IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THE SECOND DISTRICT, LAKELAND, FLORIDA

CASE NO. 2D04-4755

IN RE GUARDIANSHIP OF
THERESA MARIE SCHINDLER-SCHIAVO,

Incapacitated.

ROBERT and MARY SCHINDLER,

Appellants/Respondents,

v.

MICHAEL SCHIAVO, Guardian of the person of
THERESA MARIE SCHINDLER-SCHIAVO,

Appellee/Petitioner.

Appeal from the Circuit Court
Pinellas County, Florida
Probate Division
LT Case No. 90-2908-GD-003

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONS

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

This appeal is advanced in this Court pursuant to Fla. R. App. P. 9.130(a)(5). It emanates from a dispositive order entered on October 22, 2004, by the Circuit Court for Pinellas County, Florida, Probate Division ("trial court") dismissing Appellants' motion for relief from judgment filed pursuant to Fla. R. Civ. P. 1.540(b)(5) by Appellants Robert and Mary Schindler ("Appellants" or "the Schindlers'). Appendix ("App.") at 3-7, 42-114, 115-76.

Appellants are respondents in a guardianship adversary proceeding in which Appellee Michael Schiavo ("Mr. Schiavo") is the guardian of Appellants' daughter, Theresa Marie Schindler-Schiavo ("Mrs. Schiavo" or "Terri"), who has been adjudicated an incapacitated adult. Since becoming incapacitated in February 1990, Mrs. Schiavo has been provided nutrition and hydration through a gastronomy tube. The trial court has ruled that Mrs. Schiavo is in what is known as a "persistent vegetative state" ("PVS"). In the adversary proceeding, Mr. Schiavo sought the trial court's authority to permanently remove Mrs. Schiavo's gastronomy tube so that she would die from starvation and dehydration. App. at 8, 12; *see also In re Guardianship of Schiavo,* 780 So. 2d 176, 177 (Fla. 2nd DCA 2001) ("*Schiavo I*"). Appellants are respondents because they are "interested parties" who object to their daughter being starved to death.

In their rule 1.540(b)(5) motion, Appellants seek to set aside the trial court's February 11, 2000, order granting Mr. Schiavo the authority he sought to end Mrs. Schiavo's life by starvation and dehydration. App. at 8-17.

In its 2000 order, the trial court, relying on *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990), ruled that Mrs. Schiavo had, while competent, made oral statements that constituted "oral declarations concerning her intention as to what she would want done under the present circumstances," and that "the testimony regarding such oral declarations is reliable." App. at 16. The trial court found that the testimony was "creditable [*sic*] and rises to the level of clear and convincing evidence to this court." App. at 16. The trial court held that Mrs. Schiavo's "intention as to what she would want done under the present circumstances," supported what her "surrogate," Mr. Schiavo, sought, to wit, the "discontinuance" of "artificial life support" to end her life. App. at 17.

On February 21, 2000, the Schindlers moved for rehearing, asserting, *inter alia*, that the trial court had given undue weight to the testimony of a Catholic priest (Fr. Gerard Murphy) called by Mr. Schiavo to offer his opinion as an expert about the teachings of the Roman Catholic Church ("Church") regarding the cessation of nutrition and hydration to patients diagnosed as being in PVS, as well as whether the deprivation of nutrition and hydration to Mrs. Schiavo would be contrary to the teachings of the Church. App. at 18-36. The Schindlers contended

that Fr. Murphy's opinion was only one side of the debate over end-of-life issues within the Catholic Church at that time, and that it was therefore improper to impute Fr. Murphy's religious opinions to Mrs. Schiavo in determining what she, as a faithful Roman Catholic, would desire under the circumstances. App. at 21-23, 30-36. The trial court denied the Schindlers' Rule 1.540(b)(5) motion, stating that "[t]he doctrines of the Roman Catholic Church were not the evidence relied upon by the court in deciding this case." App. at 40. This statement is borne out by the trial court's order, which contains only one passage in which the Roman Catholic Church is mentioned. It merely states that "Terri Schiavo was reared in a normal, Roman Catholic nuclear family Consisting [*sic*] of her parents and her brother and sister." App. at 8. Further, there was little evidence before the trial court relating to Mrs. Schiavo's Roman Catholic faith and her behavior as a Roman Catholic. App. at 360-76.

This Court affirmed the trial court's order in *Schiavo I*, holding that its decision was supported by clear and convincing evidence. *Schiavo I*, 780 So. 2d at 180. The Court's opinion contains no mention of the Schindlers' motion for rehearing or the trial court's order denying that motion.

On July 20, 2004, the Schindlers moved for relief from the trial court's February 2000 order pursuant to Fla. R. Civ. P. 1.504(b)(5), as well as the United States and Florida Constitutions. App. at 42-176. The gravamen of the

Schindlers' motion was that a substantial new development had occurred in the teachings of the Roman Catholic Church on the moral obligation to provide food and water to patients in PVS. On March 20, 2004, following an international symposium at the Vatican on life-sustaining treatments and the vegetative state, Pope John Paul II proclaimed that the administration of food and water, even when provided by artificial means, is *not* a medical act, but rather a natural means of preserving life. The Pope stated further that its use should always be considered "ordinary and proportionate" and, as such, "morally obligatory." App. at 45-47, 55-64.

Following the Pope's pronouncement, the U.S. Conference of Catholic Bishops ("UCCB"), the highest Catholic ecclesiastical body in the United States, confirmed the enormous significance of the Pope's pronouncement, stating, *inter alia*, that it "profoundly changed the worldwide debate on how to respond to [the PVS] condition." App. at 47-48, 60-64, 119. The UCCB also stated that "[w]ith the Pope's statement, the Church's teaching authority has rejected each aspect of the theory that opposes assisted feeding for patients in a PVS." App. at 60, 119.

In addition, two Catholic clerics, one a moral theologian and the other a Monsignor who was ordained more than five decades ago, each submitted affidavits with Appellants' motion further attesting to the significance of the Pope's pronouncement. Father ("Fr.") Joseph Howard swore that it was

"profound," and marked a "substantial change from what had previously been Church doctrine regarding life-sustaining treatments." App. at 154-56.

Mrs. Schiavo's current priest, Monsignor Malanowski, stated that:

> This was a substantial new development in the Catholic Church, as the Holy Father clarified the moral obligation to administer food and water to patients in the clinical condition of 'persistent vegetative state.' The Pope stated that individuals, such as Terri, are not vegetables and never will be. They are dignified human beings, with a soul, who must not be denied food and water even if they are profoundly disabled. The Pope has now stated that to do so is immoral. (App. at 175.)

In their motion for relief, Appellants alleged and demonstrated with sworn affidavit testimony that Mrs. Schiavo, from early childhood through the time of her collapse, was a faithful Roman Catholic who respected the Pope and was obedient to Church teachings. She attended Catholic schools through the twelfth grade, where she learned Catholic doctrine relating to faith, morality, and the Pope's preeminent position in the Church. She observed Church customs and traditions throughout her life, and publicly proclaimed her faith and beliefs as a Catholic mere hours before her collapse. App. at 50, 73-114, 125-138, 158-169.

For a Roman Catholic such as Mrs. Schiavo, the Pope is the Vicar of Christ on Earth and the successor to the Apostle Peter. App. at 146. When he proclaims or interprets Catholic doctrine on matters of faith or morals, Catholics believe that he is assisted by the Holy Spirit, and consequently his magisterium is infallible, regardless of whether others may dissent. App. at 149. Faithful Catholics are to

acknowledge and obey papal pronouncements addressing matters of faith or morals, such as the Pope's statement of March 20, 2004. App. at 148-49. As a faithful Catholic Mrs. Schiavo would not defy the Pope by purposefully committing, or participating in, an act that the Pope has declared to be immoral. App. at 148-49, 156-57. Indeed, to faithful Roman Catholics like Mrs. Schiavo, the Pope's is the only view relating to faith or morals that matters. App. at 146-49, 156, 161.

Appellants' motion alleged that whatever Mrs. Schiavo's intent or desires may have been in February 2000 when the trial court entered its judgment, because of the Pope's pronouncement on March 20, 2004, she would no longer consent to the withdrawal of food and water by artificial means. App. at 159, 161-62, 150, 152, 159. By her very life and identity, Mrs. Schiavo would not choose to violate a papal pronouncement on a moral doctrine of the Church. App. at 159, 161-62, 150, 152, 159. Thus, Appellants contended, it would no longer be equitable for the trial court to enforce its earlier judgment. App. at 50-52, 131-34.

Mr. Schiavo opposed Appellants' motion, claiming that it was "facially insufficient" for a number of reasons. App. at 177-87. He argued that Appellants had failed to "demonstrate" that the Pope's pronouncement was made "*ex cathedra*." Consequently, he argued, properly viewed, the Pope's pronouncement was a mere allocution and of no significance. App. at 179-80. Second, Mr.

Schiavo asserted that even if the pronouncement was made *ex cathedra*, Appellants had failed to "demonstrate" that it constituted a change in Church "policy." App. at 180-82. Third, in an effort to bury the truth in a mound of pettifoggery, he claimed that the affidavits establishing that Mrs. Schiavo is a faithful Roman Catholic are "irrelevant," "contrary to the law of this case," and "untimely." App. at 182-83. He also contended that Mrs. Schiavo's Catholic faith was irrelevant because Mrs. Schiavo had provided an oral advance directive, which vitiated the need for the trial court to inquire about her religious beliefs. App. at 184-85. Finally, Mr. Schiavo made the assertion that it is impossible for Mrs. Schiavo to change her mind because she has no mind left to change. App. at 185-86. Appellants addressed each of Mr. Schiavo's arguments *seriatim* in their Memorandum of Law filed on September 2, 2004, and showed that they are without merit. App. at 134-40.

On September 7, 2004, the trial court entered an order setting a hearing on Appellants' motion. App. at 212-13. In its order, the trial court expressed confusion over "the procedures to be utilized in relief from judgment proceedings based on Fla. R. Civ. P. 1.540(b)(5)." App. at 204. It stated that "[e]ven Trawick's *Florida Practice and Procedure* suggests a two-pronged approach but does not specify the procedure to be used in determining the first prong, namely the legal sufficiency of the motion." *Id*. Nevertheless, the trial court stated that

absent any real direction in determining the legal sufficiency of the motion, it would be "guided by the test for legal sufficiency for such a motion as set forth in *In re Guardianship of Schiavo*, 792 So. 2d 551, 554 (Fla. 2nd DCA 2001)," this Court's *Schiavo II* decision App. at 212-13.

However, the correct test for determining the legal sufficiency of a motion for relief under Fla. R. Civ. P. 1.540(b)(5) is clearly prescribed by this Court in *Schiavo III. In re Guardianship of Schiavo*, 800 So. 2d 640, 642 (Fla. 2d DCA 2001) ("*Schiavo III*"). Because it focused on *Schiavo II* rather than *Schiavo III,* the trial court's summary dismissal constitutes reversible error.

Following a September 30, 2004, hearing on Appellants' motion, the trial court entered an order dismissing it on October 22, 2004. App. at 3-7. Appellants, thereafter, filed a timely notice of appeal to this Court.

SUMMARY OF ARGUMENT

In their motion for relief, Appellants alleged a change in circumstances which directly affects the decision made by the trial judge as Mrs. Schiavo's proxy in February 2000 and makes it no longer equitable for the trial court to enforce its earlier order. These new circumstances involve Mrs. Schiavo's life-long religious beliefs, and her retained, fundamental right to the free exercise of religion. With the recent developments in the Roman Catholic Church and Mrs. Schiavo's firm

adherence to Church doctrine and practice, given an opportunity, Mrs. Schiavo would *now* decide to continue the artificial provision of her food and water.

On March 20, 2004, following an international symposium at the Vatican on life-sustaining treatments and the vegetative state, Pope John Paul II, Vicar of Christ on Earth for Catholics, set forth a new moral doctrine that all Catholics are obligated to follow. The Roman Pontiff stated in the clearest possible terms that the provision of food and water, even by artificial means, can never be considered "a medical act," and can never morally be withheld from patients in the clinical condition of PVS. By proclaiming the artificial provision of food and water to be "ordinary and proportionate," and, as such, "morally obligatory," the Pope significantly changed the Church's moral teaching. (App. 155-156). Following the Pope's pronouncement, the American Bishops confirmed that it "profoundly changed the worldwide debate" on how to respond to the PVS condition.

For faithful Catholics like Mrs. Schiavo there is simply no issue: The Pope, as successor to the Apostle Peter and Vicar of Christ on Earth, is the supreme and infallible head of the Church, and when he proclaims a doctrine of faith or morals, Catholics are obliged to submit to it. Whatever her desires may have been in February 2000, because of the Pope's March 20, 2004, pronouncement, Mrs. Schiavo would no longer choose to withdraw the provision of food and water by artificial means because to do so would be morally wrong, and in direct conflict

with Catholic Church teachings and doctrine to which she faithfully adhered up to the day she collapsed. These new circumstances make it no longer equitable for the trial court to enforce its earlier decision because to do so would force Mrs. Schiavo to commit an act now forbidden by her religion, and prevent her from engaging in conduct that her Catholic faith now mandates.

In denying the motion, the trial court violated the constitutional doctrine of ecclesiastical abstention by deciding a question of religious doctrine. As a result of that constitutional error, the trial court also violated Mrs. Schiavo's state and federal constitutional and statutory rights to the free exercise of her religion by refusing as her surrogate to consider whether the Pope's statement would change her pre-2004 end-of-life decision today. Appellants' motion, memorandum of law, and sworn affidavit testimony not only meet the standard necessary to "allege" a colorable entitlement to relief under Fla. R. Civ. P. 1.540(b)(5), they exceed it.

STANDARD OF REVIEW

Because the issues in this case mirror those resolved by the Court in *Schiavo III*, Appellants submit that this Court should adopt the same standard of review that it did in that case, and review *de novo* the trial court's summary dismissal of Appellants' motion for relief from judgment. *Schiavo III*, 800 So. 2d at 644-45. The appeal should also be reviewed *de novo* because the determination of the "legal sufficiency" of a pleading is a question of law for which a *de novo* review

lies. *Sume v. State*, 773 So.2d 600, 602 (Fla. 1st DCA 2000) ("Whether the motion is 'legally sufficient' is a pure question of law. . . . It follows that the proper standard of review is the de novo standard." [Citation omitted].).

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DISMISSED APPELLANTS' FLA. R. CIV. P. 1.540(b)(5) MOTION ALLEGING NEW CIRCUMSTANCES THAT MAKE IT NO LONGER EQUITABLE TO DISCONTINUE MRS. SCHIAVO'S FOOD AND WATER.

In *Schiavo II*, this Court ruled that "the Schindlers have the right to seek relief from judgment under rule 1.540(b)(5) for the benefit of the ward," and should do so by "alleg[ing] new circumstances affecting the decision made by the trial judge as the ward's proxy in February 2000." *Schiavo II*, 792 So. 2d at 554, 561. The new circumstances "must make it no longer equitable for the trial court to enforce its earlier decision" because, given the new circumstances, Mrs. Schiavo "would not have made the decision to withdraw life-prolonging procedures," or "would make a different decision at this time." *Id*.

A. The Trial Court Erred In Not Recognizing That The Pope's Pronouncement Is A Change In Circumstances Under Fla. R. Civ. P. 1.540(b)(5).

In their motion for relief, Appellants alleged a change in circumstances, which makes it no longer equitable for the trial court to enforce its February 2000 order. These new circumstances concern Mrs. Schiavo's life-long religious beliefs,

and her retained, fundamental right to freedom of religious belief and expression.[1] As the motion explained, and the sworn affidavit testimony demonstrated, whatever her decision was before the Pope spoke, Mrs. Schiavo would *now* decide to continue the provision of her food and water by artificial means.

1. In 2004, Pope John Paul II Declared That The Artificial Provision Of Food And Water Is "Not A Medical Act" And Can Never Morally Be Withheld From Persons In A Persistent Vegetative State.

When the trial court ruled in February 2000 that Mrs. Schiavo would elect not to be kept alive by life-prolonging medical procedures, the Roman Catholic Church ("the Church") had not made a clear and explicit statement on what constitutes a "life-prolonging medical procedure." App. at 8-17, 60-64. Indeed, no Roman Pontiff had ever addressed the issue. *Id*. A few months ago at the Vatican, however, all of that changed.

On March 20, 2004, following an international symposium at the Vatican on life-sustaining treatments and the vegetative state, His Holiness Pope John Paul II, Vicar of Christ on Earth for Catholics,[2] directly addressed the issue, setting forth a

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[1] The Health Care Advance Directives provisions "do not impair any existing rights" a patient may have "under the common law, Federal Constitution, State Constitution, or statutes of this state." § 765.106, Fla. Stat. (2000).

[2] "Vicar" is defined as "[o]ne who performs the functions of another." Black's Law Dictionary 1566 (6th ed. 1990; Centennial Edition (1891-1991)).

new doctrine that Catholics are morally obligated to follow. App. at 44, 55-58, 60-63, 118-19, 144-49, 154-57. 174-75.

The Roman Pontiff stated in the clearest possible terms that the provision of food and water, even by artificial means, can never be considered "a medical act" and can never morally be withheld from those in the clinical condition of PVS:

> I should like particularly to underline how the administration of food and water, even when provided by artificial means, *always* represents a *natural means* of preserving life, *not a medical act*. Its use, furthermore, should be considered, in principle, *ordinary* and *proportionate*, and as such *morally obligatory*, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering. (App. at 56) (last emphasis added).

By proclaiming that the provision of food and water by artificial means is to be considered "ordinary and proportionate," the Pope significantly changed the Church's moral teaching. App. at 60-62, 155-56, 176. Before his proclamation, the morality of refusing a particular life-prolonging medical procedure was determined by a complex and nuanced subjective analysis about whether the particular procedure was considered "ordinary" or "extraordinary." App. at 33-34, 61, 195-97. The Church teaches that ordinary measures to preserve life are morally obligatory, but extraordinary measures are not. App. at 33-34, 61, 195-97. By his proclamation, the Pope made it clear for the first time that the administration of food and water, even by artificial means, is an "ordinary" means

of preserving life, not a medical act, and as such is now considered morally obligatory. App. at 56.

Appellants' motion further showed that following the Pope's pronouncement, the U.S. Conference of Catholic Bishops ("UCCB") issued a statement confirming that the pronouncement "profoundly changed the worldwide debate" on how to respond to the PVS condition:

> On March 20, [2004] speaking to participants in an international congress on the 'vegetative' state, Pope John Paul II *profoundly changed the worldwide debate on how to respond to this condition*. He issued the first clear and explicit papal statement on the obligation to provide food and water for patients in a 'persistent vegetative state' (PVS).
>
> *With the Pope's statement, the Church's teaching authority has rejected* each aspect of the theory that opposes assisted feeding for patients in a PVS. The Pope's speech *marks a new chapter* in the Catholic contribution to efforts against euthanasia by omission.
>
> * * *
>
> [F]or Catholics, the most painful complication has been the lack of clear and unambiguous guidance at the level of Church teaching. The Catholic Church has long had a complex and nuanced moral tradition on life-sustaining treatment.
>
> * * *
>
> As of March 20[, 2004] *this is no longer the case*. (App. at 60-62) (emphasis added).

According to the UCCB, "[w]ith the Pope's statement," the Church has rejected all theories opposing artificially assisted feeding for patients in PVS. For Catholics, assisted feeding for such patients is now morally obligatory, and any opposition to it directly conflicts with the moral teaching of the Church.

Appellants' motion also showed that according to the *Lumen Gentium,* the Dogmatic Constitution of the Church, the Roman Pontiff has overriding and infallible authority within the Church, particularly when he proclaims a doctrine of faith or morals. App. at 146-49, 156. The *Lumen Gentium* also makes it clear that when the Pope proclaims a doctrine of faith or morals, all Catholics are obligated to submit to his judgment:

> *In virtue of his office, that is as Vicar of Christ and pastor of the whole Church, the Roman Pontiff has full, supreme and universal power over the Church.* And he is always free to exercise this power. The order of bishops, which succeeds to the college of apostles and gives this apostolic body continued existence, is also the subject of supreme and full power over the universal Church, provided we understand this body together with its head the Roman Pontiff and never without this head. This power can be exercised only with the consent of the Roman Pontiff. For our Lord placed [Peter] alone as the rock and the bearer of the keys of the Church, and made him shepherd of the whole flock.
>
> * * *
>
> [*R]eligious submission of mind and will must be shown in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking ex cathedra*; that is, it must be shown in such a way that *his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will*.
>
> * * *
>
> *[T]his is the infallibility which the Roman Pontiff, the head of the college of bishops, enjoys in virtue of his office*, *when*, as the supreme shepherd and teacher of all the faithful, who confirms his brethren in their faith, *by a definitive act he proclaims a doctrine of faith or morals*. And therefore his definitions, of themselves, and not from the consent of the Church, are justly styled irreformable, since they are pronounced with the assistance of the Holy Spirit, promised to him in blessed Peter, and therefore they need no approval of others, nor do

> they allow an appeal to any other judgment. (App. at 146-49) (emphasis added).

As these sacred Catholic precepts plainly indicate, and Appellants' sworn affidavit testimony confirms, when the Pope, by a definitive act, proclaims a doctrine of faith or morals—his authentic magisterium—Catholics are morally obligated to submit both in mind and will. App. at 146-49, 154-57.

Appellants' Rule 1.540(b)(5) motion also showed that the Pope's pronouncement superceded the expert testimony received by the trial court in January 2000. App. at 123. On January 24, 2000, the Guardian offered Fr. Gerard Murphy "as an expert in the area of the Catholic Church's position on end of life care and treatment issues." App. at 351. Fr. Murphy explained the Church's complex and nuanced moral teaching as it existed in January 2000.

> [Mr. Felos:] Father, in the Catholic [C]hurch, do papal teachings or pronouncements hold primacy as compared to the teachings and pronouncements of bishops or cardinals?
>
> [Fr. Murphy:] Yes. The Pope sets the tone.
>
> [Mr. Felos:] Are there any papal pronouncements or teachings in the area on use or removal of artificial life support?
>
> [Fr. Murphy:] In 1953 Pope Pius the IV met with a group of physicians who considered those questions in conference. Pius was almost prophetic in foreseeing what would happen fifty – forty years later. The teaching that he taught was that Catholics are mortally bound to respect life and to care for life, but not at all costs. He introduced the concept of extraordinary versus ordinary means. *A Catholic is mortally bound to take advantage of the ordinary,*

proportionate or disproportionate. (App. at 364-65) (emphasis added).

Fr. Murphy also explained that the Church took various factors into account when determining whether a medical procedure was ordinary as opposed to extraordinary, or proportionate as opposed to disproportionate. He testified that balancing various emotional, psychological, medical, and financial factors in each individual case was essentially the Church's practice, "then you make your moral decision based upon those issues." App. at 365-66. Based on that teaching, Fr. Murphy concluded that the withdrawal of Mrs. Schiavo's feeding tube "would be consistent" with the moral doctrines of the Church. App. at 368.

As of March 20, 2004, however, complex subjective analyses like that used by Fr. Murphy in his trial testimony are no longer appropriate with regard to artificially assisted feeding. As the UCCB concluded, "[w]ith the Pope's pronouncement, the Church's teaching authority has rejected every aspect of the theory that opposes assisted feeding for patients in a PVS." App. at 60. Such analyses are no longer acceptable since artificially assisted feeding is now "ordinary and proportionate, and as such morally obligatory."

This doctrinal change negates Fr. Murphy's opinion that the withdrawal of Mrs. Schiavo's feeding tube "would be consistent" with the moral teaching of the Church. As shown in his excerpted testimony above, Fr. Murphy also recognized that "[a] Catholic is *mortally bound* to take advantage of *ordinary* [means],

[whether] proportionate or disproportionate." App. at 364-62. Since artificially assisted feeding is now deemed by the Pope to be ordinary and proportionate, Fr. Murphy would today have to conclude that, Mrs. Schiavo, as a Catholic, is "mortally bound to take advantage" of it. *Id*.

In addition to the foregoing allegations, Appellants' motion included the sworn affidavit testimony of Monsignor Thaddeus Malanowski and Fr. Joseph Howard. App. at 154-57, 174-75. Monsignor Malanowski has been a priest for more than five decades and, for the last four years, has tended to Mrs. Schiavo's spiritual needs. App. at 174. His testimony confirmed that the Pope's pronouncement was "a substantial new development in the Catholic Church," on the moral obligation to administer food and water to patients like Mrs. Schiavo. App. at 175.

Fr. Joseph Howard, who was ordained a Catholic priest in 1989 and is the Executive Director of the American Bioethics Advisory Commission, was present at the Vatican when the Pope delivered his magisterium on March 20, 2004. He testified that "there is no question" the Pope's pronouncement "marked a substantial change" in Catholic moral doctrine. App. at 154-55. Now that the Pope has determined that artificially assisted feeding is morally obligatory, the purposeful and knowing withdrawal of food and water would be "a grave violation of the law of God." App. at 156.

Determining whether a particular life-prolonging medical procedure is ordinary or extraordinary, and thus morally obligatory or not, led to a great deal of confusion within the Church. App. at 60. The Pope's proclamation of March 20, 2004, has now eliminated all such analyses with regard to the artificial provision of food and water by clarifying that the artificial provision of food and water is *not* a medical act, but rather a natural, ordinary means of preserving life, which is "morally obligatory" for Catholics.

As Appellants' motion alleged, and their supporting affidavits demonstrate, this significant new development in Catholic moral doctrine profoundly affects this case and directly impacts the trial court's 2000 decision that Mrs. Schiavo would elect to terminate artificially assisted feeding if she were competent to make her own decision. Given the Pope's pronouncement, enforcement of the trial court's 2000 decision would *now* directly conflict with Mrs. Schiavo's Catholic faith, her very identity as a Catholic, and her fundamental, retained right to freedom of religious belief and expression.

2. Mrs. Schiavo Was And Remains A Faithful Catholic Who Would Follow The Pope's Directives In The Matter.

For faithful Catholics like Mrs. Schiavo there is simply no issue: The Pope, as successor to the Apostle Peter and Vicar of Christ on Earth, is the supreme and infallible head of the Church, and when he proclaims a doctrine of faith or morals, all Catholics are obliged to submit to it. Even his "definitions" are "justly styled

irreformable, since they are pronounced with the assistance of the Holy Spirit." App. at 149.

Mrs. Schiavo was educated about the Pope's preeminent position in the Catholic Church, and was taught that papal pronouncements on matters of faith and morals are to be reverently respected and obeyed. App. at 163. Now, by the Pope's very words, artificially assisted feeding for patients in PVS is not a medical act, or a life-prolonging medical procedure, but rather an ordinary means of preserving life, and thus morally obligatory. Mrs. Schiavo, as a faithful Catholic, would respect and adhere to his new moral teaching. App. at 159, 161-62, 166, 168, 175.

Appellants alleged that Mrs. Schiavo is known to be a faithful Catholic, and that she publicly demonstrated this to the world in one of her last known acts. App. at 49-50, 72-114, 125-27, 158-75. Just hours before collapsing, Mrs. Schiavo attended Saturday weekly Mass with her family, and publicly declared her adherence to the Catholic faith by orally reaffirming, in communion with all those present, the sacred Apostle's Creed:

> I believe in God, the Father almighty, creator of heaven and earth.
>
> I believe in Jesus Christ, his only Son, our Lord. He was conceived by the power of the Holy Spirit and born of the Virgin Mary. He suffered under Pontius Pilate, was crucified, died, and was buried. He descended to the dead. On the third day he rose again. He ascended into heaven, and is seated at the right hand of the Father. He will come again to judge the living and the dead.

> I believe in the Holy Spirit, the holy Catholic Church, the communion of saints, the forgiveness of sins, the resurrection of the body, and the life everlasting.
>
> Amen. (App. at 125.)

"The word 'creed' has been defined as confession or articles of faith, formal declaration of religious belief, any formula or confession of religious faith, and a system of religious belief." Black's Law Dictionary 370 (6th ed. 1990; Centennial Edition (1891-1991)). By her public declaration of faith, which was witnessed by her father and mother, Mrs. Schiavo confirmed her religious beliefs, and her adherence to the Catholic Church and its teachings. App. at 74, 82, 158-59, 160-62.

It is not a mere coincidence that Mrs. Schiavo was at Mass reaffirming her beliefs only hours before her collapse that fateful Sunday morning. Appellants' affidavits demonstrated that Mrs. Schiavo attended Mass regularly, usually with her parents, and occasionally with others. App. at 73-78, 80-82, 111-12, 158-62, 164-65, 167. When Mrs. Schiavo's husband testified in January 2000 that Mrs. Schiavo did not go to church "very often," he may have been unaware of Mrs. Schiavo's regular Saturday attendance with her parents while he was at work. App. at 41, 73, 118. Either way, as evidenced by the sworn affidavits appended to Appellants' motion, his testimony regarding Mrs. Schiavo's religious practices is demonstrably untrue. App. at 49-50, 73-114, 125-27, 158-75. This testimony was

later relied on by this Court when it observed in *Schiavo I* that Mrs. Schiavo "had been raised in the Catholic faith, but did not regularly attend mass." *Schiavo I*, 780 So. 2d at 180.

In fact, as Appellants' motion alleges, one need only look at Mrs. Schiavo's life to conclude that she is, and always has been, a faithful Catholic. First, as the trial court recognized, Mrs. Schiavo "was reared in a normal, Roman Catholic nuclear family." App. at 8. As a Catholic, Mrs. Schiavo was baptized in December 1963, received her first Holy Communion in May 1972, went to Catholic elementary, middle, and high schools, and, shortly thereafter, married Michael Schiavo in a Nuptial Mass, after they received prenuptial counseling from Mrs. Schiavo's parish priest. Michael, a non-Catholic, was granted a dispensation from the Church to marry Terri. App. at 49, 73-110, 126. According to Mrs. Schiavo's sister, marriage outside of the Catholic Church was never an option for Mrs. Schiavo. App. at 126-27, 167-68.

Mrs. Schiavo received the Catholic Holy Sacraments, honored the Catholic holy days of obligation, sacrificed during the Lenten season, celebrated Catholic holy days, reminded her brother to attend Mass and not to receive communion without confession, all in her normal custom of obedience to the teachings of the Church. App. at 127, 163-68. Mrs. Schiavo's Catholic faith played a central and fundamental role in her life, and, as shown by her public profession of faith just

hours before her collapse, she continued to be a faithful Catholic right up until the time she became incapacitated.

Even now, the Church continues to recognize Mrs. Schiavo as a faithful member, entitled to receive the Church's Holy Sacraments. During the past four years, Monsignor Malanowski, Mrs. Schiavo's diocesan monsignor, with authority from the diocesan bishop, has made a special point of caring for Mrs. Schiavo's spiritual well being and immortal soul. App. at 127, 174-75. Since her incapacitation, he has continued to visit Mrs. Schiavo, praying for her, blessing her, anointing her, and providing her with the sacrament for the sick. *Id*. As Msgr. Malanowski's actions confirm, the Catholic Church recognizes that Mrs. Schiavo has been and continues to be a faithful member. Although she is incapacitated, Mrs. Schiavo still has a retained, fundamental constitutional right to express her Catholic beliefs and exercise her Catholic faith, and to reject participating in an act that the Pope has now declared to be immoral. App. at 157, 175.

Appellants' motion showed that given this new papal pronouncement and the new moral obligation it imposes, Mrs. Schiavo, as a faithful Catholic, would today *not* make the decision to terminate the artificial administration of her food and water. These new circumstances make it no longer equitable for the trial court to enforce its earlier decision because to do so would force Mrs. Schiavo to commit an act now forbidden by her religion, and prevent her from engaging in conduct

that her Catholic faith now mandates. As the sworn affidavit testimony shows, Mrs. Schiavo would not choose, on her own accord, to commit an act forbidden by her Catholic faith, nor would she refuse to engage in conduct that her Church has morally commanded. App. at 158-62, 166, 168.

A present decision by Mrs. Schiavo not to refuse artificially administrated food and water is not necessarily inconsistent with an earlier desire to refuse such life-prolonging medical procedures as a mechanical respirator. The Catholic Church has simply now made it clear that the administration of food and water, even by artificial means, is *not* a life-prolonging medical procedure, but rather a natural and ordinary means of preserving life, and thus morally obligatory.

In its February 11, 2000, order, the trial court bundled the artificial administration of food and water with the life-prolonging medical procedures that Mrs. Schiavo would have allegedly refused based upon language in the case of *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). The trial court noted that the Supreme Court in *Browning* "found that all life support measures would be similarly treated and found no significant legal distinction between artificial means of life support." App. at 14.

While the distinction between "ordinary" and "extraordinary" or "proportionate and disproportionate" end-of-life care may not have held legal significance in the *Browning* decision, the distinctions hold great legal significance

for Mrs. Schiavo in light of the 2004 pronouncement of Pope John Paul II. "The religious or ethical beliefs of" Mrs. Browning did not play a role in the decision before this Court in its consideration of *In re Guardianship of Browning*, 543 So. 2d 258 (Fla. 2d DCA 1989). *Id*. at 262. They very much do in this case.

The State of Florida may make no distinction between artificial means of life support, but as of March 20, 2004, the Catholic Church most certainly does, and Mrs. Schiavo, as a faithful Catholic, would follow her Church's teaching. Now, by the Pope's very words, the use of artificial means to administer food and water to a patient in PVS is "ordinary and proportionate, and as such morally obligatory." Mrs. Schiavo would not commit an act that is morally forbidden by her religion, nor refuse to do something that her Catholic faith morally commands. App. at 158-62, 166, 168. The trial judge, as Mrs. Schiavo's surrogate decision maker, must "make[ ] the decision which [Mrs. Schiavo] would personally choose" for herself today in light of the Pope's pronouncement. App. 14.

B. The Trial Court Erred When It Violated The First Amendment's Prohibition On Courts Deciding Religious Doctrine.

In its order denying Appellants' 2000 motion for rehearing of its February 2000 order, the trial court stated that:

> In their Motion for Rehearing, movants presented evidence from "Life, Death and the Treatment of Dying Patients, a Pastoral Statement of the Catholic Bishops of Florida," a paper that drew heavily from the [C]hurch's 1980 *Declaration of [sic] Euthanasia*,

> among other sources, and which, when paraphrased, is consistent with the words of Pope John Paul II uttered [sic] in March of this year.

App. at 5; *see also* App. at 30-36. To the extent this statement is a basis for the trial court's conclusion that "nothing has changed," the court has in fact ruled on the merits of Appellants' motion and bypassed the requirement that discovery and an evidentiary hearing to resolve factual disputes must precede such a ruling.

The trial court's ruling that the Pope's pronouncement is not new because it "is consistent with" prior Church teaching is not the test for deciding a rule 1.540(b)(5) motion. Of even greater "newness" than the new moral doctrine contained within the pronouncement is the significant fact that the Pope, "as Vicar of Christ and the pastor of the whole Church," himself made the pronouncement. (App. 146). This fact alone raises fundamental constitutional issues in this case. (App. 77-78).

Appellants have alleged and demonstrated that the Pope's March 2004 pronouncement was a new circumstance, both in its substantive content and in its ecclesiastical authority. Mr. Schiavo disagreed, claiming that the Pope's pronouncement presented nothing new in Church doctrine. App. at 178-82. The trial court agreed with Mr. Schiavo's side of the religious dispute. Thus, at a minimum, when the trial court was confronted with a doctrinal dispute regarding the significance of the Pope's pronouncement, it undertook to resolve the religious dispute in Mr. Schiavo's favor.

The trial court's determination of this doctrinal dispute within the Roman Catholic Church is in direct violation of the First Amendment's doctrine of ecclesiastical abstention which warns that

> "it is not within the 'judicial function and judicial competence'" of civil courts to determine which of two competing interpretations of scripture are correct. *United States v. Lee,*455 U.S. 252, 256, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). Instead, civil court must defer to the interpretation of religious doctrine made by the "highest ecclesiastical tribunal." *Serbian E. Orthodox Diocese*, 426 U.S. [696] at 709, 96 S.Ct. 2372. Thus, the First Amendment provides churches with the "power to decide for themselves, free from state interference, matters . . . of faith and doctrine. *Kedroff* [*v. St. Nicholas Cathedral*, 344 U.S. [94] at 116, 73 S.Ct. 143; *see Serbian E. Orthodox Diocese*, 426 U.S. at 724-25, 96 S.Ct. 2372."

Malicki v. Doe, 814 So.2d 347, 355-56 (Fla. 2002). *See also Nussbaumer v. State*, 882 So.2d 1067, 1077 (Fla. 2d DCA 2004) ("Pursuant to the ecclesiastical abstention doctrine, courts do not interpret religious doctrine or otherwise inquire into matters involving religious dogma.").

The record herein contains no allegation that the Pope is not the "highest ecclesiastical tribunal" of the Catholic Church. Neither is there any allegation that the Pope did not make the pronouncement at all. Appellee merely alleges that other Catholics within the Church disagree with the significance of the Pope himself saying it, the doctrinal validity of its content, and the spiritual obligation it imposes on members of the Catholic faith. These challenges to the Pope's new pronouncement do not focus on the newness of the Pope's statement; they raise

doctrinal disputes from which Florida civil courts must abstain under the First Amendment doctrine of ecclesiastical abstention.

When the trial court entered the religious fray, it not only violated the First Amendment doctrine of ecclesiastical abstention, it also deprived Appellants of their right to an evidentiary hearing and completely overlooked the essence of Appellants' motion, that Mrs. Schiavo, as a faithful Catholic, would adhere to the teachings contained in the Pope's pronouncement. What would matter to Mrs. Schiavo would not be what a group of Catholic bishops have to say about the issue, but would be the clear and unequivocal moral admonition from the Pope. App. at 149, 156.

The United States and Florida Constitutions require the trial court to abstain from becoming involved in the religious debate and to accept the pronouncement of the Pope as the controlling word on Mrs. Schiavo's moral obligation to today decide to continue the artificial provision of her food and water. Affidavits and documents submitted by Appellants demonstrate the significance and meaning not only of the Pope's pronouncement, but more importantly that it was the Pope himself who pronounced it. The trial court may not summarily determine that the Pope's pronouncement would not also significantly change Mrs. Schiavo's decision on the artificial administration of food and water if she could verbalize her decision today. App. at 55-58, 60-64, 143-53, 157-61, 174-76.

Because the trial court entangled itself in matters of ecclesiastical cognizance and polity instead of relying upon the crystal clear determination of the highest authority in the Catholic Church, its October 22, 2004, order should be reversed on that First Amendment ecclesiastical abstention ground alone.

The conclusory paragraph of its October 22, 2004, order, notes that this Court "held" in *Schiavo I* that Mrs. Schiavo "had been raised in the Catholic faith, but did not regularly attend mass *or have a religious advisor who could assist the Court in weighing her religious attitude about life-support methods*." App. at 5-6 (emphasis in original). This Court did not hold that Mrs. Schiavo did not regularly attend Mass.

It is true that Mrs. Schiavo had no *personal* religious advisor. She did not need one. The Pope, the Roman Catholic Church's supreme teacher, was her religious advisor. Neither Mrs. Schiavo, assuming she was competent, nor any other individual with knowledge of the Pope's pronouncement, would need a religious advisor to interpret the Pope's proclamation. His words are unmistakable.

While the trial court may not agree with the significance and doctrinal validity of the Pope's new statement, the statement must be taken by civil courts as the controlling ecclesiastical word on Mrs. Schiavo's moral obligation with regard to the artificial provision of food and water to patients in PVS. The trial court

ignored the statement from the "highest ecclesiastical judicature" of the Catholic Church and unconstitutionally chose to itself decide the Church's doctrinal debate in Appellee's favor. Instead, the court below 1) should have accepted the Pope's statement as doctrinally settling the matter and 2) should have permitted an evidentiary hearing as to how the statement would affect Mrs. Schiavo's end-of-life decision, and then, 3) as her surrogate, should have made Mrs. Schiavo's decision as she would make it after March 2004, not as she would have made it before 2004.

C. The Trial Court Can No Longer Equitably Enforce Its 2000 Order Without Violating Mrs. Schiavo's Statutory And Constitutional Rights To The Free Exercise of Religion.

The United States Supreme Court has declared freedom of religion to be a fundamental right, one that occupies a preferred position in our constitutional hierarchy. *See Follett v. Town of McCormick*, 321 U.S. 573 (1944) ("'Freedom of press, freedom of speech, freedom of religion are in a preferred position.' [citation omitted]"). Indeed, our constitutional traditions firmly establish that a person has a fundamental right to live according to his or her beliefs, free from unreasonable interference by the government. *See Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989).

This freedom is guaranteed by the First Amendment to the United States Constitution, one of the hallmarks of our Bill of Rights, which provides, *inter alia*,

that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. amend. I. This guarantee is also made applicable to the states through the Fourteenth Amendment. *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002). Additionally, the Florida Constitution provides that there shall be no law prohibiting or penalizing the free exercise of religion. Art. I, § 3, Fla. Const. *See also, Fenske v. Coddington*, 57 So. 2d 452 (Fla. 1952). There is simply no doubt that freedom of religion, as guaranteed by the federal and state constitutions, is a nearly absolute and certainly a fundamental right. *See Reynolds v. United States*, 98 U.S. 145 (1878).

One's religious liberty rights embrace the freedom to believe as well as the freedom to act. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). The first is absolute. The second remains subject to reasonable limitations for the protection of society. *Id*. Laws may not restrict religious beliefs, only religious practices, and then only in limited instances. *See Town v. State ex rel. Reno*, 377 So. 2d 648 (Fla. 1979). Conduct based on religious beliefs may only be subject to reasonable limitations if the protection of society, public health, morals, safety or convenience is at stake. *See id*.; *Hord v. City of Fort Myers*, 13 So. 2d 809 (Fla. 1943).

A free exercise violation occurs when governmental action burdens the religious adherent's practice of her religion by pressuring her to commit an act

forbidden by the religion, or by preventing her from engaging in conduct or having a religious experience which the faith mandates. *See United States v. Turnbull*, 888 F.2d 636, 638-39 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); *Graham v. CIR*, 822 F.2d 844, 850-51 (9th Cir. 1987) (citations omitted), *aff'd sub nom*., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1988); *see also Warner v. City of Boca Raton*, --- So. 2d ---, 2004 WL 1944456 at *9 (Fla. Sept. 2, 2004) ("We hold that a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires."). App. at 383.

In 1998, the State of Florida went even further, and enacted the Religious Freedom Restoration Act ("RFRA"). Under RFRA, the government cannot substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. Fla. Stat. § 761.03(1) (2003); *see also Warner v. City of Boca Raton*, *supra.*, at *9) (The Florida Supreme Court held that RFRA broadens the definition of what constitutes religiously-motivated conduct protected by law beyond the conduct considered protected under the U.S. Constitution.). App. at 377-86.

The term "government," as used in Florida's RFRA statute, includes any branch, department, agency or official acting under color of law of the state, a county, municipality, or other subdivision. *Id*. at § 761.02(1). Moreover,

governmental regulation includes both statutory law and court action initiated through civil lawsuits. *See Malicki*, 814 So. 2d at 347. The government may only substantially burden a person's free exercise of religion if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id*. at § 761.03(1)(a) & (b).

Under RFRA, the exercise of religion includes any act or refusal to act that is substantially motivated by a religious belief in some tenet, practice or custom of a larger system of religious beliefs. *Id*. at § 761.02(3). A person whose religious exercise has been substantially burdened in violation of the statute may assert that violation in a judicial proceeding and obtain appropriate relief. *Id*. at § 761.03(2).

Under both state and federal law, Mrs. Schiavo has a fundamental, absolute, and preferred constitutional and statutory right to adhere to her Catholic beliefs that cannot be restricted either by statute or by court order. She has both the freedom to believe, as well as the freedom to act on those beliefs, as long as her actions do not interfere with the protection of society. The government may not pressure Mrs. Schiavo to commit an act forbidden by her religion, and it may not prevent her from engaging in conduct mandated by her faith. Furthermore, under RFRA, the government cannot substantially burden Mrs. Schiavo's exercise of religion, even if the burden results from a rule of general applicability.

There is no question that Mrs. Schiavo is entitled, under federal and state law, to freely worship according to her Catholic faith, and to freely exercise her Catholic beliefs. She has adhered to the Catholic faith and its teachings throughout the course of her life. One of her last acts—only hours before her collapse—confirmed for everyone that she is still a faithful Catholic and still adheres to the doctrines and teachings of the Church. By her very identity and life, Mrs. Schiavo would not choose to violate a papal pronouncement on a moral doctrine of the Church. Nor may the trial court, through its February 11, 2000 order, force her to commit an act that is now forbidden by her religion, or prevent her from choosing to engage in conduct that her Catholic faith now mandates.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DISMISSED APPELLANTS' FLA. R. CIV. P. 1.540(b)(5) MOTION ALLEGING A "COLORABLE ENTITLEMENT" TO RELIEF.

At the outset it seems that the trial court was uncertain as to the proper procedure to be used in this proceeding. Although Appellants' cited the *Schiavo II* and *III* decisions by this Court, the trial court found that:

> [T]he cases submitted are of little help in determining the procedures to be utilized in relief from judgment proceedings based on Fla. R. Civ. P. 1.540(b)(5). Even Trawick's *Florida Practice and Procedure* suggests a two-prong approach but does not specify the procedure to be used in determining the first prong, namely determining the legal sufficiency of the motion. Absent any real direction, the Court will use the hearing … to determine the legal sufficiency of the [m]otion …. This hearing will be limited to legal argument only and will be guided by the test for legal sufficiency for such a motion as set forth in [*Schiavo II*].

App. at 212-13. The trial court proceeded according to *Schiavo II* rather than *Schiavo III*, where this Court clarified its *Schiavo II* ruling and explained that Appellants' motion need only allege a "colorable entitlement" to relief in order to be afforded limited discovery and an evidentiary hearing (*Schiavo III*, 800 So. 2d. at 641-42).

In *Schiavo II*, this Court ruled that Appellants must "allege new circumstances affecting the decision made by the trial judge as the ward's proxy in February 2000" (*Schiavo II*, 792 So. 2d at 561), and those circumstances "must make it no longer equitable for the trial court to enforce its earlier decision" because, given the new circumstances, Mrs. Schiavo "would not have made the decision to withdraw life-prolonging procedures," or "would make a different decision at this time." *Id.* at 561, 554.

The trial court's October 22, 2004, order appears to dismiss Appellants' motion because it could discern no "definable methodology" for resolving it. App. at 6. The lower court appears to be asking this Court to provide it with a new procedure for determining this rule 1.540(b)(5) motion. While a new procedure might be necessary for this particular motion, the lack of a specific procedure is not a valid basis for dismissing the motion, particularly one where the fundamental issue is whether Mrs. Schiavo may lawfully be starved to death contrary to her religious faith.

A. The Trial Court Erred In Not Following The Standard Established By *Schiavo III* For Determining What Constitutes "Colorable Entitlement."

In its order dismissing Appellants' motion, the trial court found that (1) the affidavits appended to the motion "present nothing new," and (2) prior Catholic doctrine "is consistent with" the pronouncement made by the Pope on March 20, 2004, therefore "[n]othing has changed." App. 5-6. While Appellants show herein that these findings are erroneous, they note first that the trial court applied the wrong legal standard. Instead of addressing whether they had *alleged* a colorable entitlement to relief under rule 1.540(b)(5), the trial court addressed the *merits* of Appellants' allegations. That is plainly contrary to *Schiavo III*, and not the appropriate standard at this stage of the proceedings. Appellants' motion, memorandum of law, and supporting affidavits need only allege—and do allege—a colorable entitlement to relief under Fla. R. Civ. P. 1.540(b)(5). Consequently, they were entitled to limited discovery and an evidentiary hearing before the merits of their motion were addressed.

In fact, in its order, the trial court acknowledged that Appellants' motion made the proper allegations:

> The Schindlers' motion alleges that the Pope's March 2004 pronouncement represents a substantial change of circumstances subsequent to the judgment to withdraw life support and that Terri would no longer opt to discontinue the life-prolonging procedures since such action is now contrary to the teachings of the Roman Catholic Church.

App. at 5. Despite expressly recognizing that Appellants had made the necessary factual allegations, the trial court did not address whether their allegations demonstrated a "colorable entitlement" to relief. It merely concluded that nothing new was presented in the motion. App. at 5-6. The trial court's conclusion that nothing is new and nothing has changed is simply contrary to the facts alleged as supported by sworn affidavit testimony.

The only reason stated in the trial court's order for its finding that Appellants' affidavits presented nothing new is that "it had the benefit of testimony from Mr. and Mrs. Schindler and others as to Terri['s] religious background" when the trial court made its decision in February 2000. App. at 5. However, when one looks at the 2000 trial record, one sees that little, if anything, was said during the trial about Mrs. Schiavo's religious beliefs and practices. In fact, out of several hundred pages of trial testimony, only seventeen contain any mention of Mrs. Schiavo's religious background. That testimony, in order of presentation, was as follows:

2000 Trial Testimony of Michael Schiavo:

Q: Tell me a little bit about – tell us a little about Terri's religious practice from the time you knew her. Well, do you know what faith Terri was brought up?

A: Terri was brought up Catholic.

Q: During the time that you knew Terri or let's say from the time you were married, how often would Terri go to mass?

A: I'm sorry repeat that for me, George.

Q: How often would Terri go to mass?

A: Not very often. Once every few months.

Q: Did you go with her?
A: Yes. I did.

Q: Did Terri ever receive communion when she attended mass?

A: No. She did not.

Q: Did Terri ever participate in the sacrament of confession?

A: No. She did not. (App. at 360-61.)

2000 Trial Testimony of Mary Schindler (Mrs. Schiavo's mother):

Q: [Regarding your family life] Did you work outside the home?

A: No. I did not.

Q: Did you – were you active in any church activities?

A: I used to help with the school that the kids used to go to called Our Lady of Good Counsel. I used to help up there during the week.

***

Q: Where did [Terri] go to high school?

A: High school she went to Archbishop Boyd for Girls in Warminster, Pennsylvania.

***

Q: [After Terri and Michael moved into their own apartment] Did you do anything particular on the weekends with Terri?

A: Well, Saturdays we went to mass. She used to go with us. After mass, we maybe went to dinner. Sundays, not really. Sometimes visit some people or just maybe go to a movie.

Q: Where did you go to mass?

A: St. John's on St. Pete Beach.

Q: Would you take communion?

A: Yes.

Q: Did you participate in confession?

A: Yes. (App. at 369-72.)

2000 Trial Testimony of Robert Schindler, Jr. (Mrs. Schiavo's brother):

Q: Could you describe your family growing up?

A: Sure. It was a typical family. Very close. We spent quite a lot of time together. The easiest way to explain our family is very typical. Very strong as far as closeness in relationship to each other.

Q: Did you attend church?

A: Yes.

Q: What church did you attend?

A: Our Lady of Good Counsel.

Q: Did you go regularly as a family?

A: Yes. (App. 373-74.)

2000 Trial Testimony of Suzanne Schindler Vitadamo (Mrs. Schiavo's sister):

> Q: Can you describe what it was like growing up in the Schindler household?
>
> A: Very normal. Close knit family. Happy childhood. Friendly, nice neighborhood. We lived in a nice house in a nice neighborhood. Catholic school. (App. at 375.)

2000 Trial Testimony of Robert Schindler, Sr. (Mrs. Schiavo's father):

> Q: While you lived in Philadelphia, did you attend church?
>
> A: Did I attend church? Oh, yeah. Our Lady of Good Counsel.
>
> Q: Did you go regularly?
>
> A: Every Sunday.
>
> Q: Did Terri go with you growing up?
>
> A: Yes.
>
> Q: After you moved to Florida, did you find a new church here?
>
> A: We went to church at St. John's on the Beach. We did not register with the church because we were not sure where we were going to live. That is another story again. To answer your question, yes, we went to St. John's on the Beach. (App. at 376.)

The record contains minimal testimony in the 2000 trial about Mrs. Schiavo's religious beliefs and practices. The nine sworn affidavits appended to Appellants' motion and memorandum of law present a substantial amount of new

factual information on this subject, and the finding that there is nothing new presented is simply contrary to the record. App. at 73-114, 158-69.

The appended affidavits provide new, much more detailed information relating to, *inter alia*, Mrs. Schiavo's childhood and upbringing by traditional Catholic parents; her Catholic education and schooling, including church and school records; her marriage to Michael Schiavo in a Catholic Nuptial Mass only after Michael, a non-Catholic, was given a dispensation from the Church to marry her; her observance of Catholic traditions and customs; her reverence for Pope John Paul, II; her respect for Church teachings; her faithful attendance at Mass; and her proclamation of her religious faith and her belief in the Catholic Church only hours before her collapse.

In *Schiavo III*, the Court cited to *Dynasty Express Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA 1996), in which the appeals court explained that to establish a "colorable entitlement" to relief, the moving party must allege facts sufficient "to permit the court 'to determine whether the movant has made a *prima facie* showing which would justify relief from judgment'" *Id*. at 239 (citation omitted). In other words, the court explained, the movant must allege facts, which, if proven, would warrant relief under the rule. *See also Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (the trial court erred in denying Southern Bell's requested hearing and discovery based upon an erroneous

finding of fact). The *Southern Bell* court also made it clear that where the moving parties' allegations raise a colorable entitlement to relief, a formal evidentiary hearing, as well as discovery prior to the hearing, is required. *Id.* at 489 (citing *Rosenthal v. Ford*, 443 So. 2d. 1077 (Fla. 2nd DCA 1983); *Pelekis v. Florida Keys Boys Club*, 302 So. 2d 447 (Fla. 3rd DCA 1974), *cert. denied*, 312 So. 2d 751 (Fla. 1975); *Stella v. Stella*, 418 So. 2d 1029 (Fla. 4th DCA 1982)). The trial court committed error when it concluded that the appended affidavits "present[ed] nothing new" so that Appellants were not entitled to discovery and an evidentiary hearing on their motion.

B. The Trial Court Erred In Not Ordering Discovery And An Evidentiary Hearing Before Ruling On Appellants' Fla. R. Civ. P. 1.540(b)(5) Motion.

Here, as in *Schiavo III*, the trial court summarily dismissed Appellants' rule. 1.540(b)(5) motion denying them limited discovery and an evidentiary hearing. On appeal in *Schiavo III*, this Court reversed and remanded that decision. *Schiavo III*, 800 So. 2d at 642-43, 645. The Court ruled that "the Schindlers' motion for relief from judgment and the supporting affidavits state a 'colorable entitlement' to relief," which "requires the trial court to permit certain limited discovery and conduct an evidentiary hearing to determine whether [the] new evidence calls into question the trial court's earlier decision that [Mrs. Schiavo] would elect to cease

life-prolonging procedures if she were competent to make her own decision." *Id.* at 641-42.

The Court based its ruling, in part, on the assumption, which Florida courts "must" make, that patients, in exercising their right to privacy, would choose to defend life:

> This [C]ourt has repeatedly stated that, in cases of termination of life-support, the courts *must* assume that a patient would choose to defend life in exercising the right of privacy." *See Schiavo I*, 780 So. 2d at 179; *In re Guardianship of Browning*, 543 So. 2d 258, 273 (Fla. 2d DCA 1989). This default position *requires* this court to conclude that the medical affidavits are sufficient to create a colorable entitlement to relief sufficient to warrant an evidentiary hearing on the motion for relief from judgment.

Id. at 645 (emphasis added). The Court stated that this default position "requires" it to conclude that the affidavits are sufficient to warrant an evidentiary hearing, even when the court is skeptical about the affidavits submitted in support of the motion. *Id*.

The facts alleged in Appellants' motion and memorandum of law, and demonstrated in the accompanying affidavits, fit squarely within the *Schiavo III* paradigm. Appellants have alleged new circumstances, supported by sworn affidavit testimony, which no longer make it equitable for the trial court to enforce the decision it made as Mrs. Schiavo's proxy in February 2000. Appellants' allegations, therefore, raise a colorable entitlement to relief under Fla. R. Civ. P.

1.540(b)(5). Thus a formal evidentiary hearing, as well as discovery prior to the hearing, is required.

Appellants have alleged and demonstrated that Mrs. Schiavo, from her early childhood, has been a faithful Catholic, who respects the Pope and adheres to the Church's teachings. On March 20, 2004, Pope John Paul II pronounced for the first time the Church's teaching on the moral obligation to provide food and water to patients in the clinical condition of PVS. The Pope stated plainly that the administration of food and water, even by artificial means, is not a medical act. Its use is ordinary and proportionate, and as such is morally obligatory.

According to the sworn affidavit testimony of two Catholic clerics, the Pope's pronouncement was enormously significant, and marked a "substantial change from what had previously been Church doctrine regarding life-sustaining treatments." App. at 154-56. According to the UCCB, the highest Catholic ecclesiastical body in the United States, the Pope's pronouncement is "the first clear and explicit papal statement on the obligation to provided food and water for patients in a 'persistent vegetative state.'" App. at 47.

For faithful Roman Catholics, the Pope is the Vicar of Christ on Earth, the successor to the Apostle Peter, and the Church's supreme teacher. App. at 146-47, 156. Catholics believe that when he proclaims or interprets Catholic doctrine on faith or morals, the Holy Spirit assists him, and his magisterium is therefore

infallible, regardless of whether others may dissent. App. at 156. Thus, to faithful Catholics such as Mrs. Schiavo, the only view that matters on this subject is the Pope's, and consequently they acknowledge and obey papal pronouncements.

No faithful Catholic would defy the Pope by purposefully committing or participating in an act that the Pope has declared to be immoral (App. at 121), and, according to those who knew Mrs. Schiavo the best, whatever her desires may have been in February 2000, because of the Pope's March 20, 2004 pronouncement, she would no longer choose to withdraw the provision food and water by artificial means.

Affidavit of Robert Schindler, Sr. (Mrs. Schiavo's father):

> I, together with Terri's mother, participated in bringing Terri into this world. I, together with her mother, participated in raising, educating and nurturing her. No man knows my daughter as I do. No man is more concerned for her best interests than I. No man knows better than I what Terri's wishes would now be, and I state that it is a fact that the faith Terri publicly proclaimed on that Saturday afternoon, February 24, 1990, would also dictate her choice today. As a faithful Catholic, Terri would not assent to the denial of food and water, even though administered by artificial means, because, after March 20, 2004, to do so would be morally wrong, in direct conflict with Catholic Church teachings and doctrine, and contrary to God's law. (App. at 159.)

Affidavit of Mary Schindler (Mrs. Schiavo's mother):

> I brought Terri into this world. I loved, nurtured, counseled and disciplined her into womanhood. I sternly but lovingly imparted to Terri the traditional Roman Catholic values that I had been given by my parents. I did these things on a full-time basis, even after Terri became an adult.

Aside from my husband, Terri's father, no other human being knows Terri as I do. Aside from my husband, no other human being loves Terri as I do. Aside from my husband, no other human being cares more than I about Terri's well being and desires.

It is a fact that my daughter Terri is a faithful, obedient Roman Catholic. From early childhood she proved this to me every day that I was in her presence. It is also a fact that Terri reveres the Holy Father, and would never defy his teaching on matters of faith and morality. It is a fact that Terri would never participate in an act that the Holy Father has said is immoral. It is also a fact that Terri would never refrain from doing an act that the Holy Father has said is morally obligatory. What anyone else might say would be beside the point to Terri. All that matters or would matter to Terri is that she adhere to the Pope's teaching.

I state that it is a fact that the faith Terri publicly proclaimed on that Saturday afternoon, February 24, 1990, would also dictate her choice today. As a faithful Catholic, Terri would not assent to the denial of food and water, even though administered by artificial means, because, after March 20, 2004, to do so would be morally wrong, in direct conflict with Catholic Church teachings and doctrine, and contrary to God's law. (App. 161-62.)

Affidavit of Robert Schindler, Jr. (Mrs. Schiavo's brother):

Since we are so close in age, almost twins, I spent most of my life, and particularly the last three years before she became disabled, in a very strong, close relationship with Terri. I know well her beliefs and her values as she expressed and lived them. I have no doubt, none whatsoever, that Terri, regardless of what her wishes supposedly were in 2000, would obediently and faithfully adhere to the moral teaching contained in the Holy Father's pronouncement of March 20, 2004. Now that the Pope has stated that the administration of food and water can never be considered a "medical act," but rather is a natural and ordinary means of preserving life, and morally obligatory, Terri would never defy the Holy Father's new instruction by assenting to the withdrawal of food and water. That would be at odds with the way Terri has lived her entire life. (App. at 166.)

Affidavit of Suzanne Schindler-Vitadamo (Mrs. Schiavo's sister):

> Terri is a devout, faithful and obedient Roman Catholic, who would never defy a papal declaration on a matter of faith or morals. Whatever she may have desired in February 2000, she would not now assent to the denial of food and water even though administered by artificial means, because, after March 20, 2004, to do so would be morally wrong, in direct conflict with Catholic Church teachings and doctrine, and contrary to God's law. (App. at 168.)

Monsignor Thaddeus Malanowski (Mrs. Schiavo's priest):

> Over the years, I have become close to Terri's family and quite familiar with Terri's life and background. She was raised in a very traditional Catholic family. She was baptized and confirmed in the Church, attended Catholic elementary, middle and high schools, learned the Catholic catechism, and regularly attended mass with her family. From what I know, Terri is a faithful, obedient Roman Catholic. No faithful Roman Catholic, who adhered to the Church's teachings all her life, would now defy the Pope.
>
> As a faithful Catholic, Mrs. Schiavo would not assent to the denial of food and water, even though administered by artificial means, because, after March 20, 2004, to do so would be morally wrong. (App. at 175.)

Appellants submit that this affidavit testimony not only meets the standard necessary to "allege" a colorable entitlement to relief under Fla. R. Civ. P. 1.540(b)(5), it exceeds it. By her very life and identity, Mrs. Schiavo would not choose to violate a papal pronouncement on a moral doctrine of the Church. Nor may the trial court, through its February 11, 2000, order, force her to commit an act that is now forbidden by her religion, or prevent her from engaging in conduct that her Catholic faith now mandates.

CONCLUSION

The trial court erred in dismissing Appellants' rule 1.540(b)(5) motion on the grounds that no new or changed circumstances exist. The Pope's March 2004 pronouncement that the artificial provision of food and water is not a "medical act" and can never morally be withheld from persons in PVS is new. Mrs. Schiavo, as a faithful Catholic, would follow the Pope's direction in this matter.

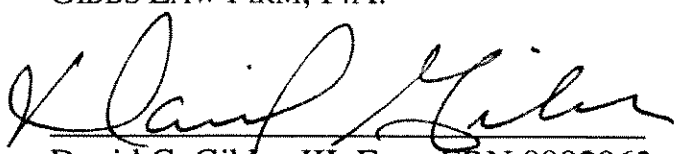
The trial court committed constitutional error when it determined end-of-life doctrines and ecclesiastical polity for the Catholic Church. As a result of that constitutional error, the trial court also violated Mrs. Schiavo's state and federal constitutional and statutory rights to the free exercise of her religion by refusing as her surrogate to consider whether the Pope's statement would change her pre-2004 end-of-life decision today.

In order to obtain discovery and an evidentiary hearing on their motion for relief, Appellants were only required to *allege* a "colorable entitlement" to relief under Fla. R. Civ. P. 1.540(b)(5). Appellants exceeded this burden by both alleging and demonstrating their entitlement to the relief they requested. The trial court was, therefore, required to afford them discovery and an evidentiary hearing.

Appellants therefore respectfully request this Court to reverse the judgment below and to remand the case to the trial court for discovery and an evidentiary hearing on their rule 1.540(b)(5) motion.

Respectfully submitted,

GIBBS LAW FIRM, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellants, with Appendix, was served via first-class mail, postage prepaid, this 22nd day of November, 2004, upon to the following addressees:

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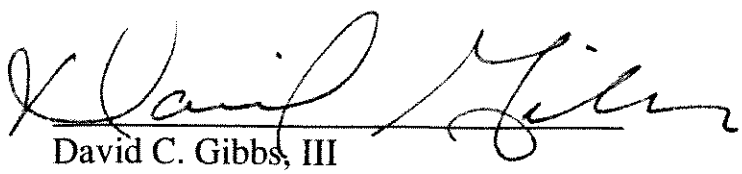

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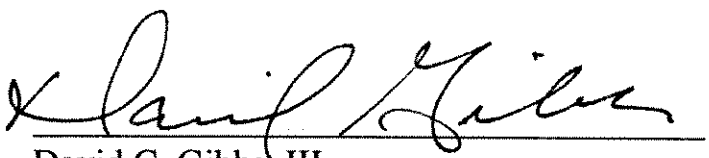
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared and is submitted in Times New Roman 14-point font, and is otherwise in compliance with Fla. R. App. P. 9.210.



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