

Memo to State Attorney Bernie McCabe from Prosecutors Doug Crow and Bob Lewis

To: BMc
From: Doug Crow/Bob Lewis
Re: Governor's Request on Schiavo case
Date: June 27, 2005

Based on what he refers to as "new information" contained in the Terri Schiavo autopsy report, Governor Bush has requested that our office take a "fresh look at the case" with no "preconceptions as to the outcome." Governor Bush's letter noted that the autopsy had not determined the cause of Mrs. Schiavo's "original injuries" in 1990 and had in fact cast doubt on the explanation that had been the basis of the 1992 malpractice verdict. He also noted that in 1992, 2003 and 2005 Michael Schiavo had given a time for his wife's collapse that was 40 to 70 minutes prior to the time that his 911 call was received by emergency services.

I believe it is unrealistic to expect, considering the past decade of increasingly venomous litigation and family members' disparate and irreconcilable beliefs as to Terri's wishes, that our office has the ability to resolve or ameliorate this long standing dispute. This occurrence has been the object of continuing litigation for the past twelve years. Most of the pertinent "facts" are in the public record and have been considered and reconsidered by lawyers, jurors, judges and a myriad of experts. Our office has twice been asked to consider accusations against Michael Schiavo - once in 2003 based upon contact from Mr. and Mrs. Schindler and again at the request of the Governor's staff earlier this year - and found insufficient evidence of any prosecutable offense to justify a criminal investigation.

Having reviewed the report and discussed the autopsy investigation with Dr. Thogmartin and his chief investigator Bill Pellan in detail and having also reviewed transcripts of the 1992 and 2002 court proceedings along with documents previously supplied to us by the Schindler family, it is obvious to us that there is no possibility of proving that anyone's criminal act was responsible for Mrs. Schiavo's collapse. Despite a thoroughly researched and extensive autopsy that included consultations with other expert pathologists and an exhaustive search for and review of all available medical records and other information concerning the events surrounding Terri's collapse, Dr. Thogmartin has been unable to determine why it occurred. He has convinced us that there are no remaining medical records in existence that would assist him in resolving what caused her 1990 cardiac arrest to a reasonable degree of medical certainty.

Without proof of criminal agency, there can be no hope of prosecution. Nor is there justification to use our investigative powers to perpetuate suspicion where, despite extended litigation and a detailed autopsy, we have no proof to suggest that a crime has occurred. Although Dr. Thogmartin did not believe that the cause could be determined with reasonable certainty, there are explanations far more likely and logical than any involving criminal wrongdoing.

Criminal verses Non-Criminal Causes of Terri's Collapse

Although the Governor suggests that the cause of Terri's "injuries" is more in doubt than ever, Dr. Thogmartin's extensive report makes clear that there is no evidence that she suffered any physical trauma. Despite repeated physical exams and radiographs, the hospital records contained no indication of traumatic injury. Dr. Thogmartin indicated the absence of such entries was significant since "contusions, abrasions, recent fractures and particularly healing fractures would have been visualized during the initial months of treatment" if they had been present. Similarly X-rays of her cervical spine that were taken within an hour of her admittance were negative and external signs of strangulation such as cutaneous or deep neck injury, blunt trauma or facial/conjunctive petechiae were not present.

The hypothesis that Terri's low potassium level was a factitious result of medication and fluid administered during her resuscitation is not new but first surfaced in the 1992 malpractice trial. The basis of the 1992 malpractice suit against Terri's gynecologist was that she had eating and nutritional disorders which he failed to detect and which allegedly led to her cardiac arrest causing profound and irreversible brain damage. Terri had sought this doctor's help in 1989 because of difficulty in getting pregnant and up until the time of her death was under treatment for amenorrhea (abnormally infrequent menstrual periods), a well documented result of eating disorders in young women. Terri had lost as much as 100 pounds since adolescence and had lost 20 pounds since her marriage. The suit alleged that her doctor failed to take a nutritional history and to diagnose and treat the eating disorders and nutritional deficiencies that were not only the cause of her menstrual problems but had ultimately led to her collapse.

Three physicians testifying on Terri's behalf concluded - based upon the medical records as well as interviews and statements of family members and co-workers - that Terri had an eating disorder or nutritional deficiency which had contributed to her cardiac arrest. The testimony suggested, without contradiction, this was the consensus opinion of all the doctors who had been involved in Terri's treatment.

The plaintiff did not attempt to specify the eating disorder but suggested that there was evidence to support bulimia and psychogenic polydipsia and that a combination of diet, excessive intake of fluids and compensatory purging behavior had caused both her amenorrhea and her extremely low level of potassium and that the latter condition led to her cardiac arrest. The defendant

doctor had admitted that Terri's eating disorder was probably a factor in the amenorrhea for which he was treating her. He acknowledged that, while there are a number of other possible causes, eating and nutritional disorders are known to cause this condition. Additionally, the defense called a psychiatrist who specialized in the treatment of eating disorders; he testified that based upon reviewing the statements of family members, the medical records, the depositions of eleven physicians and the statements of four of her co-workers that Terri suffered from bulimia. This expert did not concede that the eating disorder was responsible for her cardiac arrest. He noted, as does Dr. Thogmartin, that the resuscitation efforts and administration of medication and fluids could explain her low serum potassium after the incident and that this reading did not necessarily reflect electrolyte levels at the time of her collapse. He suggested, however, that Terri's condition was sufficiently severe and at an early enough stage in the disease process that she would carefully conceal her behavior, would not have acknowledged the problem and was not yet amenable to treatment.

Dr. Thogmartin understandably concluded that currently available evidence was insufficient to either definitively rule out the existence of an eating or nutritional disorder or to conclude with reasonable certainty that it was the cause of her collapse. However, all experts in the 1992 proceedings - relying on all available contemporary records and witness recollections - opined that Terri suffered from an eating disorder and the jury unanimously agreed.

While Dr. Thogmartin's report indicated that non-traumatic asphyxia was not impossible, I do not believe that this can be constructed to mean that it represents a plausible explanation or one that is equally or more likely than the possible non-criminal explanations for Mrs. Schiavo's collapse. Asphyxiation occurs when the brain is deprived of oxygen and can be accomplished by cutting off the air to the lungs or the flow of oxygenated (arterial) blood to the brain. While not impossible, it would be exceedingly difficult to accomplish this without leaving evidence of a struggle in a surviving victim. (*See Footnote 1 below)

Cutting off the air supply through suffocation would have to continue for approximately four to five minutes before brain damage ensues. The victim will remain conscious for a significant portion of this time. Common sense suggests and experience has confirmed that victims struggle violently when unable to breathe, flailing out at their attacker and whatever is preventing them from breathing and necessitating in turn that the assailant increase the amount of force against a moving, struggling victim. These factors make it virtually inevitable that observable injury will result. It is also possible to cause rapid unconsciousness with simultaneous bilateral compression of the carotid arteries. Based upon our experience, however, it would be virtually impossible for someone without considerable practice in using the technique to incapacitate a struggling victim, who is later resuscitated and survives, without causing visible injury.

Dr. Thogmartin's report also could not eliminate the possibility of subtle trauma in the form of "commotio cordis", a phenomenon that is most commonly seen in young athletes who are struck in the chest directly over the heart with an object such as a baseball. If the chest is sufficiently flexible and the impact occurs precisely during the 20 millisecond interval of the heart's cycle in which the ventricular muscles are repolarizing, ventricular fibrillation (rapid, unsynchronized contractions) can occur. Resuscitation efforts are rarely successful unless the person is defibrillated within two to three minutes. The timing of the impact as well as the hardness of the object, age of the subject and speed of impact are significant variables; it is unknown how often this type of blow to an unprotected chest can cause fibrillation without leaving any identifiable injury in a surviving adult victim. It seems very unlikely, however, that in the course of a domestic argument where one party is intentionally trying to harm the other, they will direct a single blow to the cardiac silhouette that is of sufficient force to cause ventricular fibrillation but not the intended injury.

Dr. Thogmartin also could not exclude the possibility of toxins or drugs being involved. Terri's described condition and the fact that paramedics were able to resuscitate her despite the twelve minute interval between her collapse and their arrival are not inconsistent with the possibility of an opiate overdose. The police officer who responded to the emergency did find a small number of medications in the residence, but did not feel that the drugs he found were relevant to Terri's collapse and did not record what they were. While there is some indication in the discovery materials from the malpractice suit that a prescription bottle of percocet may have been in the residence, Dr. Thogmartin indicated that the drug screen done at the ER would likely have detected the acetaminophen that is combined with oxycodone in that medication. There is of course no affirmative evidence that Terri ingested toxic amounts of any substance or medication and absolutely no basis to conclude they were forcibly or surreptitiously fed to her.

Time Discrepancies Concerning Terri's Collapse

Absent proof that a crime has occurred, neither Michael Schiavo's credibility nor the consistency of his statements would become a critical and material concern. Nonetheless, the discrepancy between his recollection of the time of the incident and the time that paramedics and police recorded receiving the call hardly constitutes new information. Schiavo testified in the 1992 malpractice deposition and trial that he heard a noise around five a.m. and found his wife collapsed near the bathroom door. In a 2003 interview on *Larry King Live* he indicated this occurred at 4:30 a.m., a time he repeated in a recent interview with medical examiner Jon Thogmartin. Schiavo has consistently said he called for emergency help immediately after finding his wife and that fire rescue arrived within a few minutes of the call. To our knowledge he was never asked about or confronted with the difference between his estimation of the time and the records indicating the fire rescue was called at 5:40 and began resuscitation efforts at 5:52.

Understandably, Michael Schiavo is not the only witness who has been inconsistent or had difficulty recalling the timing of events surrounding Terri's collapse and resuscitation. Shortly after finding Terri, Michael Schiavo called his in-laws and told them what happened. It is unclear whether he or the Schindlers called Bobby Schindler who lived in the same complex as Michael and Terri and who immediately went to their apartment and arrived before the paramedics. Although Terri's parents had been awakened in the middle of the night with extremely disturbing news and waited at their house for a subsequent phone call on their daughter's condition, they have no clear idea what time they were called by Michael. They had previously provided our office a timeline indicating that they were called as early as 3-4 a.m. but recently told Thogmartin they could not recall the time. Similarly, Terri's brother, Bobby Schindler, told Dr. Thogmartin he could not remember the time that he was called or initially arrived at the Schiavo residence except in relation to the arrival of the paramedics.

It is not contradicted that Michael Schiavo appeared frantic and extremely distraught throughout the incident. Under these extraordinary circumstances, where both Mr. Schiavo and his accusers have similar difficulty in reconstructing exact times, it cannot be credibly argued that this discrepancy is incriminating evidence. Nor, in light of his consistent and uncontradicted claims that he immediately called 911, can his error in estimating the time be considered an admission that he waited over an hour to get help for his wife. It does not appear that Schiavo's error was considered to be of probative value in either the civil suit or in the subsequent guardianship proceedings. Schiavo was not confronted by opposing lawyers (or by Dr. Thogmartin) with the potential inconsistency nor was he given the exact times recorded by paramedics as a point of reference. The most obvious explanation is also the most logical: under the extremely stressful circumstances his attention to and memory of the exact time were faulty - in the same way that the recollections of Mr. and Mrs. Schindler and Bobby are flawed.

Curiously, a delay such as this would further undermine the speculation that Michael Schiavo caused Terri's collapse by assaulting her. Neither the medical examiner nor our assistants were able to identify any plausible manner by which Schiavo - having physically overcome Terri without injuring her or being injured himself - could keep her incapacitated but sufficiently alive that she could still be resuscitated almost an hour later. Additionally, we could discern no rational motivation for attacking one's spouse allowing her to linger near death for forty minutes or more and then calling for help in sufficient time to save her life so she could potentially name her assailant.

Family members and others who disagreed with Mr. Schiavo's decision to seek court approval to have his wife's feeding tube removed have made repeated attacks on his credibility and accused him of mistreatment of his wife. At least some of these accusations have been shown to be baseless by the autopsy conclusions. We should note, however, that we have also received unsolicited

comments praising his honesty, sincerity and devotion to his wife's care. Also, when asked about her son-in-law during the 1992 malpractice trial, Mary Schindler testified, "He's there every day. She (Terri) does not want for anything. He is loving, caring. I don't know of any young boy that would be as attentive. He is ... he's just unbelievable, and I know without him there is no way I would have survived this."

In the complete absence of any evidence that Terri's collapse was caused by anyone's criminal actions it has been unnecessary for us to attempt to resolve these conflicting portraits of Michael Schiavo's character. It appears, however, that opinions on his culpability derive from disagreement with the Court's decision to allow Terri's life to end and not from any objective consideration of the evidence. If the available facts are analyzed without preconceptions, it is clear that there is no basis for further investigation. While some questions may remain following the autopsy, the likelihood of finding evidence that criminal acts were responsible for her collapse is not one of them.

We strongly recommend that the inquiry be closed and no further action be taken.

Footnote 1

Decomposition of the body can sometimes hide some of the more subtle signs of assault, including petechial hemorrhages. Also, the bruising process effectively ends when the heart ceases to pump blood. This would not be an issue where the victim is resuscitated and survives.