
19 House Bill 35-E and Executive Order Number 03-201 has
20 yet to be determined, and that the findings of this
21 Court should herein not be interpreted to suggest
22 otherwise.

23 Now, the Court will prepare a written order that
24 includes its findings and provide it to counsel some
25 time today.

CERTIFICATE OF OATH

STATE OF FLORIDA)

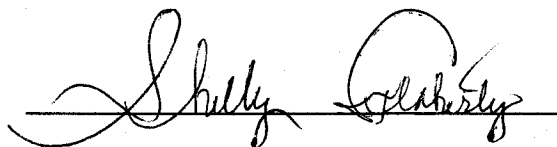
:SS

COUNTY OF PINELLAS)

I, SHELLY FLAHERTY, certify that I was authorized to and did stenographically report the foregoing hearing, and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with this action, nor am I financially interested in this action.

Dated this 17th day of November, 2003.

A handwritten signature in cursive script, appearing to read "Shelly Flaherty", is written over a horizontal line.

SHELLY FLAHERTY

SHORTHAND REPORTER

NOTARY PUBLIC- STATE OF FLORIDA

C

District Court of Appeal of Florida,
Second District.

STATE of Florida ex. rel. Michael L. MORGAN,
Petitioner,

v.

W. Douglas BAIRD, Circuit Court Judge,
Respondent.

No. 95-01238.

Aug. 30, 1995.

Defendant petitioned for writ of prohibition to the Circuit Court, Pinellas County, W. Douglas Baird, J., for denying motion for disqualification. The District Court of Appeal, Blue, Acting C.J., held that: (1) motion was timely, and (2) court's decision to proceed with sentencing on two earlier convictions, before retrial on third charge that had resulted in mistrial, despite court's earlier comments that habitualization might depend on outcome of third trial, and in light of court's comments during jury deliberations on third charge as to defendant's guilt, supported motion to disqualify.

Petition granted.

West Headnotes

[1] Judges  51(2)
227k51(2) Most Cited Cases

Motion to disqualify judge was timely made within ten days after discovery of facts constituting grounds for motion when motion was brought within ten days of trial judge's conduct, after mistrial, in stating that he would proceed with sentencing on two other charges, on which he had earlier indicated he would not sentence until third charge was resolved, not at earlier time when judge made comments about defendant's guilt during jury deliberations that resulted in mistrial. West's F.S.A. R.Jud.Admin.Rule 2.160(c).

[2] Judges  49(2)
227k49(2) Most Cited Cases

Motion to disqualify was legally sufficient to require disqualification of judge who, before conducting jury trial on third charge against defendant, indicated that

he would delay sentencing on two other charges, and commented that outcome of trial might affect his decision with respect to habitualization, but, after jury trial on third charge resulted in mistrial, indicated that he would proceed with sentencing, where judge had made comments about defendant's guilt during jury deliberations; decision to proceed, without waiting for retrial and in light of comments during jury deliberations, created in defendant well-founded fear that he would be habitualized based on evidence in third case but not on verdict. West's F.S.A. R.Jud.Admin.Rule 2.160(c).

*329 Michael W. Schwartzberg, St. Petersburg, for petitioner.

Robert A. Butterworth, Attorney General, Tallahassee, and Kimberly D. Nolen, Assistant Attorney General, Tampa, for respondent.

BLUE, Acting Chief Judge.

By petition for writ of prohibition, we are asked to determine the propriety of an order denying a motion to disqualify the respondent judge. We conclude that the motion and its supporting documents were legally sufficient and, consequently, the trial judge erred in failing to disqualify himself.

The following facts appear in the petition and supporting documents filed below. Michael L. Morgan was before the respondent judge for sentencing in two criminal cases and for a trial in a third case. The state was seeking a habitual offender sentence in the two cases. The trial judge agreed to postpone sentencing until after the resolution of the third case, indicating that habitualization might not be warranted if Morgan was acquitted. During the jury's deliberations, lasting over seven hours, the trial judge questioned why the jurors would have difficulty reaching a guilty verdict. After the case resulted in a mistrial, the trial judge held a status conference and scheduled the two sentencing cases. When reminded of his decision to delay sentencing until the third case was resolved, the trial judge indicated that he had heard all the evidence and was prepared to proceed.

[1] The state argues that the motion was untimely. Under Florida Rule of Judicial Administration 2.160(c), "[a] motion to disqualify shall be made within ... 10 days after discovery of the facts constituting the grounds for the motion." The state contends that the time began running when the judge

commented about Morgan's guilt during the jury deliberations. Morgan argues that the grounds for disqualification did not become apparent until the status conference when the judge announced that he would proceed with sentencing. We agree with Morgan and find the motion timely.

[2] The state also argues that the motion was legally insufficient because the judge's comments in one case have no bearing on his conduct in the other two cases. In Dragovich v. State, 492 So.2d 350, 352 (Fla.1986), the supreme court stated:

The function of a trial judge when faced with a motion to disqualify himself is solely to determine if the affidavits present legally sufficient reasons for disqualification. Fla.R.Crim.P. 3.230(d). The test for legal sufficiency is whether the party making the motion 'has a well-grounded fear that he will not receive a fair trial at the hands of the judge.' State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697 (1938).

*330 In this case, the judge agreed to delay sentencing until the disposition of the third case. According to the motion's allegations, the judge's decision on whether to impose a habitual offender sentence was contingent, in part, on the outcome of the third case. The decision to proceed, without waiting for a retrial and in light of his comments during the jury deliberations, created in Morgan a well-founded fear that he would be habitualized based on the evidence in the third case but not on a verdict.

'It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.' State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So.2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially. Livingston v. State, 441 So.2d 1083, 1086 (Fla.1983). Accordingly, we conclude that the motion was legally sufficient and the trial judge erred by denying it.

Petition granted.

FULMER and WHATLEY, JJ., concur.

660 So.2d 328, 20 Fla. L. Weekly D2017

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