UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THERESA MARIE SCHINDLER SCHIAVO,
Incapacitated *ex rel,* ROBERT AND MARY SCHIAVO, her Parents & Next Friends,

Petitioners,

vs.

THE HONORABLE GEORGE W. GREER,
Circuit Court Judge, Sixth Judicial Circuit of the State of Florida, in his official capacity, and as Surrogate Health Care Decision-Maker for Theresa Marie Schindler Schiavo, Incapacitated,

Rm. 484, 315 Court Street
Clearwater, FL 33756,

and

MICHAEL SCHIAVO,
as Guardian of the Person of Teresa Marie Schindler Schiavo, Incapacitated,

and

THE HONORABLE CHARLIE CRIST,
Attorney General of the State of Florida,

Respondents.

Case No.

EMERGENCY PETITION FOR TEMPORARY INJUNCTION
and
Petition for a Writ of Habeas Corpus By an Incapacitated Person in State Custody and Subject to an Order Mandating Withdrawal of all Nutrition and Hydration

COMES NOW Petitioner, Theresa Marie Schiavo, Incapacitated, by and through her parents and Next Friends Robert and Mary Schindler, pursuant to 42 U.S.C. § 2254 and 28 U.S.C. § 1331 who submit the following **Emergency Petition for Temporary Injunction** and Petition for Writ of Habeas Corpus by a petitioner in state custody subject to an order mandating death through slow dehydration and starvation.

Petitioner is being confined at The Hospice of the Florida Suncoast, 6774 102nd Ave., Pinellas Park, Florida 33782 , by Respondent Michael Schiavo, acting pursuant to the orders of the Respondent, Judge George W. Greer, in his capacity as Circuit Probate Judge of the Sixth Judicial Circuit Court of Pinellas County, Florida (Probate Division) in an action styled *In re Guardianship of Theresa Marie Schiavo, Incapacitated*, No. 90-2908-GD-03. Terri is being denied her liberty, and, beginning March 18 at 1:00 p.m., will be denied both her property and her life pursuant to unconstitutional proceedings and orders of the state court, including an order intended to cause her death by starvation and dehydration.

The allegations in this Petition are in accordance with the model form for use and application for habeas corpus under 42 U.S.C. § 2254.

INTRODUCTION

In the early morning hours of February 25, 1990, Petitioner Theresa Schiavo (hereinafter "Terri" or "Mrs. Schiavo") was deprived her brain of oxygen to her brain for a significant period of time. Her husband, Respondent Michael Schiavo, said he found her collapsed in the hallway of their home. Paramedics were summoned who performed

CPR and took Terri to the hospital. The incident left her brain damaged. Michael Schiavo was appointed plenary guardian of his wife on June 18, 1990.

In 1992, Michael Schiavo filed a malpractice action against two physicians who had been treating Mrs. Schiavo before her collapse. The case was resolved in 1993 by a settlement and a jury verdict, with Michael Schiavo receiving $300,000 and Terri Schiavo receiving a net award of $700,000. Until the malpractice award was issued, Michael Schiavo was providing his wife with appropriate medical treatment, rehabilitation, and therapy. In late 1993, however, after receiving the money, all treatment, rehabilitation, and therapy stopped. Since 1993, Terri's rehabilitation, therapy, education, socialization, and medical treatment have been virtually non-existent.

On May 11, 1998, Michael Schiavo, as guardian of his wife, and represented by Attorney George Felos, petitioned the Circuit Court for Pinellas County, Florida, Sixth Judicial Circuit, Probate Division, for authority to discontinue Terri's "artificial life support," which consisted only of assisted feeding through a PEG (percutaneous endoscopic gastrostomy) tube. The petition was filed as an adversary action, with Petitioners herein, Terri's parents having been served with notice of the proceeding.

It is the opinion of one doctor who examined Terri and of many others who have seen videos of her responses that feeding Terri through a tube is merely a convenience for her health-care providers and that Terri, who regularly swallows her own saliva, could also swallow food if she were provided with appropriate rehabilitation and swallowing therapy. Instead, Mrs. Schiavo has not even been permitted by Michael Schiavo and Judge Greer to have a swallowing test administered since 1992.

The case was tried before the trial court and on February 11, 2000, the trial court:

> ORDERED AND ADJUDGED that the Petition for Authorization to Discontinue Artificial Life Support of Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, an incapacitated person, be and the same is hereby GRANTED and Petitioner/Guardian is hereby authorized to proceed with the discontinuance of said artificial life support for Theresa Marie Schiavo.
>
> DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida at the hour of 5:00 on this 11th day of February, AD, 2000.

(Appendix 1). The execution of the Order was stayed to permit the Schindlers to appeal it.

Since the February 11, 2000, Order, Terri's assisted feeding has been discontinued twice, once on April 24, 2001, when her feeding tube was capped, and again on October 15, 2003, when her nutrition and hydration tube was entirely removed and later reinserted. In 2001, Terri's feeding was reestablished in two days by order of a judge in the civil division of the circuit court in response to an injunctive action filed by the Schindlers. *Schiavo II*, 792 So.2d at 556. In 2003, after Terri had been without food and water for six days, Florida Governor Jeb Bush by Executive Order ordered the tube to be reinserted pursuant to Chapter 2003-418, Florida Laws (referred to herein as "Chapter 2003-418") that had been adopted by the Florida Legislature on October 21, 2003.

The next death order was issued by the trial court on February 25, 2005, when the trial court entered an order authorizing a third removal, this time a complete removal of nutrition and hydration from Terri, not merely removal of the feeding tube. In relevant part, the Order provides:

> The Court is persuaded that no further hearing need be required [before Respondent, Michael Schiavo, can act] but that a date and time certain should be established so that last rites and other similar matters can be addressed in an orderly manner. Even though the Court will not issue another stay, the scheduling of a date certain for implementation of the February 11, 2000 ruling will give [Petitioners Robert and Mary Schindler] ample time to appeal this denial, similar in duration to previous short-time stays granted for that purpose. Therefore, it is
>
> **ORDERED AND ADJUDGED** that the Motion for Emergency Stay filed on February 15, 2005, is DENIED. It is further
>
> **ORDERED AND ADJUDGED** that absent a stay from the appellate courts, the guardian, Michael Schiavo, shall cause the removal of nutrition and hydration from the Ward, Theresa Schiavo, at 1:00 P.M. on Friday, March 18, 2005.
>
> **DONE AND ORDERED** in Chambers at Clearwater, Pinellas County, Florida at 2:50 p.m. this 25th day of February. (Appendix 1)

Later the trial court denied the Schindlers' request to have medical personnel attempt to feed their daughter by mouth after the tube was removed. (Appendix 2) The Florida District Court of Appeal, Second District, affirmed the trial court's order on March 16, 2005. (*In re Guardianship of Schiavo*, No. 90-2908- GD-003, 2005 WL 459634 at *5 (Fla. Cir. Ct. Feb. 25, 2005) (*Schiavo V*) (Appendix 4).

Although families are often divided over decisions to withdraw nutrition and hydration from a patient found to be in a persistent vegetative state (PVS), they are *not* usually divided – as the parties are here – over whether the person is actually *in* PVS and over whether the trial was tainted *ab initio* by structural due process violations, which include a judicial conflict of interest, failure to appoint a guardian *ad litem* or independent counsel for the incapacitated ward in a situation where the courts themselves have recognized the potential for a conflict of interest, and on the key issue of whether

the incapacitated ward will be able to feel the excruciating pain that accompanies a death by starvation and dehydration for a potentially extended period of time, perhaps several weeks. The following facts, however, are undisputed.

1. The guardianship court acted in the dual capacity of health-care surrogate and trial judge. In *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. App. 2d Dist. 2001) [*Schiavo I*], the District Court of Appeal held that:

> Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker.

The Court of Appeal confirmed this procedure in *Schiavo II*, 792 So. 2d at 557, when it noted that "Mr. Schiavo, as guardian, requested the court to function as the proxy in light of the dissension within the family." (Footnote referencing Florida guardianship priorities omitted).

2. The Florida courts have held that it is permissible for the ***trial court*** to simultaneously try to function as both the Ward's guardian and her judge, notwithstanding Florida statute and constitutional law to the contrary.

> In this context, the trial court essentially serves as the ward's guardian. Although we do not rule out the occasional need for a guardian in this type of proceeding, a guardian ad litem would tend to duplicate the function of the judge, would add little of value to this process, and might cause the process to be influenced by hearsay or matters outside the record.

Schiavo I, 780 So. 2d at 178.

3. Although Terri's constitutional rights are non-delegable under Florida law, her legal interests were represented by counsel for Respondent Michael Schiavo who

initiated the state court proceedings for authority to withdraw nutrition and hydration. It was Michael Schiavo's financial and personal conflicts of interest that led the trial court judge to conclude that he himself could serve in the dual capacity of both health-care proxy and judge.

4. Florida law provides that while judges may act as guardians of members of their families, they may not do so for anyone else. FLA. STAT. § 744.309(b)(2).

5. Florida judges are not among the individuals the Florida Legislature has designated as eligible to serve as proxies who can act on behalf of incapacitated patients. *See* FLA. STAT. § 765.401(1)(a)-(g).

6. Florida constitutional law also forbids the assumption of guardianship responsibilities by judges who are presiding in a disputed case. In *In Re TW*, 551 So.2d 1186, 1190 n. 3 (1989), the Florida Supreme Court held:

> Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.

7. Petitioner, Theresa Marie Schiavo, Incapacitated, has never been represented in her individual capacity by independent counsel. Instead, Michael Schiavo's legal counsel has purported to represent Terri's constitutional rights despite the fact that Florida courts have found Michael Schiavo to have at least the appearance of a conflict of interest. See *Schiavo I*, 780 So.2d at 178.

8. At no time during the course of the guardianship proceedings (*i.e.*, since 1991) did the judge-surrogate ever visit Terri. He has, therefore, had no opportunity to

determine, for himself, her reactions to stimuli, or her level of her responsiveness to anyone, including her parents.

9. Death by starvation and dehydration is neither quick nor painless. A person who, like Terri, is otherwise in good health will die painfully over an extended period of time.

10. The guardianship court's order mandates the withdrawal of *all* nutrition and hydration, even that delivered by mouth. (Appendix 2)

11. Terri has not had a swallowing test since 1992, and has never been examined with state-of-the-art medical diagnostic equipment. She has had no diagnostic testing since 2002 to determine her current condition.

12. Terri, by her parents and next friends, has exhausted all remedies available under state law, including remedies available through the legislative process. The order of the Second District Court of Appeal issued on Wednesday, March 17, 2005, upheld Judge Greer's death order for the starvation and dehydration of Robert and Mary Schindler's daughter on March 18, 2005 at 1:00 p.m. The Second District Court of Appeal ignored the Schindlers' U. S. Constitution due process claims and simply declared "that the Florida Constitution has long been interpreted to authorize the process used by the trial court in this case." *In re Guardianship of Schiavo*, No. 90-2908- GD-003, 2005 WL 459634 at *5 (Fla. Cir. Ct. Feb. 25, 2005) (*Schiavo V).* In other words, the Florida Constitution provides no due process protections for disabled Floridians such as Terri Schiavo.

II. PROCEDURAL HISTORY

Michael Schiavo sought authorization from the Florida courts to terminate his wife by the removal of her nutrition and hydration feeding tube under chapters 744 and 765, Florida Statutes (2005), and under Florida's constitutional guidelines enunciated in *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990). The case began on May 22, 1990, when Respondent Michael Schiavo filed a guardianship petition for his wife, Theresa Marie Schiavo, who was, and remains, incapacitated because of a severe brain injury suffered on February 25, 1990.

The Florida courts construed the Florida laws applicable to the case in the following reported appellate opinions: *In Re Guardianship of Theresa Marie Schiavo*, 780 So.2d 176, 177 (Fla. Dist. Ct. App. 2001) ("*Schiavo I*"), *rev. den*. 789 So.2d 348 (Fla. 2001) (Table); *In re Guardianship of Schiavo*, 792 So.2d 551, 555 (Fl. Dist. Ct. App. 2001) ("*Schiavo II*"); *In re Guardianship of Schiavo*, 800 So.2d 640, 642 (2001) *rev. denied*, 816 So.2d 127 (Fla. 2002) (Table, No. SC01-2678) (*"Schiavo III"*); *In re Guardianship of Schiavo*, 851 So.2d 182, 185 (2003) *rev. denied*, 855 So.2d 621 (Fla. 2003) (Table, No. SC03-1242) ("*Schiavo IV*"); *In re Guardianship of Schiavo*, --- So.2d ----, 2005 WL 600377 (Fla. 2d DCA Mar 16, 2005) (NO. 2D05-968) (*Schiavo V*). *Theresa Marie Schindler Schiavo, an Incompetent Ward, Incapacitated, by her Parents and Next Friends, Robert and Mary Schindler v. Michael Schiavo, Individually, and in his Capacity as Guardian of the Person of Theresa Marie Schindler Schiavo, Incapacitated*, 2003 WL 22469905 (M.D. Fla., Sep 23, 2003) (dismissed on *Rooker-Feldman* grounds).

Concerned that Terri's rights to procedural due process, equal protection, fair trial, and adequate representation were violated by the guardianship court, the Florida Legislature enacted a remedy that closely resembled a clemency or *habeas corpus* proceeding. Chapter 2003-418, Florida Laws (referred to herein as "Chapter 2003-418"), was adopted on October 21, 2003, six days after the tube was withdrawn.

Acting pursuant to the authority granted by the Legislature, the Governor issued Executive Order No. 03-201 on October 21, 2003, reinstating the provision of nutrition and hydration to Terri pending receipt of a report by the court-appointed guardian *ad litem*. (Appendix 3)

As implemented, the review process had features similar to clemency proceedings employed in Florida capital cases:[1]

1.) Review of the facts of the case and the fairness of the judicial process by the Governor; [2]

2.) Appointment by the chief judge of the circuit court of an independent guardian *ad litem* whose loyalties are to the ward alone;[3] and

3.) A report to the chief judge and the Governor of the guardian *ad litem's* findings and conclusions,[4] after which the Governor could either dissolve the stay, or seek such further relief on behalf of the ward as may be warranted under the circumstances.

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[1] *Compare* FLA. CONST. Art. IV § 8 (Clemency); FLA. STAT. § 22.06 (Stay of Execution of Death Sentence)

[2] *Compare* FLA. STAT. § 904.03 (West 2004) (An application for executive clemency "may require the submission of a certified copy of the applicant's indictment or information, the judgment adjudicating the applicant to be guilty, and the sentence, if sentence has been imposed, and may also require the applicant to send a copy of the application to the judge and prosecuting attorney of the court in which the applicant was convicted, notifying them of the applicant's intent to apply for executive clemency.")

[3] *Compare* FLA. R. CR. P. 3.851(b) "Appointment of Post-Conviction Counsel"; FLA. STAT. § 27.703 (specific conflicts of interest).

[4] *Compare* FLA. CONST. Art. IV § 8(a) (clemency requires approval of two members of the cabinet).

Michael Schiavo challenged the facial and as-applied constitutionality of Chapter 2003-418, alleging, among other things, that Chapter 2003-418 violated the separation of powers. The Governor sought a jury trial at which the facts supporting the facial and as-applied constitutionality of Chapter 2003-418 and his Executive Order could be established before an impartial fact-finder, but the Florida Supreme Court held Chapter 2003-418 to be unconstitutional on Florida separation of powers grounds in *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004). The United States Supreme Court denied *certiorari*. *Bush v. Schiavo*, 125 S.Ct. 1086 (2005) (No. 04-757).

The guardianship court issued its third death order on February 25, 2005. This time Judge Greer ***mandated*** (not merely authorized as in the original Order, February 11, 2000) the withdrawal of nutrition and hydration, not merely the removal of the feeding tube. (Appendix 1)

Petitioners took a timely appeal to the Second District Court of Appeal, which affirmed the order on March 16, 2005. No discretionary appeal lies from that order to the Florida Supreme Court. (Appendix 4)

Petitioners filed a motion for stay with the Second District Court of Appeal pending their filing of a Petition for *Certiorari* with the United States Supreme Court. (Appendix 5)

The Second District Court of Appeal denied the stay on March 16, 2005. (Appendix 4)

Petitioners then filed an application for an emergency stay from the Supreme Court of the United States, Associate Justice Anthony Kennedy, Circuit Justice for the Eleventh Circuit. (Appendix 6)

Justice Kennedy denied the application on March 17, 2005. (Appendix 7)

Petitioners have therefore exhausted all of their remedies and appeals under state law.

III. PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner's confinement pursuant to the orders of the Honorable Judge George W. Greer was authorized in violation of her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States in the following respects:

1. He has authorized the removal of Terri's nutrition and hydration feeding tube by the guardian for the express purpose of terminating her life. (Appendix 1). [This Order was implemented on April 24, 2001. On April 26, 2001, assisted feeding was reinstated by order from another circuit court (See *Schiavo II*, 792 So.2d at 556)].

2. He discharged the guardian *ad litem* for Terri despite the guardian *ad litem's* finding that a guardian *ad litem* was needed to represent Terri's interests and to insure a "full and fair presentation of the evidence." (Guardian Ad Litem's Petition for Additional Authority or, in the Alternative, Discharge. February 22, 1999. Order, June 5, 1999 (Appendix 8)).

3. He has limited and, at times, suspended physical access to Terri by family, friends, and spiritual advisors, including prohibiting the taking of videos or photographs

of her. (Order, March 28, 2000 (Appendix 9); Petition to Modify Visitation, October 3, 2003, Order, October 10, 2003 (Appendix 10); Emergency Petition to Restore Family Visitation, May 10, 2004, Order, June 4, 2004 (Appendix 11)).

4. He has ordered the guardian to cause the removal of Terri's nutrition and hydration feeding tube for the express purpose of terminating her life (Order, September 17, 2003 (Appendix 1)). [On October 15, 2003, the Ward was deprived of nutrition and hydration as ordered by Judge Greer. Six days later, assisted feeding was reinstated by the Florida Governor's Executive Order No. 03-201, October 21, 2003 (Appendix 3)].

5. He has refused to allow medical personnel access to Terri to provide for oral feeding and drinking by Terri after the nutrition and hydration tube was removed. (Petition for Expedited Judicial Intervention, September 10, 2003, Order, September 17, 2003 (Appendix 12); Motion for Clarification, October 14, 2003, Order October 15, 2003 (Appendix 13); Emergency Expedited Motion for Permission to Provide Theresa Schiavo with Food and Water by Natural Means, February 28, 2005, Order March 8, 2005 (Appendix 2)).

6. He has refused to allow Terri's priest to administer last rites. (Motion for Clarification, October 14, 2003, Order October 15, 2003 (Appendix 13)).

7. He has ordered the guardian, for a third time, to cause the removal of Terri's nutrition and hydration feeding tube (Order, February 25, 2005 (Appendix 1)). [This Order is scheduled to be executed Friday, March 18, 2005 at 1:00 p.m.].

8. He has refused to allow Terri to be reevaluated medically based on current advances in neurology and neurological technology. (Order, March 9, 2005 (Appendix 14)).

9. He has refused to allow Terri to die at home with her parents once her nutrition and hydration feeding tube has been removed. (Emergency Expedited Motion for Theresa Schiavo to Die at Home February 28, 2005; Oral Order March 8, 2005 (Appendix 15)[written Order not issued as of the date of filing this Writ].

CLAIM I

I. The Trial Court Compromised its Judicial Independence by Acting as both Judge and Health-Care Proxy in the "Substituted Judgment" Proceeding in which Petitioner Theresa Marie Schiavo's Alleged "Intent" Regarding Continued Nutrition and Hydration was Determined by Judge Greer.

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), and that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 11, 14 (1954).

Petitioners submit that there is not even the ***appearance*** of justice in this case. "[W]ith less process than would be necessary to seize a refrigerator,"[5] a Florida court has ordered the death of an innocent, profoundly disabled young woman by means of one of the most cruel and unusual means imaginable: starvation and dehydration. This method of execution would be illegal in Florida if done to a dog or a death row criminal. *See*

[5] *Dahl v. Akin*, 630 F.2d 277, 279 (5th Cir. 1980) *citing, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

generally Geneva Convention of 1949, Article 25, 6 U.S.T. 3316; David Marcus, *Famine Crimes in International Law*, 97 Am. J. Int'l Law 245 (2003). Petitioners submit that the trial court's assumption of conflicting functions – judge and health-care proxy for Petitioner Theresa Marie Schiavo [hereafter Terri Schiavo] – constitutes a fatal "structural" defect in those proceedings that renders its February 11, 2000 death order void *ab initio.*

A. The "Substituted Judgment" Proceedings

When Michael Schiavo sought permission from the guardianship court to withdraw nutrition and hydration from his wife, Terri, he did so under a "substituted judgment" theory that presumes that the right of an incapacitated person "to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right … must be exercised for her, if at all, by some sort of surrogate." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990); *Re Guardianship of Browning*, 568 So.2d 4, 12 (Fla.1990) *quoting John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So.2d 921, 924-925 (Fla.1984) ("The question [in substituted judgment proceedings] is who will exercise this right and what parameters will limit them in the exercise of this right.")

In *theory*, the "decision" to forego necessary medical treatment – in this case, assisted feeding and hydration – is that of the incapacitated person. In *law and in practice*, the decision is the ***proxy's***. FLA. STAT. §765.401(2) provides that:

> a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient

> been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.

Because a judicial decree authorizing denial of life-sustaining treatment will inevitably result in death, it can be justified only on the premise that the purpose of the order is not to cause death, but rather to effectuate the ward's substituted judgment concerning the continuation of life-sustaining medical care. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990). *Any* defect in the judicial process that would taint, or otherwise call into question the integrity of the fact-finding process, would – and should – place the entire proceeding "in constitutional jeopardy."

B. Trial Courts May Not Serve Simultaneously Judges and Health Care Proxies

Most states, including Florida, have adopted statutes that prescribe detailed procedures that must be followed by guardians and surrogates. FLA. STAT., §§ 744.101 *et. seq.* (surrogates and guardians), § 765.401 (the proxy); by persons who wish to make an advance directive or appoint a health care proxy, FLA. STAT., Ch. 765. Florida also gives detailed instructions to the courts it has charged with the responsibility of ascertaining the intent of an individual who has left no advance directive and who, like Terri Schiavo, has been diagnosed as being in a PVS.[6] Fla. Stat. § 765.404.

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[6] Petitioners dispute this finding. Florida guardianship procedures require the court "[p]ersonally meet with the incapacitated person to obtain *its own impression* of the person's capacity" (emphasis added). Fla. Stat. § 744.3725(3) (2005). Though Petitioner Terri Schiavo's condition does not make it possible for *her* to take advantage of "the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court," *id*, her parents, Petitioners Robert and Mary Schindler, contend that her capacity is obvious to those who have taken the time to observe her interaction with members of her family. *See* Erik J. Kobylarz, MD and Nicholas D. Schiff, MD, "Functional Imaging of Severely Brain-Injured Patients: Progress, Challenges, and Limitations," 61 *Archives of Neurology* 1357-1360 (September

Florida law is clear that proxies, surrogates, and the courts that supervise them must be untainted by any possible conflict of interest. Fla. Stat. §744.309 (1)(b) provides, in relevant part:

> (1) (b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation.

See also Fla. Stat §744.309 (3) ("The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.")

Had the Florida courts followed the law *as written*, the trial judge would not have been permitted to act as her surrogate, but the record is clear that the Florida courts apply a different rule in disputed proceedings to withdraw medical treatment. (See Appendix 16, Order on Voidness motion at 5: drawing a distinction between incompetency and guardianship proceedings "and this type of proceeding where an incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her.")

The "modification" of Florida law that occurred below began in *Schiavo* I.[7] Michael Schiavo, had petitioned for an order authorizing withdrawal of nutrition and hydration, but Terri's parents, Robert and Mary Schindler, objected. They alleged that Respondent should be disqualified from serving as Terri's guardian and surrogate

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2004) at 1358 ("To maintain nosological clarity in such borderline cases, it would seem essential to diagnose the patient as having MCS [Minimally Conscious State] *if there is any reproducible evidence of awareness on examination* and to diagnose the patient as having VS if not." (emphasis added) (Appendix 17)

[7] *In Re Guardianship of Theresa Marie Schiavo*: Schindler v. Schiavo , 780 So.2d 176, 177 (Fla. Dist. Ct. App. 2001), aff'd without opinion *In re Guardianship of Schiavo*, 789 So.2d 348 (Fla. 2001) (Table).

because Mr. Schiavo stood to inherit the balance of a large malpractice award to Terri from the doctor who treated Terri before her brain injury.

Recognizing that "there may be occasions when an inheritance could be a reason to question a surrogate's ability to make an objective decision," *Id.*, the Court of Appeal held that *the guardianship court itself* had jurisdiction to serve as surrogate decision-maker for Terri.

> Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked *the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker*." *Schiavo I*, 780 So.2d at 178 (emphasis added).

Petitioner submits that the Due Process Clause does not permit judges to serve in the dual capacity of health-care surrogate and judge. Florida's guardianship statutes, Florida Laws, Chapter 744, expressly prohibit such conflicts of interest. So too does Florida constitutional law. In *In re TW*, 551 So.2d 1186, 1190 n. 3 (1989), the Florida Supreme Court held:

> Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.

Accord, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822-825 (1986) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S.

899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *Compare*, *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (opinion of the Court, per Rehnquist, C.J., and Scalia, O'Connor, Kennedy, and Souter, JJ.) (describing the lack of an impartial judge as one of several "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial."); *American Bonding Company of Baltimore, Md. v. American Surety Co. of New York*, 127 Va. 209, 103 S.E. 599 (1927) ("[I]t is clear that the judicial position of the commissioner imposed upon him duties which were inconsistent with the obligations which had been assumed by him as the guardian ad litem of an infant who had a substantial interest in his report as commissioner.")

With all of this authority backing up what appears to be an elementary proposition of law, the Florida appellate courts should have corrected the situation. Instead, they have refused even to consider the federal due process and equal protection issues. When Governor Jeb Bush and the Florida Legislature attempted to remedy the situation by adopting Florida Statutes, Chapter 2003-418 (2003), the Florida Supreme Court invalidated the law as an attack on the doctrine of separation of powers. *Bush v. Schiavo*, *supra*. Though asked to do so, the Florida Supreme Court would not even hear argument on the federal issue.

The Florida Supreme Court thus allows judges to serve as proxies *only* in substituted judgment cases where there are reasonable grounds to believe that those otherwise eligible to serve will not provide their ward with effective assistance. This, Petitioner submits, violates the ward's rights under the Due Process *and* Equal Protection Clauses. See *Tennessee v. Lane*, 124 S.Ct. 1978, 1989 & nn. 8-14 (2004) (recounting the history of discrimination against persons with disabilities); *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse and neglect in state hospitals); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (irrational discrimination in zoning). After *Schiavo I*, which is the law of the case below, the *only* persons in the State of Florida who are not entitled to an impartial judge are incapacitated persons whose rights must be determined in substituted judgment proceedings. Petitioner submits that a due process violation of this magnitude that exists *only* in the case of incapacitated persons also raises profound equal protection questions that extend far beyond the four corners of this particular case.

Petitioners are thus left with the unpleasant task of arguing in this Court that the Florida courts have not only violated Petitioners' federal due process and equal protection rights, but also that they stubbornly refuse even to acknowledge or address Petitioners' federal claims.

C. This Court Should Affirm the Power of State Legislatures to Structure the Process in which Substituted Judgment Decisions are Made for Incompetent Wards.

Petitioners have consistently – and persistently – argued that Florida has failed to follow its own law in this case, but the courts involved in this case have, just as

consistently, refused to hold that these statutes even *apply* to this action. (App. XXX—Greer order on voidness motion)

Florida recognizes the right of competent adults to refuse treatment, Fla. Stat. § 765.101. It also provides detailed guidelines for cases in which the right to self-determination must be made for an incapacitated person by a proxy. Fla. Stat. § 765.401. In every case, these rights are expressly made "subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession." Fla. Stat. § 765.102(1).

In the case at bar, the Florida Legislature attempted to resolve *two* "'unfortunate situations" that arose because disputes among family members made it impossible for them "to protect [their] patient." *Cruzan*, 497 U.S. at 281, *quoting In re Jobes*, 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). The appearance of a conflict of interest on the part of both Respondent and Petitioners Robert and Mary Schindler made it inappropriate, in the guardianship court's opinion, for *any* of them to serve as Terri's surrogate. See *Schiavo I*, 780 So.2d at 178.

Petitioners submits that, at that point, the guardianship court was required by both the federal Due Process Clause *and* Florida law to appoint a proxy who would represent *only* Terri's interests, but it did not do so. The judge improperly tried to resolve the problem by appointing *himself* to serve as both Terri Schiavo's proxy (or health care surrogate), even though he was already charged by the Florida Constitution and laws with the task of serving as the ultimate finder-of-fact. *Id*.

The case at bar offers this Court an opportunity to clarify the ways in which the Due Process and Equal Protection Clauses of the Fourteenth Amendment *affirm* the powers of the state4 legislatures to preserve individual rights in a setting where the person whose rights are to be adjudicated cannot speak for herself. Because the Florida Supreme Court refused even to consider the possibility that permitting a trial court to serve simultaneously as surrogate might have tainted the fact-finding process, it is now impossible for Florida's political branches to adopt post-judgment (but pre-death) remedies that will resolve these important federal due process and equal protection issues. Federal relief is Petitioners' only alternative. *Bush v. Schiavo*, supra.

In *Cruzan*, this Court recognized that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," and that a State has more particular interests at stake" when it elaborates and refines a process by which it will resolve conflicts between family members over the person's wishes or the fairness of the proceeding in which they were determined. Writing for the majority, the Chief Justice held:

> Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.

Cruzan, 497 U.S. at 280.

Petitioners respectfully submit that this Court should grant the writ and clarify the boundary between the political and judicial branches in this important, and emerging, field of law.

CLAIM NO. II

II. The Florida Courts Denied Petitioners their Right to Confront and Examine Witnesses and Denied Petitioner Terri Schiavo's Right to Adequate Representation.

When Respondent applied to the court for state authority to terminate Terri's artificially supplied food and water, he raised a "serious due process issue affecting life" (*Schiavo II*, 792 So.2d at 557). Because an order such as the one entered below will deprive Petitioner, Terri Schiavo, of her life, liberty, *and* property (which Respondent will inherit), both the Florida and United States Constitutions require that she be represented by a guardian *ad litem* assisted by counsel, to conduct discovery, to appear in court and present evidence in her own behalf, and to cross-examine adverse witnesses. FLA. CONST. art. 1, § 9, and U.S. CONST. amend. XIV.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), this Court explained that:

> "We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final.... Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support.... [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. *Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.*" *Id.*, at 681-682 (emphasis added).

In the case at bar, Terri Schiavo did not have ***any*** legal representation. She was not noticed to appear for the proceedings, she was not provided with guardian *ad litem*

assisted by legal counsel, and she was not permitted discovery or the right to call or cross-examine witnesses. Michael Schiavo, by contrast, was represented by counsel, who was paid by her estate, even though his interests and hers are clearly adverse. Terri's parents also were represented by counsel, and they were treated by the trial court as their daughter's adversaries. The trial court judge never even ***saw*** Terri in person so that he could make an independent assessment of her demeanor, capabilities, credibility, and other factors before authorizing and subsequently *ordering* her death by starvation and dehydration in increasingly strident orders entered in 2000, 2003, and 2005.

Florida case law holds that although a health care proxy or surrogate need not do so, he may apply for judicial authority to discontinue a patient's extraordinary life support measures, which include the discontinuance of assisted feeding intended to result in death by starvation and dehydration.

> The courts must always be open to hear these matters on request of the family, guardian, affected medical personnel, or the state. . . . [I]n cases where doubt exists or where there is a lack of concurrence among the family, physicians, and the hospital, or where an affected party simply desires a judicial order, then the court must be available to consider the matter.

John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So.2d 921, 926 (Fla. 1984). *See also In re Guardianship of Barry*, 445 So. 2d 365, 372 (Fla. 2d DCA 1984).

Like an involuntary commitment, the discontinuation of assisted feeding constitutes a deprivation of life, liberty, and property interests requiring scrupulous attention to the preservation of procedural due process rights. *Chalk v. State of Florida*, 443 So.2d 421, 422 (Fla. 2d DCA 1984). The incapacitated person whose life and liberty

interests are being curtailed by the state has "a right to the effective assistance of counsel at all judicial proceedings which could result in a limitation on the subject's liberty." *Id.*

Florida statutes and case law do not specifically provide that a contested procedure for court authority to terminate assisted sustenance entitles a ward to due process rights, such as the assistance of an independent guardian *ad litem* who has the benefit of counsel whose loyalties are to the ward alone. Yet these rights are among those that Florida recognizes as the minimums. Under both Florida Const., art. 1, § 9, and the Due Process Clause of the Fourteenth Amendment, the due process of law:

> contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings, i.e., all judicial proceedings and any other proceedings at which a decision could be made which might result in a detrimental change to the subject's liberty.

Jones v. State of Florida, 611 So.2d 577, 579 (Fla. 1st DCA 1992). *See also, Specht v.* Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1211-13, 18 L.Ed.2d 326 (1967) ("Due process . . . requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own") and *Ibur v. State of Florida*, 765 So.2d 275, 276 (Fla. 1st DCA 2000) ("Because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard.")

> As the United States Supreme Court first stated more than twenty-five years ago, "death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see also State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973) (stating that because: "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of

> rehabilitation ..., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). We have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fla. 2002).

State v. Davis, 872 So.2d 250, 254 (Fla. 2004).

The state trial court's reasoning, by contrast, is to the contrary. In the state court judge's view, the burden was on the *Petitioners* to prove that incompetent persons are entitled to the same due process protections that others enjoy. (Appendix 16, Order on Voidness motion at 6). To the state court judge, there is a meaningful distinction between incompetency and guardianship proceedings "and this type of proceeding where an incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her." (Appendix 16, Order on Voidness motion at 5).

It surely cannot be argued that an incapacitated person deserves ***fewer*** procedural safeguards than an accused criminal in proceedings seeking to cause her death. Therefore, the only rational explanation for the trial court's ruling is the very structural due process problem that lies at the core of this appeal: a judicial conflict of interest. Where, as here, *the court itself* is attempting to serve as both the incapacitated person's surrogate decision-maker and judge, the need for an independent guardian *ad litem* represented by counsel loyal only the ward is absolutely necessary to protect the ward *from the judge himself*. *Cf.* U.S. Const. Amend. VI (right to a jury trial).

A judicial decree authorizing death is the ultimate "final solution." By its very nature, it rejects the possibility of rehabilitation and enhances the likelihood that the

Petitioner, Terri Schiavo, will endure extreme suffering as she slowly dies from starvation and dehydration.

> An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite …life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction."

Cruzan, 497 U.S. at 283.

CLAIM III

III. The Florida Courts' Selective Application of the Law to Petitioners Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

A. The Decisions Below Violate Petitioners' Equal Protection Rights.

It should be obvious that substituted judgment proceedings are permissible *only* in the case of persons with cognitive or other disabilities that make it impossible for them to make, and communicate, independent, fully informed choices regarding the nature and duration of their medical treatment. *Cf.* Americans with Disabilities Act, 42 U.S.C. §§ 12131, 12132 (2005); 28 U.S.C. §794 (2005). Since persons with severe cognitive disabilities have the same rights to procedural due process and equal protection enjoyed by others, the courts, no less than the other two branches of government, must ensure that surrogates – whoever they may be – protect the rights of their incapacitated wards. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse & neglect in state hospitals); *Cleburne v. Cleburne Living*

Center, Inc., 473 U.S. 432 (1985) (irrational discrimination in zoning). *But see* Appendix 18, Greer Order Denying DPS intervention.

The absurd result in the proceedings below is that Florida's state courts afford less protection to severely handicapped individuals who are in *their* custody than they do for capital criminal defendants who are in the custody of the executive branch. This is not because Florida expressly contemplates that cruel and unusual treatment is *permissible* for anyone, but because the courts appear to believe that profound disabilities render individuals like Terri Schiavo incapable of *feeling* pain, suffering, or anxiety.

This, however, is precisely the kind of stereotype that the law forbids. *Cleburne*, *supra.* Because the state trial judge had acquired a professional interest in preserving his decision as proxy, he would not even allow the parties to challenge his factual findings on the basis of admissible evidence that can be discovered by using diagnostic tools readily available to others. *Cf.*, 42 U.S.C. §§ 3796gg, 3796kk, *et seq*. (authorizing grants for DNA research and training).

This is why the rule that "[e]very litigant is entitled to nothing less than the cold neutrality of an impartial judge" is particularly relevant here. *Clark v. Board of Education of Independent School District No. 89 of Oklahoma County,* 32 P.3d 851, 854 (Ok., 2001). The Constitution requires due process before the state may authorize acts that would otherwise constitute homicide without first ensuring due process of law, and Florida itself forbids cruel or unusual methods of execution. FLA. CONST, Art. I, § 17 (prohibiting cruel and unusual punishments). *Cruzan*, *supra*.

Florida, to its credit, recognizes that its ultimate concern is the preservation of human dignity. Though the state is satisfied that the *nature* of the sanction it applies in capital murder cases comports with human dignity, it is rightly concerned that the *methods* used to carry out that punishment have legal and moral consequences that speak volumes about what kind of a People we are. *See Roper v. Simmons*, 125 S.Ct. 1183 (2005); *Provenzano v. Moore*, 744 So.2d 413, 415 (Fla.1999); *id.*, 744 So.2d at 422 (Shaw & Anstead, JJ., dissenting); *id.*, 744 So.2d at 444 (Anstead & Shaw, JJ., dissenting; *id.*, 744 So.2d at 486 (Pariente & Anstead, JJ., dissenting) (Fla. 1999) (execution by electrocution); *Sims v. State*, 754 So.2d 657, 668 (Fla.2000) (execution by lethal injection). See also *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 315-16, 318 (1990) (Brennan, Marshall, and Blackmun, JJ., dissenting) (until the patient's wishes are determined, "accuracy …must be our touchstone.")

B. The judge's participation as the Ward's "proxy" denied Terri Schiavo her right to privacy under the Due Process Clause of the Fourteenth Amendment.

Florida courts have held that Florida's explicit right to privacy, FLA. CONST. Art. I, § 23, guarantees the right of both competent and incompetent patients to make fully informed decisions to refuse medical treatments, including the assisted provision of food and water. *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990); *Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980) (competent patients). If the family members agree concerning an incompetent patient's wishes, and there is no dissent to that agreement, the decision to discontinue artificial life support is a private medical decision that needs no court oversight. If there are questions about the oral instructions of the principle, however, or

if an interested party disagrees with the decision, "the surrogate or proxy may choose to present the question to the court for resolution" or "interested parties may challenge the decision of the proxy or surrogate." *In re Guardianship of Browning*, 568 So.2d 4, 16 (Fla. 1990).

The participation of the state trial court as proxy for Terri foreclosed both of these *Browning* options to Petitioners in this case. Although the Respondent did present the question to the judge for review pursuant to FLA. STAT. § 765.401, there was no *independent* surrogate or proxy "to present the question to the court for resolution," and there was no unbiased tribunal in which "interested parties may challenge the decision of the proxy or surrogate." The trial judge's Due Process violations thus violated Petitioners rights under both state law and the decisions of this Court. [8]

Because Terri herself has had ***no*** due process protection, medical technology has advanced significantly, and she has never been examined with state-of-the art diagnostic means, *see* 61 *Archives of Neurology* 1357-1360 (September 2004) (Appendix 17) (Appendix 14, Order Rejecting Testing), Respondent cannot prove the central premises of his case: 1) that Terri Schiavo is actually *in* a PVS (as opposed to a "minimally conscious state" or an even higher category); 2) that her *present* intent is to discontinue of medical treatment;[9] and 3) that she will *not* be cognizant of pain and suffering as the

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[8] Petitioners do not contend that *Browning* authorizes Florida judges to act in a manner inconsistent with Florida statute and constitutional law. To the contrary, they submit that the right to privacy recognized in *Browning* cannot be effectuated without scrupulous compliance with federal due process guarantees.

[9] Though it is undisputed that Terri Schiavo is a devout Catholic, and that the Holy Father has explicitly rejected withdrawal of nutrition and hydration in this case, the trial court judge also rejected Petitioners' motion to reconsider the impact of its decision on Terri Schiavo's religious liberty. (Appendix 19)

dying process progresses. Even the most hardened, serial murderers on death row are entitled to more protection.

In *Abdur'Rahman v. Bredesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227 at *14 (Tenn. Ct. App 2004), *permission to appeal granted*, the Tennessee Court of Appeals observed that:

> The state and federal constitutional prohibitions against cruel and unusual punishments proscribe more than physically barbarous punishment. They embody broad and idealistic concepts of dignity, civilized standards, humanity, and decency. *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290 (1978). The basic concept underlying these prohibitions is nothing less than human dignity.
>
> Cruel and unusual punishments imply something inhuman and barbarous--more than the extinguishment of human life. *In re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 933 (1890). To pass constitutional muster, a particular punishment must not involve the unnecessary and wanton infliction of pain. *Gregg v. Georgia*, 428 U.S. at 173, 96 S.Ct. at 2927; *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002). Thus, punishments involving torture and lingering death violate both Tenn. Const. art. I, § 16 and the Eighth Amendment. See *Estelle v. Gamble*, 429 U.S. at 102, 97 S.Ct. at 290; *Campbell v. Wood*, 18 F.3d 662, 683 (9th Cir.1994); *Moore v. State*, 771 N.E.2d 46, 55 (Ind. 2002).

For Terri, the state trial judge's orders are a death sentence. They forbid any attempt to provide food or water by mouth. The trial judge explicitly *rejected* a swallowing test, even though both rehabilitation medicine and medical imaging have progressed enormously in the nearly *thirteen years* that have passed since her last swallowing test in 1992. The state trial court judge also explicitly rejected testing with the diagnostic tools that experts in the field now believe are essential tools that enable them to make accurate diagnoses that distinguish – as they must – between the "persistent vegetative state" (PVS) and the "minimally conscious state" (MCS). *See* Erik J.

Kobylarz, MD and Nicholas D. Schiff, MD, "Functional Imaging of Severely Brain-Injured Patients: Progress, Challenges, and Limitations," 61 *Archives of Neurology* 1357-1360 (September 2004) (Appendix 17) (Appendix 14, Order Rejecting Testing). The state trial court, while acting as Terri's proxy, did not even once actually observe Terri Schiavo in person, (Appendix 20), even though Florida law requires that the court "[p]ersonally meet with the incapacitated person to obtain its own impression of [her] capacity." FLA. STAT. § 744.3725(3).

In sum, Judge Greer appears to have decided that, as Terri's self-appointed proxy, he *alone* was entitled to decide what course of action would be in her "best interests" – regardless of the facts.

In *Cruzan*, The United States Supreme Court held that Missouri's imposition of heightened evidentiary requirements was *one* acceptable means by which the State might "legitimately seek to safeguard the personal element of this choice." *Id*., 497 U.S. at 281. The Supreme Court also implied, but did not decide, that the integrity – if not the constitutionality – of a substituted judgment order turns on the nature and quality of the representation provided by those charged with the duty of protecting those whose "'right' [to refuse treatment] must be exercised for her, if at all, by some sort of surrogate." *Id*., 497 U.S. at 280.

Effective representation is thus the *sine qua non* of *the incompetent person's* right to procedural due process in the substituted judgment proceeding. It is also the necessary precondition for the full implementation of the substantive rights the state sought in *Cruzan* to protect with its heightened evidentiary requirement. Given the nature of a

substituted judgment proceeding, inadequate representation is the one defect that neither the State, *as parens patriae*, the court, nor the parties can waive or otherwise avoid. Without effective representation, neither the parties, nor the State can be sure that the facts found by state trial courts are constitutionally sufficient "substitutes" for the decisions incompetent wards would have made for themselves under the circumstances.

Even the dissenters in *Cruzan* recognized that *accuracy* is the touchstone of all substituted judgment inquiries.

> As the majority recognizes, (citation omitted) Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, the only state interest that may be asserted is an interest in safe-guarding the accuracy of that determination.
>
> Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination.

Cruzan, 497 U.S. at 315-16, 318 (Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis in the original). Like the Florida Legislature in this case, the Justices expressly distinguished cases in which the families agree from cases like this one in which there is a real controversy over the ward's wishes. *Cruzan*, 497 U.S. at 318.

As Justice Brennan pointed out in his dissent in *Cruzan*:

> In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of

> interest and ensure that each party likely to have relevant evidence is consulted and brought forward--for example, other members of the family, friends, clergy, and doctors.

Because Terri was denied an independent guardian *ad litem* and independent counsel to advocate for *her* federal due process rights, one who was willing to argue that her federal due process rights were denied by ineffective representation, *see* Appendix 21 (transcript of oral argument, January 28, 2005); Appendix 22 (motion for rehearing), Terri's "right to privacy" became her death warrant. This cannot be the meaning *Cruzan*.

This Court should grant the writ and reach the merits of Petitioners' claim that the Florida state courts have violated the federal due process and equal protection rights of both the Schindlers and their daughter, Terri.

REQUEST FOR EVIDENTIARY HEARING

Petitioners submit that the state trial court's assumption of inconsistent functions – judge and health-care proxy for Petitioner Theresa Marie Schiavo [hereafter Terri Schiavo] – constitute a fatal "structural" defect in those proceedings that renders its findings constitutionally suspect and its decrees void. Petitioner is therefore entitled to an evidentiary hearing on her constitutional claims that the process employed by the Florida state courts violated her rights to due process, effective representation of counsel, an impartial judge, her right to privacy, and equal protection of the laws. In *Keeney v. Tamao-Reyes*, 504 U.S. 1, 11 (1992), the Supreme Court held that a "habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."

Though the district courts have discretion on whether to hold an evidentiary hearing, the Supreme Court has held that they are required to do so when any of the following six circumstances applies:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 757.

In the case at bar the following circumstances exist:

(1) The merits of the factual dispute were not resolved in the state hearing;

Neither the state trial court nor the Second District Court of Appeal would even consider, much less address, the merits of the federal claims raised in this petition. They were raised in the trial court (Appendix 16), in the District Court of Appeals (Appendix 4), and the Governor's counsel raised them in the Florida Supreme Court (Appendix 23).

(2) The fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

The state trial court judge made it clear that Florida law did not countenance Petitioners' claims. In his view, the burden was on *Petitioners* to prove that incompetent persons are entitled to the due process protections that others enjoy. (Appendix 16, Order on Voidness motion at 6). In its view, there is a meaningful distinction between incompetency and guardianship proceedings and the "type of proceeding where an

incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her." (Appendix 16, Order on Voidness motion at 5).

Since it surely cannot be argued that an incapacitated person deserves ***fewer*** procedural safeguards than an accused criminal in proceedings seeking to cause her death, the only rational explanation for the trial court's ruling is the structural due process problem that lies at the core of this appeal: judicial conflict of interest. Where, as here, *the court itself* is attempting to serve as the incapacitated person's surrogate decision-maker as well as judge, the need for an independent guardian *ad litem* represented by counsel loyal only the ward is absolutely necessary to protect the ward *from the judge. Cf*. U.S. Const. Amend. VI (right to a jury trial).

(3) There is a substantial allegation of newly discovered evidence.

Petitioners submitted thirty-three medical declarations and a recent medical journal article concerning the use of imaging technology to distinguish between persons in PVS and those in MCS. The court rejected any attempt to bring the record up to date. (Appendix 14). It also rejected ordering a swallowing test, even though the last one was in 1992 and both rehabilitation and diagnostics relating to the treatment of severe brain injuries has improved considerably since then. The state trial court also rejected Petitioners' religious liberty claims based on the Holy Father's recent pronouncement on withholding nutrition and hydration. (Appendix 19).

Because Petitioner is in the custody of Respondents, and development of the medical record requires the consent of the guardian and the guardianship court, the complete failure to supplement the evidentiary record is that of the state trial court itself.

(4) The material facts were not adequately developed at the state-court hearing; or

The facts "material" to a substituted judgment proceeding are those which would be relevant to Petitioner's choice were she capable of making it on her own. Thus, all facts that would be relevant to an "informed consent" to accept or reject medical treatment, testing or rehabilitation were relevant – but not developed – in the state court hearing. For example, Petitioner was entitled to have the state court consider, among other things: current developments in the diagnosis of brain injury; current developments in rehabilitation medicine, including swallowing; the pain and suffering attendant to death by starvation and dehydration; the specific "death management" plan arranged for Petitioner by her guardian, Michael Schiavo; the loyalty (or lack thereof) of her "husband" and his specific reasons for the zeal he has shown in advocating her "right to die"; and his suitability (if any) to continue in her service as her guardian.

(5) For any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Although Teresa Marie Schiavo's constitutional rights are non-delegable under Florida law, her legal interests were represented by counsel for Respondent, Michael Schiavo, who initiated the instant proceedings to withdraw nutrition and hydration and whose financial and personal conflicts of interest led the trial court judge to conclude that he could serve in the dual capacity of health care proxy and judge.

While Florida statute and case law do not specifically provide that a contested procedure for court authority to terminate assisted provision of food and water entitles the ward to her due process right to the assistance of an independent guardian *ad litem* who

has the benefit of counsel whose loyalties are to the ward alone are among the rights that Florida recognizes as the minimums. Under both FLA. CONST., art. 1, § 9, and the Due Process Clause of the Fourteenth Amendment, the due process of law

> contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings, i.e., all judicial proceedings and any other proceedings at which a decision could be made which might result in a detrimental change to the subject's liberty.

Jones v. State of Florida, 611 So.2d 577, 579 (Fla. 1st DCA 1992). *See also*, *Specht v.* Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1211-13, 18 L.Ed.2d 326 (1967) ("Due process ... requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own") and *Ibur v. State of Florida*, 765 So.2d 275, 276 (Fla. 1st DCA 2000) ("Because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard.")

> As the United States Supreme Court first stated more than twenty-five years ago, "death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see also State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973) (stating that because: "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation . . . the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). We have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fla. 2002).

State v. Davis, 872 So.2d 250, 254 (Fla. 2004).

The trial court's reasoning, by contrast, is to the contrary. In his view, the burden was on *Petitioners* to prove that incompetent persons are entitled to the due process protections that others enjoy. (Appendix 16, Order on Voidness motion at 6). In its view, there is a meaningful distinction between incompetency and guardianship proceedings "and this type of proceeding where an incompetent person's guardian or surrogate decision-maker is authorized to exercise her constitutional right of privacy for her." (Appendix 16, Order on Voidness motion at 5).

Since it surely cannot be argued that an incapacitated person deserves *fewer* procedural safeguards than an accused criminal in proceedings seeking to cause her death, the only rational explanation for the trial court's ruling is the structural due process problem that lies at the core of this appeal: judicial conflict of interest. Where, as here, *the court itself* is attempting to serve as the incapacitated person's surrogate decision-maker, the need for an independent guardian *ad litem* represented by counsel loyal only the ward is absolutely necessary to protect the ward *from the judge.* *Cf.* U.S. Const. Amend. VI (right to a jury trial).

A judicial decree authorizing death is the ultimate final order. By its very nature, it rejects the possibility of rehabilitation and enhances the likelihood that the Petitioner, Terri Schiavo, will suffer as she slowly dies from starvation and dehydration.

> An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite . . . life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.

Cruzan, 497 U.S. at 283.

Unless an injunction issues, Mrs. Schiavo will suffer the irreparable harm of a slow and painful death pursuant an order of a state court proceeding in which she had no due process of law protections. She will also be unable to respond to the March 17, 2005, request of Senator Michael B. Enzi, Chairman of the United States Senate Health, Education, Labor and Pensions Committee, to appear at a March 28, 2005, official committee hearing regarding "Health Care Provided to Non-Ambulatory Persons." (Appendix 25).

The injury of an unjust, state-ordered death cannot be remedied if a court later determines that Mrs. Schiavo was entitled to more protections than the State of Florida gave her. Clearly, the threatened harm to Mrs. Schiavo far outweighs whatever harm might befall Respondents by being forced to wait a while before they cause her death. Maintaining the status quo—and taking Florida's default position of choosing life when there is doubt—while the courts consider issues that directly impact the rights available to the disabled in a proceeding to terminate life-support measures will not disserve the public interest. To the contrary, clarifying the equal status of the disabled in Florida's courtrooms will greatly serve the public interest.

Our American culture has taken great strides in protecting our disabled who cannot protect themselves. In this case,

> where there are serious questions and substantial doubts, our society, our laws, and our courts should have a presumption in favor of life. Those who live at the mercy of others deserve our special care and concern. It should be our goal as a nation to build a culture of life, where all

> Americans are valued, welcomed, and protected and that culture of life must extend to individuals with disabilities.

Statement by President George W. Bush, White House Press Release, Office of the Press Secretary, March 17, 2005. (Appendix 24). Because of the critical importance of these complex issues and the care with which our culture treats our disabled, Mrs. Schiavo's plight will be likely to succeed on the merits.

PRAYER FOR RELIEF

Wherefore, Petitioner, Terri Schiavo, by her parents and next friends, Robert Schindler and Mary Schindler, request relief as follows:

1. **A temporary injunction restraining Respondents from taking any action to cause Mrs. Schiavo to die while this action is pending.**
2. A writ of habeas corpus requiring Respondents, Judge George W. Greer and Michael Schiavo to show cause why their actions are not in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment to the Constitution of the United States.
3. A declaratory judgment to the effect that Chapters 744 and 765, Florida Statutes, are unconstitutional as applied to Petitioner in the circumstances of this case.
4. A jury trial to determine Terri's present physical and mental condition, as well as her wishes regarding both medical treatment and rehabilitation.
5. An injunction against any attempt by Respondent Michael Schiavo or any other person to withhold or withdraw or to cause to withhold or withdraw food and fluids from Petitioner.
6. Damages, including attorney fees and costs under 42 U.S.C. § 1988.
7. Such other relief as may be appropriate under the circumstances.

Dated this 18th day of March, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier and by fax to **George J. Felos**, Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; and by fax to **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; on this 18th day of March 2005.

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