No. 05-11628D

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

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

Petitioner-Appellant,

---V.---

MICHAEL SCHIAVO, as Guardian of the
Person of Theresa Marie Schindler
Schiavo, Incapacitated,
THE HONORABLE GEORGE W. GREER,
and THE HOSPICE OF THE FLORIDA
SUNCOAST, INC.,

Respondents-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLANT

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Statement Regarding Oral Argument

Should this Court desire, counsel for Robert and Mary Schindler stand ready to provide oral argument about the due process and religious rights to which incapacitated individuals should be entitled in state proceedings to authorize the termination of the individual's assisted feeding. However, because of the immediacy of the threat that Petitioner will die before oral argument can be heard, Petitioner's next friends will waive oral argument in order to expedite the Court's consideration of this appeal.

Jurisdictional Statement

This Court has jurisdiction of the final order of the District Court of the Middle District of Florida pursuant to 28 U.S.C. § 1291 which provides that Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. The Middle District also had jurisdiction pursuant to Public Law 109-3, which expressly gave the Middle District jurisdiction for this case. The Eleventh Circuit is constituted of Florida, Alabama, and Georgia. 28 U.S.C. § 41.

Statement of the Case

This appeal comes to this Court from a denial of Plaintiff's Motion for Temporary Restraining Order to restrain the further withholding of Plaintiff's nutrition and hydration pending the trial of the claims she raises pursuant to the "For the relief of the parents of Theresa Marie Schiavo Act" a bipartisan law enacted by Congress on March 21, 2005. (Public Law 109-3). The District Court denied the temporary restraining order on March 25, 2005.

Notice of Appeal of the Order denying the temporary injunction and writ was filed on March 25, 2005.

Argument and Citations of Authority

I. Introduction

This is a mercy killing case. Plaintiffs have alleged, and proved, that there is a significant difference of opinion concerning the present physical condition of Terri Schiavo. The following facts are undisputed:

A. Florida law defines "persistent vegetative state" as follows:

765.101 Definitions.--As used in this chapter:

(12) "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.
(b) An inability to communicate or interact purposefully with the environment.

B. Judge Greer acknowledged in his findings that led to the 2005 order to withdraw nutrition and hydration that Terri Schiavo was conscious on an intermittent basis (App. 3 and 4), but held that her level of consciousness was irrelevant to the question of her present desire to accept or reject nutrition and hydration.

C. There is evidence in *this* record (affidavit of William P. Cheshire, Jr., M.D., March 23, 2005) that Terri Schiavo is *not* in a PVS *as defined by Florida law*. (App. 2).

D. If provided with hydration and sustenance, Terri Schiavo is not dying.

E. Florida law expressly forbids mercy killing

> 765.309 Mercy killing or euthanasia not authorized; suicide distinguished.—
> (1) Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.
> (2) The withholding or withdrawal of life-prolonging procedures from a patient in accordance with any provision of this chapter does not, for any purpose, constitute a suicide.

Any order by the judge authorizing mercy killing is beyond the court's jurisdiction and subject to collateral attack as a violation of constitutional law.

II. Plaintiffs Have Adduced Sufficient Evidence to Warrant a Preliminary Injunction

A. Judge Greer's Order Authorizing Withdrawal of Nutrition and Hydration from a Person who is NOT in a Persistent Vegetative State is Unconstitutional.

Terri Schiavo's Alleged "Consent" to the Withdrawal of Nutrition and Hydration is Premised on a Factual Finding that She is in a Persistent Vegetative State and would, for that Reason, Decline to Accept It.

The federal right of self-determination accepted in *Cruzan v. Director, Missouri Department of Health* is premised on *two* factual findings: 1) what is the exact nature of the patient's condition?; and 2) given that condition, what *fully informed* decision would they make regarding continued nutrition and hydration?

In the case at bar, plaintiffs have raised a significant question concerning the factual premise of the first question: What is Terri's present medical condition?

Judge Greer's findings indicate that she is *at least* "minimally conscious" and Dr. Cheshire's affidavit indicates that she may have a cognitive functioning level considerably above the baseline for the minimally conscious state (MCS).

Public Law No. 109-3 provides plaintiffs with the right to a de novo hearing on the question of Terri Schiavo's informed consent *under the circumstances in which she is living today*, and assumes that state-of-the art diagnostics – not treatments – will be brought to bear on the question of her intent.

Ascertaining *Terri's* intent under the present circumstances is, in fact, the *only* relevant issue under *Cruzan*. A full factual hearing, de novo, is essential if we are to ascertain whether she would want to know the following facts *before* exercising her admitted right to self-determination:

(a) What is Terri's current level of cognition?

(b) What is Terri's current level of interaction with her parents, siblings, and caregivers?

(c) Given that level of cognition, is it possible to ascertain her present wishes, either immediately or after a period of rehabilitation?

(d) Can she swallow, or be trained to swallow?

B. To the Extent that Florida Law Authorizes Judicial Decrees Authorizing Withdrawal of Nutrition and Hydration from a Person in a Minimally Conscious State without First Having Ascertained the Precise Level of Cognition, it is Unconstitutional.

Orders of a Guardianship Court Premised on an Unconstitutional Statute or Reading of State Law are State Action

It is well settled that judicial decrees authorizing unconstitutional action or enforcing unconstitutional statutes are state action. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) (probate judge, unconstitutional procedure); *Bell v. Maryland*, 378 U.S. 226 (1964) (judge, unconstitutional application of law); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judge, enforcement of racial covenant).

In the case at bar, Judge Greer's orders authorize what would, in ordinary circumstances, be mercy killing. His orders presuppose that Terri's life does not rise to a sufficient level of quality, and that, as a result, she *herself* would not want to continue in her present condition. (App. 3 and 4)

While *Cruzan* recognizes Terri's right to make that determination, there is no evidence in the record concerning her *present* condition, or the quality of life she could have if she received (or had received) adequate rehabilitation over the last 15 years. Judge Greer, acting as Terri's proxy, has effectively substituted his judgment for hers *without the required factual findings* required under *Cruzan*. Public Law 109-3 gives *Terri* the right to a de novo hearing on her condition, and

to adduce evidence as to her intent regarding life in an impaired – but not PVS – condition.

We believe that Terri has attempted to communicate her wishes to live in best way that she can. (App. 5 and 6).

Conclusion

Wherefore, the Plaintiff therefore respectfully requests this court to:

a. Reverse the District Court's denial of Plaintiff-Appellant's request for temporary restraining order;

b. Enter a temporary restraining order and preliminary injunction prohibiting Defendants and anyone acting in concert or participation with them from further withholding Plaintiff's nutrition and hydration or any medical treatment necessary to sustain her life;

c. Order Hospice to immediately transport Terri by ambulance to Morton Plant Hospital for any medical treatment necessary to sustain her life and to reestablish her nutrition and hydration.

d. Remand the case to the District Court with instructions to conduct an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

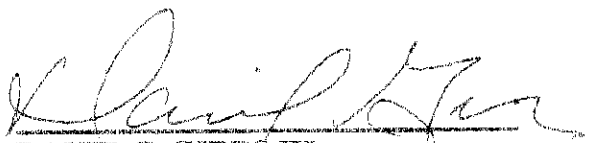
This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.Civ.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2002.

Dated: March 25, 2005

David C. Gibbs III
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing All Writs Petition has been furnished by facsimile transmission and electronic mail to George J. Felos, (727) 736-5050; and to Gail Holtzman (813) 223-7166; and to Barry Cohen (813) 2251921, on this 25th day of March 2005.



DAVID C. GIBBS III

Exhibit 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THERESA MARIE SCHINDLER SCHIAVO, Incapacitated ex rel., ROBERT SCHINDLER and MARY SCHINDLER, her Parents and Next Friends,

Plaintiffs,

vs. Case No. 8:05-CV-530-T-27TBM

MICHAEL SCHIAVO, as Guardian of the Person of Theresa Marie Schindler Schiavo, Incapacitated, JUDGE GEORGE W. GREER and THE HOSPICE OF THE FLORIDA SUNCOAST, INC.

Defendants.
_____/

ORDER

BEFORE THE COURT is Plaintiffs' (First Amended) Motion for Temporary Restraining Order (Dkt. 34)[1] and Memorandum in Support (Dkt. 39).[2] After notice to the parties, the Court conducted a hearing on March 24, 2005. Upon careful consideration, Plaintiffs' motion (Dkt. 34) is DENIED.

[1] As to Defendant Judge George W. Greer, Plaintiffs' counsel confirmed at oral argument that Plaintiffs were not seeking injunctive relief as to Judge Greer in his official capacity.

[2] Plaintiffs acknowledge that this Court's decision on the Emergency Motion Temporary Restraining Order which was affirmed by the Eleventh Circuit, resolved all issues with respect to Counts One through Five. Accordingly, the only issue before the Court is the propriety of the injunctive relief requested in Counts Six through Ten.

Applicable Standards

A temporary restraining order protects against irreparable harm and preserves the status quo until a meaningful decision on the merits can be made. *Canal Auth. of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). This Court has previously determined and reaffirms that Plaintiffs have established that an irreparable harm will be suffered unless the injunction issues, the threatened injury outweighs any damage the proposed injunction could cause the opposing party and that an injunction would not be adverse to the interests of the public.

Once again the critical issue is whether Plaintiffs have established a substantial likelihood of success on the merits on any one of Counts Six through Ten.[3] A substantial likelihood of success on the merits requires a showing of only *likely* or probable, rather than *certain* success. *Home Oil Company, Inc. v. Sam's East, Inc.*, 199 F. Supp. 2d 1236, 1249 (M.D. Ala. 2002)(*emphasis in original*). Where, as here, the "balance of the equities weighs heavily in favor of granting the [injunction]" the Plaintiffs need only show a "substantial case on the merits." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). On careful consideration of each count, the Court concludes that Plaintiffs have not shown a substantial case on the merits.

Discussion

Pursuant to Pub. L. No. 109-3 this court has jurisdiction "to hear, determine and render judgment" on the claims brought by Plaintiffs on behalf of Theresa Schiavo "for the alleged

[3]The Act does not address the traditional requirements for temporary injunctive relief. Accordingly, these standards control whether temporary injunctive relief is warranted, notwithstanding Congress's intent that the federal courts determine *de novo* the merits of Theresa Schiavo's claimed constitutional deprivations. *Schiavo v. Schiavo*, No. 05-11556 at 5 (11th Cir. March 23, 2005).

violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States related to the withholding or withdrawal of food, fluids or medical treatment necessary to sustain her life." This Court is to determine *de novo* Plaintiffs' asserted claims as set forth in Counts Six through Ten.

The court must determine whether Plaintiffs have shown a substantial case on the merits of any claim for purposes of temporary injunctive relief. Absent a showing of a deprivation of a constitutional right or violation of a federal law, the *sine qua non* of this Court's jurisdiction under Pub. L. No. 109-3, Plaintiffs cannot establish a substantial likelihood of success on the merits or even a substantial case on the merits.

-Count Six-
The Americans with Disabilities Act

In Count Six, Plaintiffs allege that the failure and refusal of Defendant Michael Schiavo to furnish Theresa Schiavo with necessary and appropriate therapy, rehabilitation services and essential medical services and his demand that she be deprived of food and water violate her rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et. seq.* (Dkt. 36, ¶83).

In pertinent part, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. To state a claim under Title II of the ADA, a plaintiff must allege: (1) that she is a "qualified individual with a disability;" (2) that she was "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by such entity;" (3) "by reason of such disability."

Shotz v. Cates, 256 F.3d 1077, 1079 (11th Cir. 2001). Assuming *arguendo* that Theresa Schiavo is a "qualified individual with a disability," Plaintiffs must show that Defendants Michael Schiavo and Hospice are "public entities" that discriminated against her "by reason of" her disability.

Contrary to Plaintiffs' argument, Michael Schiavo, as court appointed guardian for Theresa Schiavo, was not acting under color of state law. *See Harvey v. Harvey*, 949 F. 2d 1127, 1132-33 (11th Cir. 1992); *Kirtley v. Rainey*, 323 F. 3d 1088, 1092-96 (9th Cir. 2003). Moreover, Michael Schiavo cannot be a "public entity" under the ADA by virtue of the plain language of the statutory definition, which defines "public entity" as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131. Accordingly, Plaintiffs cannot show a substantial likelihood of success on the merits against Michael Schiavo under the ADA.

As to Defendant Hospice, Plaintiffs contend that it is a "public entity" under the ADA because it accepts federal funding. Plaintiffs offer no authority, however, for their contention. Again, the term "public entity" means " . . . any state or local government." Simply put, Plaintiffs have not shown that the Hospice is a "public entity" under the ADA, an essential element of a Title II claim.

Plaintiffs contend in the alternative that Hospice is a "public accommodation" under the ADA. However, the definition "public accommodation" in the statute, 42 U.S.C. § 12181(7), does not include a facility such as Hospice. Moreover, even if it is assumed *arguendo* that Hospice falls within the definition of "public accommodation," Plaintiffs cannot show a substantial case on the merits against Hospice under the ADA because they have not shown that

any alleged discrimination against Theresa Schiavo was by reason of a disability. In order to prevail under Title III of the ADA, a plaintiff generally has the burden of proving: (1) that she is an individual with a disability; (2) that defendant is a place of public accommodation; and (3) that defendant denied her full and equal enjoyment of the goods, services, facilities or privileges offered by defendant (4) on the basis of her disability. *Larsen v. Carnival Corp., Inc.*, 242 F. Supp. 2d 1333, 1342 (S.D. Fla. 2003).

Plaintiffs have not shown that Hospice's compliance with the state judge's order to withhold nutrition and hydration constituted discrimination "on the basis of a disability." For example, it is undisputed that Hospice, when directed by the state court, cooperated in not only the removal of Theresa Schiavo's feeding tube but also its reinsertion.[4] Hospice's conduct therefore, must necessarily have been motivated by the Court's order, not any discriminatory animus toward Theresa Schiavo. For all of these reasons, Plaintiffs cannot establish a substantial likelihood of success on the merits or even a substantial case on the merits.

-Count Seven-
The Rehabilitation Act of 1973

In Count Seven, Plaintiffs allege that Hospice of Florida Sun Coast, Inc. violated Theresa Schiavo's right to rehabilitation under the Rehabilitation Act of 1973, § 504, *as amended*, 29 U.S.C. § 794. (Dkt. 36, ¶¶ 85-87).

The Rehabilitation Act of 1973 provides that "no otherwise qualified individual with a disability . . . shall, *solely by reason of his or her disability* . . . be subjected to discrimination

[4] Plaintiffs reliance on the regulation at 28 C.F.R. § 35.130 is misplaced. That provision merely "clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment." Dept. Of Justice, Section-by-Section Analysis, 56 FR 35694 (July 26, 1991).

under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (*emphasis added*). The elements of a claim under the Rehabilitation Act are: "(1) that [she] is a 'handicapped individual' under the Act, (2) that [she] is 'otherwise qualified' for the [benefit] sought, (3) that [she] was [discriminated against] solely by reason of [her] handicap, and (4) that the program or activity in question receives federal financial assistance." *Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116, 119 (7th Cir. 1997). The first and fourth elements are met as Theresa Schiavo is a handicapped individual and Hospice receives federal funds.

The second element requires that Theresa Schiavo be "otherwise qualified," which means that *absent her disability*, she would qualify for the treatment she is being denied. *Id.* at 120. The Rehabilitation Act is intended to ensure that handicapped individuals are not denied access to programs provided to non-handicapped persons. *Id.* at 121. Because of this intended statutory purpose, courts hold that "'the otherwise qualified criteria . . . cannot be meaningfully applied to a medical treatment decision.'" *Id. (quoting United States v. Univ. Hosp. of State Univ. of New York at Stony Brook*, 729 F.2d 144, 156 (2d Cir. 1984)). Theresa Schiavo is not "otherwise qualified" because she would not have any need for a feeding tube to deliver nutrition and hydration but for her medical condition.

Plaintiffs also cannot establish the third element. Hospice is not withholding nutrition and hydration "solely by reason of" Theresa Schiavo's medical condition, but rather because it is complying with a court order and the instructions of her guardian.

Finally, Plaintiffs' attempt to bring an action on Theresa Schiavo's behalf under the Rehabilitation Act for withholding nutrition and hydration fails as the Rehabilitation Act does not mandate the provision of services. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603

n. 14 (1999) ("We do not in this opinion hold that the ADA imposes on the States a standard of care for whatever medical services they render, or that the ADA requires States to provide a certain level of benefits to individuals with disabilities.").

Plaintiffs accordingly have not established a substantial likelihood of success on the merits or a substantial case on the merits under the Rehabilitation Act of 1973.

-Count Eight-
Violation of Fourteenth Amendment Due Process Right to Substituted Judgment Decision Based on a Clear and Convincing Evidence Standard

Count Eight alleges that Theresa Schiavo's Fourteenth Amendment due process rights were violated in that the state court's order of February 11, 2000, authorizing the discontinuation of hydration and nutrition, "was not supported by clear and convincing evidence that Terri would have made the same decision." (Dkt. 36, ¶ 90). Plaintiffs contend that the state trial judge made a number of evidentiary errors in concluding that Theresa's intentions were established by clear and convincing evidence. Plaintiffs' counsel acknowledged during oral argument that Count Eight presents a procedural due process claim under the Fourteenth Amendment.

Plaintiffs contend, relying on *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990), that "the Due Process Clause of the Fourteenth Amendment *requires* that decisions to remove hydration and nutrition from an incapacitated person must be supported by clear and convincing evidence that the incapacitated person would have made the same decision." (Dkt. 36, ¶ 89)*(emphasis added)*. Contrary to Plaintiffs' contention, the Supreme Court in *Cruzan* did not mandate application of the heightened clear and convincing evidence standard. The question before the *Cruzan* court was whether the state's application of the heightened evidentiary standard overburdened the patient's right to refuse medical treatment, not whether it adequately

protected the patient's right to life.

Given the holding in *Cruzan*, Plaintiffs cannot complain of a deprivation of Theresa Schiavo's Fourteenth Amendment procedural due process rights. The state court judge applied the heightened clear and convincing evidence standard in determining her intentions, as permitted by *Cruzan* and in accordance with *Fla. Stat.* § 765.401(3).[5] To the extent Plaintiffs complain that the quantum of evidence did not rise to the level of clear and convincing, these claimed evidentiary errors are a matter of state law, not federal constitutional law.

-Count Nine-
Violation of Eighth Amendment Prohibition Against Cruel and Unusual Punishment

Count Nine of the Plaintiffs' Second Amended Complaint alleges that Defendants violated the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs' assert that "Judge Greer and Michael Schiavo, as state actors, have vioated [sic] Terri Schiavo's Eighth Amendment rights by demonstrating a deliberate indifference to a know [sic], substantial risk of serious harm . . . ." (Dkt. 36, ¶ 101).

The Eighth Amendment, as applied to the states through the Fourteenth Amendment, prohibits the infliction of cruel and unusual punishment. *Hamm v. Dekalb Cty.*, 774 F.2d 1567, 1571 (11th Cir. 1985). The Eighth Amendment's prohibition against cruel and unusual punishment only applies "subsequent to and as a consequence of a person's lawful conviction of a crime." *Id.* at 1572.

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[5] *Fla. Stat.* § 765.401(3) provides, in pertinent part:

> Before exercising the incapacitated patient's rights to select or decline healthcare, . . . 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.

The Eighth Amendment is inapplicable to Theresa Schiavo because the state has not "obtained a formal adjudication of guilt." *Id.* at 1572 (*quoting Ingraham v. Wright*, 430 U.S. 651, 671-72, n. 40 (1977)). Despite Plaintiffs' contentions, Theresa Schiavo is not being "detained" by the state at the Hospice. Finally, as the court has previously noted, Michael Schiavo and Judge Greer are not state actors. *See Kirtley*, 326 F.3d at 1092-96; *Harvey*, 949 F.2d at 133-34; *Torres v. First State Bank of Sierra Cty.*, 588 F.2d 1322, 1326-27 (10th Cir. 1978). For these reasons, Plaintiffs cannot establish a substantial likelihood of success on the merits or a substantial case on the merits on their Eighth Amendment claim.

-Count Ten-
Violation of Fourteenth Amendment Right to Life

In Count Ten, Plaintiffs allege that "depriving Plaintiff of nutrition and hydration contrary to her wish to live is a violation of her Fourteenth Amendment right to life." (Dkt. 36, ¶ 104). As in Count Eight, Plaintiffs rely on the Fourteenth Amendment to the United States Constitution which provides that no state shall "deprive any person of life, liberty or property, without due process of law." During oral argument, Plaintiffs' counsel confirmed that Plaintiffs assert a substantive due process claim in Count Ten. The issue presented in Count Ten for purposes of temporary injunctive relief, is whether, consistent with the jurisdictional grant in Pub. L. No. 109-3, Plaintiffs have established a substantial likelihood of success on the merits of their contention.

"A finding that a right merits substantive due process protection means that the right is protected against certain government actions regardless of the fairness of the procedures used to implement them." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (*citing Collins v. City of Harker Heights*, 503 U.S. 115 (1992)) (*internal quotations and citations omitted*); *see also*

Zinermon v. Burch, 494 U.S. 113, 125 (1990)("the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'").

As an initial matter, a substantive due process violation requires state action. *DeShaney v. Winnebago Cty. DSS*, 489 U.S. 187, 195 (1989)("nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors"). For the same reasons that Plaintiffs could not establish state action in their other claims, Plaintiffs have not established state action in Count Ten.

Substantive due process rights are those rights "created by the Constitution," of which "no amount of process can justify [their] infringement." *Vinyard v. Wilson*, 311 F.3d 1340, 1356 (11th Cir. 2002). The plain language of the Fourteenth Amendment contemplates that a person *can* be deprived of life so long as due process of law is provided. XIV Amend., U.S. Const. ("[n]o State shall. . . deprive any person of life. . . without due process of law"). The "right to life" is accordingly protected by Fourteenth Amendment procedural due process. *Cf. Cruzan*, 497 U.S. at 293 (J. Scalia, concurring)("The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law'"). All of Plaintiffs' procedural due process claims have now been addressed and rejected by this court.

Accordingly, Plaintiffs cannot establish a substantial likelihood of success on the merits or a substantial case on the merits on their Fourteenth Amendment substantive due process claim.

All Writs Act, 28 U.S.C. § 1651

The Eleventh Circuit stated that "[o]ur decisions make clear that where the relief sought is in essence a preliminary injunction, the All Writs Act is not available because other, adequate remedies at law exist." *Schiavo v. Schiavo*, No. CV-05-00530-T at 9 (11th Cir. March 23, 2005). Accordingly, the All Writs Act cannot be used here to "evade the requirements for preliminary injunctions." *Id.*

Plaintiffs (First Amended) Motion for Temporary Restraining Order (Dkt. 34) is **DENIED**.

Finally, the court would be remiss if it did not once again convey its appreciation for the difficulties and heartbreak the parties have endured throughout this lengthy process. The civility with which this delicate matter has been presented by counsel is a credit to their professionalism and dedication to their respective clients, and Terri.

DONE AND ORDERED in chambers this 25th day of March, 2005.

JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record

Exhibit 2

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF DUVAL

Before me this day personally appeared William Polk Cheshire, Jr., M.D. who, being duly sworn, deposes and says:

I, William Polk Cheshire, Jr., M.D., have personal knowledge of the facts stated in this declaration and, if called as a witness, I could and would testify competently thereto under oath. I declare as follows:

I am a neurologist practicing in the State of Florida and am certified by the American Board of Psychiatry and Neurology. In regard to my educational background, I received an A.B. in biochemical sciences from Princeton University, an M.A. in bioethics from Trinity International University, and an M.D. from West Virginia University. I completed an internship in internal medicine at West Virginia University, a residency in neurology and a pain fellowship at the University of North Carolina.

I am also an appointed volunteer with the Florida statewide Adult Protective Services team, in which capacity I was called on March 1, 2005, to provide an independent and objective medical review of allegations of possible abuse, neglect, or exploitation of Ms. Theresa Marie Schiavo.

Although no one from the Department of Children and Families has inquired about my personal views about treatment decisions in cases of persistent vegetative state (PVS), I would like to disclose that I came into this case with the belief that it can be ethically permissible to discontinue artificially provided nutrition and hydration for persons in a permanent vegetative state. Having now reviewed the relevant facts, having met and observed Ms. Schiavo in person, and having reflected deeply on the moral and ethical issues, I would like to explain why I have changed my mind in regard to this particular case.

In my daily conversations with colleages, I have been interested to hear what others have thought about the issues surrounding this case. I have heard from neurologists, other physicians, nurses, other paramedical professionals, attorneys, ethicists, clergy, geriatricians, teachers, the elderly and the young. I have heard from people of many faiths, Roman Catholic, Protestant, Jewish, and people without a particular faith commitment. Generally, I have found that many people who have thought seriously about this case say that they have been unable to reach a judgment. They acknowledge valid principles on both sides of the arguments, and they recognize the difficulty of ascertaining from the media accurate and complete facts needed to reach a trustworthy conclusion. All agree that this is an extraordinarily difficult case and that the family members on both sides must be suffering greatly.

There is, at the heart of this case, uncertainty regarding the neurologic diagnosis on which treatment decisions have rested. The courts have ruled, on the basis of credible expert testimony, that Terri is permanently in a persistent vegetative state (PVS), which is a

specific neurologic diagnosis meaning wakefulness without awareness. Patients in a persistent vegetative state lack integrated function of the cerebral cortex while retaining involuntary brain stem reflexes that regulate heart rate, digestive, circulatory, sleep and other involuntary bodily functions. Their behaviors are automatic, nonpurposeful, uninhibited reflexes no longer under voluntary control by higher brain centers.

On the other hand, there have been repeated claims that Terri at times seems more responsive, even intentional and interactive. Such observations, if true, would be inconsistent with a diagnosis of PVS, the diagnosis upon which medical and legal decisions have been based. The question thus arises, whether Terri might be in what neurologist call a "minimally conscious state." This question is important, for in making decisions that affect the life and welfare of Terri, one would like to know whether she is aware of her environment, aware of others, aware of her own bodily discomfort, or has thoughts that we would regard as human even if she cannot communicate them to us. As my charge is to investigate the possibility of abuse or neglect, it matters whether Terri would be able to recognize and feel the consequences of abuse or neglect. Some actions might even be unintentionally neglectful if performed by persons unaware of Terri's level of awareness.

There are many behaviors typical for patients in PVS that someone without neurological training could easily mistake as voluntary. The non-neurologist seldom has experience in observing how the brainstem and basal ganglia behave when deprived of input from the cerebral cortex, where consciousness is believed to reside. It is quite common for dedicated and caring family members, hoping desperately for a sign from their loved one, to misinterpret these reflexes as evidence of communication. Such behaviors can include involuntary arousal, eye opening, random eye movements (nystagmus and horizontal scanning), brief eye contact, reflexive withdrawal from a noxious stimulus, movement of the lips or mouth or turning of the head in response to oral stimulation (suck and rooting reflexes which also occur in newborn infants), spontaneous grimmacing or smiling or displays of emotion (affective release, usually a momentary gesture), and certain other nonsustained behaviors usually not seen in healthy adults. Some of the video clips of Terri Schiavo that have been presented in the media display such involuntary behaviors. It is the responsibility of neurologists in cases like this to educate family members so that they will not develop a false hope of recovery.

Where is the neurologist in this case at this time? It is my understanding that nearly three years have passed since Terri has had the benefit of neurologic consultation. How, then, are we to be certain about her current neurologic status? There remain, in fact, huge uncertainties in regard to Terri's true neurologic status. Although exploring such questions may be uncomfortable, I believe that medicine has an obligation to ascertain the neurological facts to the highest possible degree of certainty.

Some studies have indicated, upon follow-up over time, a high rate of false initial diagnosis of PVS.[1] Furthermore, the diagnosis of minimally conscious state had not yet

[1] Andrews K, Murphy L, Munday R, et al. Misdiagnosis of the vegetative state: retrospective study in a rehabilitation unit. British Medical Journal 1996; 313: 13-16.

become standard parlance in the field of neurology at the time of Terri's initial diagnosis. The minimally conscious state has emerged as a distinct diagnostic entity only within the last few years.[2,4]

Although Terri has undergone structural imaging studies of her brain (such as the CT scan which I have reviewed), she has not, to my knowledge, undergone functional imaging studies, such as positron emission tomography (PET) or functional magnetic resonance imaging (fMRI). The structural studies have shown substantial loss of cerebral cortex which was deprived of blood supply for more than 40 minutes in 1990, but there does remain some cerebral cortex.

New facts have come to light in the last few years that should be weighed in the neurologic assessment of Terri Schiavo. Significant strides have been made in the scientific understanding of PVS and minimally conscious states since Terri last underwent neurologic evaluation. As usually happens in science, the newest evidence is prompting the medical community to think about this field in new ways. With new evidence comes fresh appreciation for what is actually happening in the brains of persons with profound cognitive impairment. And there is a great deal more to be learned.

Of particular interest was the fMRI study published just this year by Schiff and colleagues of two patients at Cornell University. When these patients, who had been diagnosed as being in a minimally conscious state, listened to narratives read by a familiar person, large areas of the cerebral cortex normally involved in language recognition and processing lit up. The presence of metabolic activity in those brain cells was far more than expected given their inability to follow simple instructions reliably or otherwise demonstrate at the bedside evidence of comprehension or communication.[5] From this study one may conclude that there is still a great deal we do not know about what previously unsuspected cerebral cortex functions may yet be occurring in the minds of persons who have sustained profound brain damage and are no longer able to communicate outwardly what their thoughts may be.

Based on my review of extensive medical records documenting Terri's care over the years, on my personal observations of Terri, and on my observations of Terri's responses in the many hours of videotapes taken in 2002, she demonstrates a number of behaviors that I believe cast a reasonable doubt on the prior diagnosis of PVS. These include:

1. Her behavior is frequently context-specific. For example, her facial expression brightens and she smiles in reponse to the voice of familiar persons such as her parents or

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[2] Childs NL, Mercer WN, Childs HW. Accuracy of diagnosis of persistent vegetative state. Neurology 1993; 43: 1465-1467.
[3] Giacino JT, Ashwal S, Childs N, Cranford R, Jennett B, Katz DI, Kelly JP, Rosenberg JH, Whyte J, Zafonte RD, Zasler ND. The minimally conscious state: definition and diagnostic criteria. Neurology 2002; 58: 349-353.
[4] Laureys S, Owen AM, Schiff ND. Brain function in coma, vegetative state, and related disorders. Lancet Neurology 2004; 3: 537-546.
[5] Schiff ND, Rodriguez-Moreno D, Kamal A, Kim KHS, Giacino JT, Plum F, Hirsch J. fMRI reveals large-scale network activation in minimally conscious patients. Neurology 2004; 64: 514-523.

her nurse. Her agitation subsides and her facial demeanor softens when quiet music is played. When jubilant piano music is played, her face brightens, she lifts her eyebrows, smiles, and even laughs. Her lateral gaze toward the tape player is sustained for many minutes. Several times I witnessed Terri briefly, albeit inconsistently, laugh in response to a humorous comment someone in the room had made. I did not see her laugh in the absence of someone else's laughter.

2. Although she does not seem to track or follow visual objects consistently or for long periods of time, she does fixate her gaze on colorful objects or human faces for some 15 seconds at a time and occasionally follows with her eyes at least briefly as these objects move from side to side. When I first walked into her room, she immediately turned her head toward me and looked directly at my face. There was a look of curiosity or expectation in her expression, and she maintained eye contact for about half a minute. Later, when she again looked at me, she brought her lips together as if to pronounce the letter "O," and although for a moment it appeared that she might be making an intentional effort to speak, her face then fell blank, and no words came out.

3. Although I did not hear Terri utter distinct words, she demonstrates emotional expressivity by her use of single syllable vocalizations such as "ah," making cooing sounds, or by expressing guttural sounds of annoyance or moaning appropriate to the context of the situation. The context-specific range and variability of her vocalizations suggests at least a reasonable probability of the processing of emotional thought within her brain. There have been reports of Terri rarely using actual words specific to her situational context. The July 25, 2003 affidavit of speech pathologist Sara Green Mele, MS, on page 6, reads, "The records of Mediplex reflect the fact that she has said 'stop' in apparent response to a medical procedure being done to her." The Adult Protective Services team has been unable to retrieve those original medical records in this instance.

4. Although Terri has not consistently followed commands, there appear to be some notable exceptions. In the taped examination by Dr. Hammesfahr from 2002, when asked to close her eyes she began to blink repeatedly. Although it was unclear whether she squeezed her grip when asked, she did appear to raise her right leg four times in succession each time she was asked to do so. Rehabilitation notes from 1991 indicated that she tracked inconsistently, and although did not develop a yes/no communication system, did follow some commands inconsistently and demonstrated good eye contact to family members.

5. There is a remarkable moment in the videotape of the September 3, 2002 examination by Dr. Hammesfahr that seemed to go unnoticed at the time. At 2:44 p.m., Dr. Hammesfahr had just turned Terri onto her right side to examine her back with a painful sharp stimulus (a sharp piece of wood), to which Terri had responded with signs of discomfort. Well after he ceased applying the stimulus and had returned Terri to a comfortable position, he says to her parents, "So, we're going to have to roll her over…." Immediately Terri cries. She vocalizes a crying sound, "Ugh, ha, ha, ha," presses her eyebrows together, and sadly grimmaces. It is important to note that, at that moment, no one is touching Terri or causing actual pain. Rather, she appears to comprehend the

meaning of Dr. Hammesfahr's comment and signals her *anticipation* of pain. This response suggests some degree of language processing and interpretation at the level of the cerebral cortex. It also suggests that she may be aware of pain beyond what could be explained by simple reflex withdrawal.

6. According to the definition of PVS published by the American Academy of Neurology, "persistent vegetative state patients do not have the capacity to experience pain or suffering. Pain and suffering are attributes of consciousness requiring cerebral cortical functioning, and patients who are permanently and completely unconscious cannot experience these symptoms."[6] And yet, in my review of Terri's medical records, pain issues keep surfacing. The nurses at Woodside Hospice told us that she often has pain with menstrual cramps. Menstrual flow is associated with agitation, repeated or sustained moaning, facial grimacing, limb posturing, and facial flushing, all of which subside once she is given ibuprofen. Some of the records document moaning, crying, and other painful behavior in the setting of urinary tract infections.

The neurologic literature has traditionally distinguished between, on one hand, the patterned reflex responses resulting from mere activation of spinal and brain stem pain circuits in PVS and, on the other hand, conscious awareness of pain which requires participation by the cerebral cortex, including interpretation, felt emotional awareness, and volitional avoidance behavior that would not be expected to occur in PVS. Recent studies suggest, however, that such a distinction may not be the clear bright line previously imagined. Laureys and colleagues demonstrated, for example, neuronal processing activity in the primary somatosensory area of the cerebral cortex in response to noxious stimuli in patients with PVS.[7]

Regardless of what objective measures may be available, the conscious experience of pain remains a phenomenon directly discernable only through introspective awareness, which means that one cannot directly know with certainty the pain another person experiences. If, as the authors of a consensus statement on PVS wrote in 1994, there are some cases in which "the absence of a response cannot be taken as proof of the absence of consciousness,"[8] then should not the clear presence of pain be given serious consideration as possibly indicating conscious awareness in Terri Schiavo? The fact that Terri's responses to pain have been context-specific, sustained, and, in the taped example I cited, in response to a spoken sentence, all suggest the possibility that she may be at some level consciously aware of pain.

Terri has received analgesic medication as treatment for her pain behavior. This seems to be appropriate medical treatment if one cannot know with certainty whether her behavior indicates conscious awareness of pain. If a patient behaves as if in pain, then the

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[6] http://www.aan.com/about/ethics/1995ll.pdf
[7] Laureys S, Faymonville ME, Peigneux P, Damas P, Lamy M, Del Fiore G, Degueldre C, Aerts J, Luxen A, Franck G, Lamy M, Maquet P. Cortical processing of noxious somatosensory stimuli in the persistent vegetative state. Neuroimage 2002; 17: 732-741.
[8] Multi-Society Task Force on PVS. Medical aspects of the persistent vegetative state -- second of two parts. New England Journal of Medicine 1994; 330: 1572-1579.

clinically prudent and compassionate response, when in doubt, is to treat the pain. If a patient behaves at times as though there may be some remnant of conscious awareness, then the clinically prudent and compassionate response, when in doubt, is to treat that patient with respect and care. If Terri is consciously aware of pain, and therefore is capable of suffering, then her diagnosis of PVS may be tragically mistaken.

7. To enter the room of Terri Schiavo is nothing like entering the room of a patient who is comatose or brain-dead or in some neurological sense no longer there. Although Terri did not demonstrate during our 90 minute visit compelling evidence of verbalization, conscious awareness, or volitional behavior, yet the visitor has the distinct sense of the presence of a living human being who seems at some level to be aware of some things around her.

As I looked at Terri, and she gazed directly back at me, I asked myself whether, if I were her attending physician, I could in good conscience withdraw her feeding and hydration. No, I could not. I could not withdraw life support if I were asked. I could not withhold life-sustaining nutrition and hydration from this beautiful lady whose face brightens in the presence of others.

The neurologic signs are in many ways ambiguous. There is no guarantee that more sophisticated testing would definitively resolve that ambiguity to everyone's satisfaction. There would be value, I think, in obtaining a functional MRI scan if that is possible.

This situation differs fundamentally from end-of-life scenarios where it is appropriate to withdraw life-sustaining medical interventions that no longer benefit or are burdensome to patients in the terminal stages of illness. Terri's feeding tube is not a burden to her. It is not painful, is not infected, is not eroding her stomach lining or causing any medical complications. But for the decision to withdraw her feeding tube, Terri cannot be considered medically terminal. But for the withdrawal of food and water, she would not die.

In summary, Terri Schiavo demonstrates behaviors in a variety of cognitive domains that call into question the previous neurologic diagnosis of persistent vegetative state. Specifically, she has demonstrated behaviors that are context-specific, sustained, and indicative of cerebral cortical processing that, upon careful neurologic consideration, would not be expected in a persistent vegetative state.

Based on this evidence, I believe that, within a reasonable degree of medical certainty, there is a greater likelihood that Terri is in a minimally conscious state than a persistent vegetative state. This distinction makes an enormous difference in making ethical decisions on Terri's behalf. If Terri is sufficiently aware of her surroundings that she can feel pleasure and suffer, if she is capable of understanding to some degree how she is being treated, then in my judgment it would be wrong to bring about her death by withdrawing food and water.

At the time of this writing, Terri Schiavo, as the result of decisions based on what I have argued to be a faulty diagnosis of persistent vegetative state, has been without food or water for 5 days. She is thus at risk of death or serious injury unless the provision of food and water can be restored. Terri Schiavo lacks the capacity to consent to emergency protective services and must trust others to act on her behalf. If she were to be transferred to another facility, it would be medically necessary first to initiate hydration and ensure that her serum electrolytes are within normal values.

How medicine and society choose to think about Terri Schiavo will influence what kind of people we will be as we evaluate and respond to the needs of the most vulnerable people among us. When serious doubts exist as to whether a cognitively impaired person is or is not consciously aware, even if these doubts cannot be conclusively resolved, it is better to err on the side of protecting vulnerable life.

Respectfully submitted,

William Polk Cheshire, Jr., M.D., M.A., F.A.A.N.

William P. Cheshire, Jr.

Sworn to (or affirmed) and subscribed before me this 23 day of March, 2005, by William Polk Cheshire, Jr., M.D.

Personally known ✓ OR
Produced Identification _____
Type of Identification Produced _____

Christine A. Lent

CHRISTINE A. LENT
MY COMMISSION # DD 194178
EXPIRES: December 29, 2007
Bonded Thru Budget Notary Services

Exhibit 3

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
File No. 99-2908-GD-003

IN RE: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.

MICHAEL SCHIAVO,

Petitioner,

vs.

ROBERT SCHINDLER and MARY SCHINDLER,

Respondents.

ORDER

THIS CAUSE came before the Court for hearing on March 23, 2005, for determination of the facial sufficiency of Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment. The Court heard legal argument from David C. Gibbs, III, Esq, for Mr. and Mrs. Schindler and from George J. Felos, Esq, for the Petitioner.

The Respondents move the Court for relief from its final Order rendered February 11, 2000, based on (1) the fact that an Act of Congress was passed granting de novo jurisdiction to the federal court and that this Court's Order is in opposition to Congress's intent; (2) that Theresa Marie Schiavo has been neglected or abused, as approved by this Court, and that she is in need of further medical evaluation and rehabilitation to assess her current condition based on Florida Department of Children and Families (DCF)'s determination that she is not in a persistent vegetative state; and (3)

Terri Schiavo's improvement or misdiagnosis of PVS, as stated in Dr. Cheshire's affidavit.

Although the Motion as filed is legally insufficient in form, the Court permitted Respondent's legal argument based on the affidavit of Dr. William Polk Cheshire, Jr., which was an exhibit attached to the petition/motion for intervention submitted by DCF. Dr. Cheshire, described as a board-certified neurologist, observed Theresa Marie Schiavo as part of his volunteer work with DCF Adult Protective Services Team's investigation of allegations that Terri Schiavo has been abused, neglected and/or exploited. DCF counsel conceded that he did not medically examine her. He also reviewed her medical records and viewed portions of videotapes that have already been considered by this Court. As a result, he believes that there is a greater likelihood that she is in a minimally conscious state rather than in a persistent vegetative state.

The Court analyzed a Rule 1.540(b)(5) motion filed by Respondents a few weeks ago that similarly alleged that Terri Schiavo should be reevaluated based on affidavits of doctors and the availability of new diagnostic testing procedures. The Court will not repeat what it said in its previous Order denying Rule 1.540(b)(5) motion for medical evaluations, other than to reconfirm that the Second District Court of Appeal set forth the burden that proponents of Rule 1.540(b)(5) motions in this case face in order to show that the initial judgment is no longer equitable.

> To meet this burden, they must establish that new treatment offers sufficient promise of increased cognitive function in Mrs. Schiavo's cerebral cortex—significantly improving the quality of Mrs. Schiavo's life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures.

In re Guardianship of Schiavo (Schiavo III), 800 So.2d 640, 645 (Fla. 2d DCA 2001).

Neither the present motion nor Dr. Cheshire's affidavit alleges that there is any new treatment that would significantly improve the quality of her life so that she would reverse the prior decision to withdraw life-prolonging procedures. The fMRI testing is a diagnostic tool, not a treatment that will significantly improve her quality of life, as was previously ruled by this Court. Dr. Cheshire primarily reviewed the evidence that was received at the 2002 trial and reached a different conclusion.

Theresa Marie Schiavo cannot live without a nutrition and hydration tube and Dr. Cheshire does not suggest otherwise. By clear and convincing evidence it was determined that she did not want to live under such burdensome conditions and that she would refuse such medical treatment/assistance. This motion does not show any significant change in her circumstances or that it would no longer be equitable to enforce this Court's judgment of February 2000, the Second District Court of Appeal's mandate, or this Court's order of February 25, 2005. Based on the Respondents' request for relief, this Court does not find that a colorable entitlement to relief has been established. It is therefore

ORDERED AND ADJUDGED that Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment is DENIED because the movants have not shown that their motion is legally sufficient to go forward.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 24 day of March, 2005, at 12:45 p.m.

GEORGE W. GREER
CIRCUIT JUDGE

90-2908-GD-003
Copies furnished to:
David C. Gibbs, III, Esq.
George J. Felos, Esq.
Deborah A. Bushnell, Esq.
Gyneth S. Stanley, Esq.
Hamden H. Rankin, III, Esq.
Joseph D. Mugri, Esq.

Exhibit 4

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
File No. 90-2908-GD-003

IN RE: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.

MICHAEL SCHIAVO,
Petitioner,

vs.

ROBERT SCHINDLER and MARY SCHINDLER,
Respondents.

ORDER

THIS CAUSE came before the Court for hearing on March 8, 2005, for determination of the facial sufficiency of Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment Pending Contemporary Medical-Psychiatric-Rehabilitative Evaluation of Theresa Marie Schiavo. The Respondents move the Court for relief from its final Order rendered February 11, 2000, based on several contentions: (1) that her prior evaluations are out-dated and that she is entitled to be reevaluated using 2005 medical procedures and technology; (2) that there is a high rate of misdiagnosis of persistent vegetative state and that some severely brain-injured patients do improve; (3) that she is no longer in a persistent vegetative state but that she has moved into a "minimally conscious state" since her 2002 evaluations; (4) that a new neurological test can determine

whether she is in a minimally conscious state (MCS); (5) that therapeutic methods developed since 2000 may help her learn to swallow; and (6) that her guardian testified that he would want her to receive any treatment that would help her. The Respondents further request that if further testing and evaluation indicates that her condition has changed since 2002, that an evidentiary hearing should be permitted to determine if she would still wish to refuse her assisted feeding.

Attached to Respondents' motion are this Court's February 11, 2000 Order; the guardian ad litem Jay Wolfson's report; pages of prior applicable testimony; reports in the media about brain-injured patients; and reports in medical journals of applicable studies and new diagnostic tools. Respondents' motion is also accompanied by thirty-three affidavits from doctors in several specialties, speech pathologists and therapists, and a few neuro-psychologists, all urging that new tests be undertaken.

The Court heard argument from David C. Gibbs, III, Esq., for the Respondents, and from George J. Felos, Esq., for the Petitioner.

In *In re Guardianship of Schiavo*, 800 So.2d 640 (Fla. 2d DCA 2001) (*Schiavo III*), the Respondents argued that Terri Schiavo's medical condition in February 2000 was misrepresented to the trial court and that she was not in a persistent vegetative state, among other things, and attached several affidavits from doctors, which varied in their bases and suggestions. Dr. Webber's affidavit, which was closely examined by the appellate court, claimed that she was not in a persistent vegetative state and that she exhibited purposeful reaction to her environment and that he might be able to restore her ability to speak and otherwise restore her cognitive function. The Second District Court of Appeal stated, "when numerous doctors dispute the diagnosis of persistent vegetative state based on the records

available to them, it is difficult for judges untrained in any medical specialty to summarily reject their opinions without additional evidence." The appellate court then discussed the burden the Respondents faced to show that the initial judgment is no longer equitable.

> "To meet this burden, they must establish that new treatment offers sufficient promise of increased cognitive function in Mrs. Schiavo's cerebral cortex—significantly improving the quality of Mrs. Schiavo's life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures." *Schiavo III* at p. 645.

As a result of this opinion, a new evidentiary hearing on Terri Schiavo's condition was conducted in October 2002 and current diagnostic testing procedures and high quality brain scans were undertaken, the results of which were presented to this Court along with evidence of any new medical procedures that would significantly improve the quality of her life. The Order from the 2002 trial reflects the Court's Order that Terri Schiavo remained in a permanent or persistent vegetative state and that no treatment existed that would significantly improve the quality of her life so that she would reverse the prior decision to withdraw life-prolonging procedures. This Order was affirmed by the Second District Court of Appeal after they closely examined all the evidence in the record and concluded that if they were called upon to review the decision de novo, they would still affirm it. *In re Guardianship of Schiavo (Schindler v Schiavo)*, 851 So.2d 182 (Fla. 2d DCA 2003) (*Schiavo IV*).

Respondents are now again asking the Court to once again determine whether Terri Schiavo remains in a permanent or persistent vegetative state since 2002. Significantly, they are not alleging that any new treatment exists that would significantly improve the quality of her life so that she would

reverse the prior decision to withdraw life-prolonging procedures. They are arguing that a new diagnostic tool, the fMRI, has been developed that is useful in recording brain activity in patients who are in a minimally conscious state. They also allege that the VitalStim swallowing therapy would benefit Terri and they cite patient Sara Scantlin who regained partial ability to speak after being in a coma for many years as a case study showing the improvement possible for severely brain-injured patients.

The Court cannot see how the Respondents have met the burden established by *Schiavo III*. Most of the doctor affidavits submitted are based on their understanding of Terri's condition from news reports or video clips they have seen. Many are obviously not aware of the medical exams undertaken for the 2002 trial since they suggest the very tests that were given at that time or appear to be unaware that batteries of tests have been given at all. Others recommend that the new fMRI test be given since they believe that Terri is not in a permanent or persistent vegetative state based on the available video footage but that she must be in a minimally conscious state or even better. The video footage referred to is either, a portion of, or all of the 4½-hour videotape that was examined at the 2002 trial and was part of the basis of the Court's decision that she remained in PVS, which was affirmed by the Second District Court of Appeal. The minimally conscious state was discussed at some length with witnesses at the 2002 trial so it is certainly not new. According to the article in *Neurology*, the fMRI was employed in a study that showed that some MCS patients may retain widely distributed cortical systems with potential for cognitive and sensory function despite their inability to follow simple instructions or communicate reliably. One of the Respondents' affiants cautions that fMRI testing is an experimental procedure that has shown promise but is not yet routinely used

for clinical purposes and that any fMRI testing should be conducted in an academic setting with ongoing research protocols investigating coma/VS/MCS. Petitioner contends that no MRI can be conducted on Terri Schiavo without brain surgery to remove a device that was previously inserted in her brain and that such an invasive procedure has not been previously favored. A few of the other affiant doctors have appeared in this case before and their diagnoses and recommended courses of treatment have been previously considered. Although all of the affiants urge that new tests be given, most are vague as to the course of treatment that should be given, while other suggest treatment that has already been considered (e.g., hyperbaric oxygenation). Both sides have cited guardian ad litem Wolfson's report in which he found the evidence of PVS to be compelling.

In regard to swallowing tests, she has previously undergone them. The issue of swallowing saliva has also been previously heard by the Court. The Respondents and some of the affiants, notably speech pathologists or therapists, have recommended the swallowing therapy called VitalStim, but notably there has been no allegation that VitalStim can be performed on patients who are in PVS. Dr. Wolfson also recommended such swallowing tests, but only if the parties agreed. Without an agreement to be bound by the results, he suggested that those tests had no feasibility. It is conceded that this was his attempt to broker an agreement between the parties to resolve this matter.

In regard to patient Scantlin, news reports state that she was able to blink on command, and therefore, was apparently not in PVS, so the issue of her improvement has limited, if any, applicability to this case.

Based on the Respondents' request for relief as submitted, this Court does not believe that a colorable entitlement to relief has been established. It is therefore

ORDERED AND ADJUDGED that Respondents' Fla. R. Civ. P. 1.540(b)(5) Motion for Relief from Judgment Pending Contemporary Medical/Psychiatric/Rehabilitative Evaluation of Theresa Marie Schiavo is DENIED because the movants have not shown that their motion is legally sufficient to go forward.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 9 day of March, 2005.

GEORGE W. GREER
CIRCUIT JUDGE

90-2908-GD-003
Copies furnished to:
David C. Gibbs, III, Esq.
George J. Pelos, Esq.
Deborah A. Bushnell, Esq.
Gyneth S. Stanley, Esq.
Hamden H. Baskin, III, Esq.
Joseph D. Magri, Esq.

TRUE COPY

Exhibit 5

DECLARATION OF BARBARA J. WELLER

STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, BARBARA WELLER, Attorney for Respondents in the above-styled case, hereby declare under penalty of perjury:

1. I visited with Terri at various times during the day on March 18, 2005, the day her feeding tube was removed.

2. During the morning I was in the room with Terri and various members of her family. Terri was in good spirits that morning. The mood in her room was jovial, particularly around noontime, as we knew Congressional attorneys were on the scene and many were working hard to save Terri's life. For most of that time, I was visiting and talking with Terri along with Terri's sister Suzanne Vitadamo, Suzanne's husband, and Terri's aunt, who was visiting from New York to help provide support for the family. A female Pinellas Park police office was stationed at the door outside Terri's room.

3. Terri was sitting up in her lounge chair, dressed and looking alert and well. Her feeding tube had been plugged in around 11 a.m. and we all felt good that she was still being fed. Suzanne and I were talking, joking, and laughing with Terri, telling her she was going to go to Washington D.C. to testify before Congress, which meant that finally Terri's husband Michael would be required to fix her wheelchair. After that Suzanne could take Terri to the mall shopping and could wheel her outdoors every day to

feel the wind and sunshine on her face, something she has not been able to do for more than five years.

4. At one point, I noticed Terri's window blinds were pulled down. I went to the window to raise them so Terri could look at the beautiful garden outside her window and see the sun after several days of rain. As sunlight came into the room, Terri's eyes widened and she was obviously very pleased.

5. Suzanne and I continued to talk and joke with Terri for probably an hour or more. At one point Suzanne called Terri the bionic woman and I heard Terri laugh out loud heartily. She laughed so hard that for the first time I noticed the dimples in her cheeks.

6. The most dramatic event of this visit happened at one point when I was sitting on Terri's bed next to Suzanne. Terri was sitting in her lounge chair and her aunt was standing at the foot of the chair. I stood up and leaned over Terri. I took her arms in both of my hands. I said to her, "Terri if you could only say 'I want to live' this whole thing could be over today." I begged her to try very hard to say, "I want to live." To my enormous shock and surprise, Terri's eyes opened wide, she looked me square in the face, and with a look of great concentration, she said, "Ahhhhhhh." Then, seeming to summon up all the strength she had, she virtually screamed, "Waaaaaaaa." She yelled so loudly that Michael Vitadamo, Suzanne's husband, and the female police officer who were then standing together outside Terri's door, clearly heard her. At that point, Terri had a look of anguish on her face that I had never seen before and she seemed to be struggling hard, but was unable to complete the sentence. She became very frustrated and began to cry. I was horrified that I was obviously causing Terri so much anguish.

Suzanne and I began to stroke Terri's face and hair to comfort her. I told Terri I was very sorry. It had not been my intention to upset her so much. Suzanne and I assured Terri that her efforts were much appreciated and that she did not need to try to say anything more. I promised Terri I would tell the world that she had tried to say, "I want to live."

7. Suzanne and I continued to visit and talk with Terri, along with other family members who came and went in the room, until about 2:00 p.m. when we were all told to leave after Judge Greer denied yet another motion for stay and ordered the removal of the feeding tube to proceed. As we left the room, the female police officer outside the door was valiantly attempting to keep from crying.

8. About four in the afternoon, several hours after the feeding tube was removed, I returned to Terri's room. By that time she was alone except for a male police officer now standing inside the door. When I entered the room and began to speak to her, Terri started to cry and tried to speak to me immediately. It was one of the most helpless feelings I have ever had. Terri was looking very melancholy at that point and I had the sense she was very upset that we had told her things were going to get better, but instead, they were obviously getting worse. I had previously had the same feeling when my own daughter was a baby who was hospitalized and was crying and looking to me to rescue her from her hospital crib, something I could not do. While I was in the room with Terri for the next half hour or so, several other friends came to visit and I did a few press interviews sitting right next to Terri. I again raised her window shade, which had again been pulled down, so Terri could at least see the garden and the sunshine from her lounge chair. I also turned the radio on in her room before I left so that when she was alone, she would at least have some music for comfort.

9. Just before I left the room, I leaned over Terri and spoke right into her ear. I told her I was very sorry I had not been able to stop the feeding tube from being taken out and I was very sorry I had to leave her alone. But I reminded her that Jesus would stay right by her side even when no one else was there with her. When I mentioned Jesus' Name, Terri again laughed out loud. She became very agitated and began loudly trying to speak to me again. As Terri continued to laugh and try to speak, I quietly prayed in her ear, kissed her, placed her in Jesus' care, and left the room.

FURTHER YOUR DECLARANT SAYETH NOT.

I hereby declare, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief. Executed this 22nd day of March, 2005, at Seminole, Florida.

Barbara J. Weller

BARBARA J. WELLER

Sworn to and subscribed before me this 25nd day of March, 2005.

Warren R. Bennett

Notary Public, State of Florida

Warren R. Bennett, III
Commission #DD296556
Expires: Mar 04, 2008
Bonded Thru
Atlantic Bonding Co., Inc.

Printed Name: Warren R. Bennett

✓ Personally Known

_____ Produced _____

as identification.

Exhibit 6

DECLARATION OF SUZANNE VITADAMO

STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, SUZANNE VITADAMO, sister of the Petitioner in the above-styled case, hereby declare under penalty of perjury:

1. I visited with Terri at various times during the day on March 18, 2005, the day her feeding tube was removed.

2. Terri was in good spirits that morning. My husband, Michael Vitadamo and Terri's aunt, Claudia Tamarro, were in the room with myself and Attorney Barbara Weller when Terri attempted to speak to Mrs. Weller. A female Pinellas Park police office were standing at the door of Terri's room.

3. Terri was sitting up in her lounge chair and Mrs. Weller and I were sitting on her bed. My aunt was standing at the found of Terri's chair.

4. Mrs. Weller stood up and learned over Terri. She took her arms in her hands. Mrs. Weller begged Terri to try to say, "I want to live." Terri's eyes opened wide, she looked at Mrs. Weller with great concentration and said, "Ahhhhhhhh." Then, with great effort, she screamed, "Waaaaaaaa" so loudly that Michael Vitadamo and the female police officer who were then standing together outside Terri's door, clearly heard her. Terri had a look of anguish on her face and she seemed to be struggling hard, but was she

could not complete the sentence. Terri began to cry and Mrs. Weller and I began to stroke Terri's face and hair to comfort her.

5. Mrs. Weller and I continued to visit and talk with Terri, along with other family members who came and went in the room.

FURTHER YOUR DECLARANT SAYETH NOT.

I hereby declare, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief. Executed this 22nd day of March, 2005, at Seminole, Florida.

Suzanne Vitadamo

SUZANNE VITADAMO

Sworn to and subscribed before me this 25nd day of March, 2005.

Warren R. Bennett III

Notary Public, State of Florida

Warren R. Bennett, III
Commission #DD296556
Expires: Mar 04, 2008
Bonded Thru
Atlantic Bonding Co., Inc.

Printed Name: Warren R. Bennett III

____ Personally Known

✓ Produced FL Drivers License

as identification.