

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 05-11556-DD**

THERESA MARIE SCHINDLER SCHIAVO,)
Incapacitated <i>ex rel.</i> ROBERT SCHINDLER)
and MARY SCHINDLER, her Parents and)
and Next Friends,)
)
Plaintiffs,)
)
vs.)
)
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.)
)

**Brief for *Amicus Curiae* Association of American Physicians and Surgeons
Filed in Support of Plaintiffs**

The *amicus curiae* Association of American Physicians and Surgeons, Inc. (“AAPS”) hereby submits this memorandum in support of Plaintiffs.

INTEREST OF *AMICUS CURIAE* AAPS

Amicus curiae AAPS is a not-for-profit membership organization founded in 1943. AAPS represents approximately 4,000 physicians nationwide in all practices and specialties. AAPS was established to preserve the practice of private medicine and has remained dedicated to the defense of ethical medicine and the patient-physician relationship. AAPS seeks to correct several misconceptions about the medical facts and applicable law in this case.

BACKGROUND

The courts have denied the emergency requests of Terri Schiavo's parents, Mr. and Mrs. Schindler, to reinsert her feeding tube. This continued the "death process," as the lead defense attorney put it, in starving and dehydrating Terri Schiavo against the will of her parents. In unprecedented fashion, bystanders are being arrested for attempting to give water to a woman dying of thirst.

Mrs. Schiavo's current health is described in the words of attorney David Gibbs III, "Where, as here, death is imminent, it is hard to imagine more critical and exigent circumstances." In his dissent to the panel decision, Judge Wilson of the Eleventh Circuit put it best: "I am aware of no injury more irreparable than death." *Schiavo ex rel. Schindler v. Schiavo*, 2005 U.S. App. LEXIS 4702, *27 (11th Cir. Mar. 23, 2005) (Wilson, J., dissenting).

An Act for the Relief of the Parents of Theresa Marie Schiavo (the "Terri Schiavo Act") mandated that:

the District Court **shall determine de novo** any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, **notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings**. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

Pub. L. No. 109-3 (emphasis added).

Yet this de novo review has not occurred, despite the express mandate of Congress. A stay is necessary to prevent the mootness of the case, and to enable the requisite de novo review to

occur. There are serious errors of medicine and law underlying the state rulings in this case, and this court should act immediately to ensure due process for plaintiffs. A stay to preserve the evidence and issues for the de novo determination is warranted immediately.

ARGUMENT

Terri Schiavo is not terminally ill, she is not “end stage,” and she is likely not in a persistent vegetative state. It is unlawful to deprive her of nourishment.

Specifically, it violates due process to cause the death of Terri Schiavo based on an outdated and inherently unreliable diagnosis of a persistent vegetative state (PVS). It further violates due process and the First Amendment to find that there is “clear and convincing” evidence of a desire to die when her own religious leader, viewed as infallible by her faith, condemns this death process, with only self-serving hearsay offered to the contrary.

There is state action here, and the trial court erred in holding otherwise. Also, the trial court applied the incorrect standard for reviewing what amounts to a request for a stay to preserve the issues for the de novo determination as mandated by Congress.

I. It Violates Due Process to Assume that Terri Schiavo is in a Persistent Vegetative State, as Required by Florida Statute, Without Allowing Her Parents to Arrange for a Current, Objective, and Thorough Medical Examination.

Persistent vegetative state (PVS), the medical basis for the state court orders, is misdiagnosed as much as 43% of the time. *See* Andrews K. et al., “Misdiagnosis of the vegetative state: retrospective study in a rehabilitation unit,” 313 *British Medical J.* 13-16 (1996). The state court order denying food and water to Terri Schiavo depends entirely on this highly unreliable diagnosis. Yet numerous physicians have expressed disagreement or skepticism that this diagnosis is even correct for Mrs. Schiavo, and the state court refused to hold a hearing

based on their multiple affidavits. The court did even not allow a recent, objective evaluation of her. A de novo consideration of this case requires, at a minimum, a careful determination of whether she is even in a PVS, and an immediate stay is necessary to preserve her condition for this requisite evaluation.

One study of PVS in a rehabilitation unit concluded as follows: “The level of cognitive functioning present in this misdiagnosed group at the time of discharge was considerable: 60% were oriented in time, place and person, 75% were able to recall a name after 15 minutes delay, 69% were able to carry out simple mental arithmetic, 75% were able to generate words to communicate their needs and 86% were able to make choices about their daily social activities.” “Editorial: The vegetative state – clinical diagnosis,” 75 Postgrad Med. J. 321-324 (1999). Does Terri Schiavo fall into one of these or other categories showing capacity for improvement? It is easy to allow for current, unbiased and thorough medical evaluations, yet that has been repeatedly denied in a violation of her, and her parents’, due process rights.

Even if there were objective and thorough medical evaluations of Terri Schiavo years ago – which is highly doubtful – far too much time has passed to commit her to death today based on those determinations. Medical technology improves over time, as do patients. The due process rights of Terri Schiavo and her parents have been thoroughly violated by state court orders frustrating a current, objective and thorough medical examination, and the trial court erred in engaging in a de novo review of this issue.

II. The Order to Withhold Food and Water Improperly Substituted the Views of the Court for the Presumptive Religious Views of the Patient.

Terri Schiavo, a Roman Catholic, almost certainly would have followed the papal pronouncement of her church, which emphatically denounced this “death process.” Yet the legal proceedings have ignored her church’s clear condemnation of this method of death in this case. The courts have substituted their own views of an appropriate death for that of the patient. Judges and others are free to ignore the statements of a religious leader, but the courts should not exclude them when assessing the intent of a member of that religion.

Pope John Paul II declared that the removal of feeding tubes from patients in vegetative states is immoral, calling it “euthanasia by omission.”¹ He confirmed that no matter how sick someone is, “he is and will always be a man, never becoming a ‘vegetable’ or ‘animal.’”² Indeed, recent reports are that the Pope will himself be receiving a feeding tube, which surely would have influenced Terri’s view.

This strong moral command of her own church has bearing on Terri Schiavo’s own views. Yet the state courts have effectively ignored Terri’s religion in pretending to ascertain her wishes. Such religious condemnation of this “death process” would likely influence, if not reflect, a member of the church, and it is a violation of her First Amendment rights to compel a violation of these principles.

This trampling on religious principles is among the protections included in the Terri Schiavo Act passed by Congress. Yet the court below was oblivious to it, essentially denying

¹ <http://www.cathnews.com/news/403/122.php> (viewed Mar. 22, 2005).

² *Id.*

constitutional rights that Congress ordered it to safeguard. The Terri Schiavo Act ordered the federal court to “protect the rights of Theresa Marie Schiavo under the Constitution,” and that plainly includes her right not to be compelled to violate her own religious principles, or at least entitles her to a meaningful hearing and review of the record on this point.

III. The Court Below Erred in Finding a Lack of “State Action” in the Court-Ordered Withholding of Food and Water from Terri Schiavo.

The court below mistakenly omitted Judge George W. Greer in its finding of no state action by defendants. Plaintiffs named Judge Greer as a defendant and he clearly acted under color of state law. His orders in affirmatively preventing the provision of food and water to the starving Terri Schiavo undeniably constitute “state action” that implicates constitutional rights. Many bystanders have been arrested for attempting to bring water to alleviate the thirst of Terri Schiavo. There is every bit as much state action here as there would be in forcibly segregating schools or lunch counters. Nothing about this case is private, as neither Michael Schiavo nor the Hospices of the Florida Suncoast has acted in a private manner in withholding food and water. To the contrary, the state has authorized and mandated such deprivation from Terri Schiavo.

The Supreme Court established that private actions should be treated as state action “if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” *Brentwood Academy v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). Michael Schiavo and the Hospice are not merely declining to provide Terri Schiavo with food and water. The full power and force of state actors are preventing her parents from doing likewise. Surely there is state action in obtaining court orders that effectively block others from feeding a starving person. *See also Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (court

enforcement of private racial restrictive covenants in deeds constitutes state action); *cf. Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980). Forcing someone into a “death process” against the wishes of her brother, her parents, her church, and millions of supporters rises to the level of state action.

IV. The Court Below Applied the Incorrect Standard for Injunctive Relief in the Context of an Attempt to Stay the Withholding of Food and Water.

The court below and the panel erred in applying the standard for injunctive relief. The underlying goal of Plaintiffs is to obtain a stay of the order denying Terri Schiavo food and water while the trial court makes a *de novo* determination. Such stays are commonplace in the context of review of capital punishment and the yet court incorrectly denied plaintiffs the equivalent of a stay here. It takes far more than the March 21st cursory afternoon hearing, held without any witnesses, to comply with the trial *de novo* requirement of the “Terri Schiavo Act.” The heightened standard for a restraining order is not necessary in this case and it was erroneous for the court below, and the prior panel, to rely on that legal standard for granting one.

It is neither necessary nor precedented for Plaintiffs to be compelled to prove a likelihood of prevailing on the merits in order for them to obtain a stay for their trial. For example, Terri Schiavo herself is the central evidence for the trial. Is there any doubt that the court should issue an order preserving evidence for the benefit of the trial? Plaintiffs need to have medical experts examine Ms. Schiavo to prove their case, yet the court unjustifiably frustrated their ability to do so. This directly contravened the letter and spirit of the Terri Schiavo Act.

Congress could not possibly have intended that its emergency preservation of rights for Ms. Schiavo be mooted, thereby denying the rights established by the statute. This Court should

reverse the decision below, stay the orders by the state court, and command the provision of food and water to Ms. Schiavo pending further proceedings.

Conclusion

For the foregoing reasons, this Court should grant the relief sought by Petitioners, and order that the February 2000 state court order (and all such subsequent orders, including those dated 2/25/05 and 3/8/05) be stayed pending the outcome of de novo review. To protect the objectives of this proceeding, this Court should further order that Terri Schiavo be placed on a feeding tube and receive medical treatment and intravenous fluids so that items 1 & 2 listed above can be accomplished.

Counsel for Amicus

Dated: March 30, 2005