**IN THE FLORIDA SUPREME COURT**
**CASE NO. SC01-2678**

In re Guardianship of
Theresa Marie Schiavo,

Incapacitated.

_____//

Michael Schiavo, as Guardian of the
Person of Theresa Marie Schiavo,

Petitioner,

Petition from the Second District
Court of Appeal
Case No. 2D01-3626

v.

Robert Schindler and Mary Schindler,

Respondents.

_____//

# RESPONDENTS JURISDICTIONAL BRIEF

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## SUMMARY OF ARGUMENT

This is Michael Schiavo's last chance to effect his wife's death, before physicians of the parents' choosing examine her. Once that happens – as it has never happened since she fell ill in 1990 – Terri Schiavo's true condition will reveal that she is not a candidate for death under Florida's statutes.

This Court should bear in mind that Terri Schiavo is not on a ventilator, merely a feeding tube. She is not brain dead. She is responsive – at a minimum – to her mother and to Monsignor Thaddeus Malanowski, a retired brigadier general who has been a priest for 54 years and who began visiting Terri on a weekly basis in October, 2000, *after the trial in this case.*[1]/ Monsignor Malanowski confirms that Terri is especially attentive to her mother.

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[1]/ Msr. Malanowski's affidavit was before the trial court and the Second District. Mrs. Schindler, Terri's mother, testified at trial.

The present posture of the case stems from several facts. First, one of Schiavo's expert medical witnesses at trial in January, 2000, testified that Terri Schiavo's brain had almost completely disappeared. Second, trial counsel for the parents presented no countervailing expert medical witness who could have pointed out that human beings cannot live without a brain, that Terri's brain is clearly visible on the lone, 1996 CT scan of her head from which the witness had testified, and that rendering a diagnosis of persistent vegetative state – which is tantamount to a death sentence in Florida – without conducting current tests is professionally irresponsible.[2]/ Finally, the Second District in its January, 2001 opinion affirmed the trial court and, perhaps moved by the vivid testimony that Terri is without a brain, overlooked some of the key elements of a carefully-crafted statutory scheme devised by the Legislature to protect persons in Terri's situation. The net result is that no one – not a guardian *ad litem* as the statute requires nor the trial judge whom the Second District "appointed" her guardian after the fact – spoke for Terri at the trial.

However, now that seven reputable physicians[3]/ have come forward

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[2]/ If this were a death penalty case, the parents would be urging an ineffective assistance of counsel claim upon this Court.

[3]/ The medical doctors who submitted affidavits represent a broad cross-section of American medical education. They either attended or taught, or both, at

voluntarily and submitted affidavits questioning whether Terri is in a persistent vegetative state, the Second District has weighed the equities and has permitted the parents to try to prove that fact in an evidentiary hearing conducted by the trial court. This Court should not stop this hearing nor permit Terri Schiavo to die the gruesome death of dehydration and starvation.

## ARGUMENT

**Rule 1.540(b)(2) "Newly Discovered Evidence"** Schiavo's argument here rests on the faulty premise that newly discovered evidence is a category mutually exclusive of evidence that shows it is "no longer equitable that the judgment or decree should have prospective application." The illogical nature of this analysis is starkly demonstrated by the record in this case.

In support of this central premise, Schiavo offers the Court a tautology: Terri Schiavo is now in a persistent vegetative state because she was found to be in a persistent vegetative state at the time of trial two years ago. He makes this assertion

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the medical schools of the following institutions: University of Alabama, Medical College of South Carolina, University of Florida, University of the Pacific, University of Virginia, Baylor University, Johns Hopkins University, Tulane University, Louisiana State University, Northwestern University, and Medical College of Virginia. In addition, one osteopath and one neuropsychologist submitted affidavits, who received training at the College of Osteopathic Medicine at the University for Health Sciences in Kansas City, and Yeshiva University, Boston University and Harvard University, respectively.

in the face of no current medical testing or examination; he simply points out that until the parents can prove her current condition is different from January, 2000, they are not entitled to the opportunity to prove it. This circular reasoning is legalistic in the extreme and completely ignores the equitable nature of the parents' position and, also, ignores the reality that Schiavo has veto power over who can even visit Terri, much less examine her. Schiavo simply does not permit and has not permitted any physician except those of his choosing to examine her. He keeps her medically sequestered. The essence of this argument demonstrates an uncommon insensitivity to fundamental notions of due process, where *his* experts have unfettered access to her and the parents' experts have been denied access.

As a matter of state and federal constitutional law, Terri Schiavo has a right to live. This is the "default position" in deciding these kinds of cases. The Legislature has devised a detailed and comprehensive method of analyzing and resolving the issues in a case such as this. On several key points, the trial court ignored those statutory protections. *See* Chapters 744 and 765, generally, of the Florida Statutes.

In the absence of a written living will, Terri Schiavo's life can be terminated only under certain narrow conditions. Those conditions are set forth in Fla. Stat. §765.305(2): there is no "reasonable medical probability of recovering capacity"

**and** the "patient has an end-stage condition, the patient is in a persistent vegetative state, **or** the patient's physical condition is terminal." (Emphasis supplied). The parents contend here, as they contended below, that none of these conditions applies to Terri Schiavo. If none of these conditions applies to her, *regardless of her wishes in the matter*, Terri may not be put to death without running afoul of Florida law. If her death is not imminent, if she is not in a persistent vegetative state, or if she is not suffering from a terminal illness or injury – in short, if she is merely a disabled adult – the withdrawal of food and hydration from her is either assisted suicide (if one believes she wants to die, as does the trial court) or murder (if one believes she wants to live). Both are unlawful, and neither is acceptable. Thus, her current condition is of crucial importance.

The death order of the trial court was entered two years ago. The parents have now raised a claim that she does not *presently* fit the statutory requirements to have her feeding tube withdrawn. This claim is based on the opinions of the seven physicians who filed affidavits in support of the parents' position. For whatever reason, the Second District focused on only one of the physician affidavits, that of Dr. Fred Webber, but the other affidavits are equally persuasive. There is no reason to impugn the integrity of these physicians, as Schiavo repeatedly has done, nor any reason to suspect their motives. The presence of these affidavits in the file,

standing alone, is a sufficiently alarming red flag to warrant further judicial investigation, which is all the Second District has done in its latest opinion in ordering the limited discovery and evidentiary hearing.

Schiavo, however, argues that Dr. Webber's statements are not relevant because he does not purport to have successfully treated patients in a persistent vegetative state.[4]/ This argument begs the question. Furthermore, regardless of her condition at the time of trial when the original death order was entered, it is her *current medical condition* that matters, for she cannot be put to death if she does not meet the statutory criteria set out in Fla. Stat. § 765.305(2). Dr. Webber and the other physicians, as clinicians, are not so much interested in the diagnostic label as they are the individual's symptoms and potentialities, regardless of label, as is readily discernible from their statements.

The fact, also, is that counsel for the parents did not present any medical expert to rebut Dr. James Barnhill's testimony that Terri's brain is gone. If this were an ordinary contract dispute, for example, it would be far easier to leave the parents where the Court finds them. However, a life is at stake, and there are at

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[4]/ The history and misuse of this diagnostic label is discussed in "Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support," 263(3) JAMA 426-430 ( Jan 19, 1990). *See also* "International Working Party Report on the Vegetative State" (1996), published privately by the Royal Hospital for Neuro-disability and available on the Internet at www.comarecovery.org/pvs.htm.

least seven physicians who believe strongly enough to have submitted sworn statements that Terri Schiavo is not in a persistent vegetative state. Under these unusual facts, the Court should not "visit upon the client the sins of counsel." *Paul v. Paul*, __ So.2d __, 2002 WL 236966, *2 (Fla. 3d DCA, Feb. 20, 2002)(1.540 motion).

**1.540(b) Discovery** Schiavo argues in his jurisdiction brief that the Second District has permitted discovery on "medical claims that did not raise colorable entitlement to relief." Juris. Br. at 8. He does not specify to which "medical claims" he refers, but from the context it appears he is attacking the entire notion of inquiry into her current medical condition. If that, indeed, is his contention, Schiavo should have taken an appeal to this Court from the second opinion issued by the Second District last July, *In re Schiavo,* 792 So.2d 591 (Fla. 2d DCA 2001), which he did not do. It was in that opinion the Second District remanded the case to the trial court in order to give the parents the opportunity to file a motion pursuant to Rule 1.540, an idea in keeping with the purpose of the rule and the equities of this circumstance. "A full evidentiary hearing should have been granted to enable the trial court to determine whether, under the entire circumstances, the

motion to vacate should have been granted based on any misrepresentation or fraudulent conduct of Appellees, who were parties to the transaction at issue." *Seal v. Brown*, 801 So.2d 993 (Fla. 1st DCA 2001)(per curiam)( citing *Southern Bell Tel. and Tel. Co. v. Welden*, 483 So.2d 487 (Fla. 1st DCA 1986)).

**Burden of Proof** Schiavo argues the Second District erred in ruling that the parents had to prove their claims in any evidentiary hearing by a preponderance of the evidence instead of by clear and convincing evidence. However, if, as this Court said in *Krischer v. McIver*, 697 So.2d 97, 100 (Fla. 1997), life is the "default position" in Florida, it would seem contrary to that principle to require any litigant to meet the higher burden of proof to save someone's life. This seems especially true, given Florida's express. constitutional protection for the right to "enjoy and defend life." Fla. Const., Art. 1, § 2,

**Intrinsic Fraud** For some reason, Schiavo takes issue with a footnote in the most recent Second District opinion that in no way has any impact on his position. That footnote reads in full: "We assume without deciding that such allegation could be sufficient to obtain relief under rule 1.540(b)(5)." *In re Schiavo*, 800 So.2d 640, 643 n.5. The allegations to which the Second District refers concern the parents second basis for relief under Rule 1.540: the statements of two of Schiavo's former ladyfriends, whom he was dating in the early 1990's,

around the time of the medical malpractice trial. Those statements were before the trial court, appended to the Rule 1.540 motion, which rejected them. That ruling was affirmed by the Second District. Having prevailed on the point, Schiavo inexplicably now invites this Court to resolve the perceived "dicta conflict," and cites a 1982 case overruled by this Court in the following year. in invitation which seems at least a waste of judicial resources and at most an advisory opinion.

**Quality of Life** Concern with Terri Schiavo's cognitive functioning is not a qualify of life concern of the Second District, as Schiavo contends. The Second District is focused, instead, on the dictates of § 765.305(2). If Terri has cognitive functioning – that is, if she regains some capacity, she might be able to express, herself, her wish to live or die. Furthermore, to the extent that therapy results in increased cognition, she may be said to have regained sufficient capacity to take her out of the reach of § 765.305(2)(a). This focus of the Second District on the statutes' requirements is newly-minted, however.

The Second District previously had ruled that the *trial judge* functioned as Terri's guardian, surely one of the most inventive departures from statutory dictates ever seen in Florida law. *See In re Schiavo*, 780 So.2d 176, 179 (Fla. 2d DCA

2001)("In this context, the trial court essentially serves as the ward's guardian").[5] / Had a guardian *ad litem* been appointed for Terri, the trial court would have heard both sides of the story of Terri's medical condition and not just the unrebutted, preposterous testimony that her skull is filled with spinal fluid. The only real qualify of life issue in this case is Schiavo's apparent belief today (contrary to his sworn testimony in prior years) that Terri's life is not worth living because she is "broken," and so she must die.

## CONCLUSION

Schiavo's laments about "interminable legal proceeding" ring hollow, when he himself fights so ferociously to prevent Terri's current medical condition from being examined in an even-handed manner. What does he have to fear from two doctors chosen by the parents examining her? Would not ordinary decency militate in favor of being as certain as possible that the law's requirements have been met, before taking an innocent life? In this case of first impression – and possibly

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[5]/ If the trial court was supposed to function as Terri's guardian during the trial – thereby obviating the necessity to appoint a guardian *ad litem*, according to the Second District's reasoning – the judge / guardian did a singularly poor job, not calling or cross-examining any witnesses on her behalf nor making any objections nor offering any documentary evidence. Obviously, no person can serve as both impartial arbiter and zealous advocate in an adversary proceeding, and this flaw in the Second District's very first opinion in large measure has caused the procedural morass of today.

singular application – the equities of these facts compel the conclusion that the Second District, albeit belatedly, has done the right thing in permitting a thorough and fair hearing about Terri Schiavo's current medical condition and the possibility that new therapies can help her. This Court can hardly overlook the irony that the person who pleaded with a Pinellas County jury back in 1992 to award the money his wife would need for life-long rehabilitative care is the very same person who stands before this Court today, asking to end her life, having used the very money awarded by that jury in the effort to kill her. Is it Terri's wishes on the matter that have changed over the years, or Mr. Schiavo's?

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail this _____ Day of February, 2002, to GEORGE J. FELOS, ESQ., Felos & Felos, 595 Main Street, Dunedin, FL 34698; DEBORAH A. BUSHNELL, ESQ., 204 Scotland Street, Dunedin, FL 24698; LARRY CROW, ESQ., 1247 S. Pinellas Avenue, Tarpon Springs, FL 34689.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in Times New Roman typeface, 14 points, and is otherwise in compliance with Fla. R. App. P. 9.210.

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