IN THE FLORIDA SUPREME COURT
CASE NO. SC01-2678

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| IN RE: THE GUARDIANSHIP OF<br><br>THERESA MARIE SCHIAVO,<br><br>Incapacitated. | ) | |
| MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO,<br><br>Petitioner,<br><br>vs.<br><br>ROBERT SCHINDLER and MARY SCHINDLER,<br>Respondents. | ) | Petition from the Second District Court of Appeal<br>Case No. 2D01-3626 |

# JURISDICTIONAL BRIEF OF PETITIONER

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## PRELIMINARY STATEMENT

The Petitioner, MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO, was the Appellee in the district court of appeal. He is referred to in this brief as "Petitioner," "Guardian," or by name.

Respondents, ROBERT SCHINDLER and MARY SCHINDLER, were the Appellants in the district court of appeal. They are referred to in this brief as "Respondents" or by name.

THERESA SCHIAVO is referred to by name or as the "Ward."

The October 17, 2002 opinion of the lower court, 800 So.2d 640 (Fla. 2d DCA 2001), is appended to this brief. References to the opinion are by Southern Reporter page number.

## STATEMENT OF THE CASE AND FACTS

The appellate court's opinion is its third "addressing a bitter dispute among the family members of Mrs. Theresa Schiavo's family over her medical condition and her right to forego life-prolonging medical procedures." 800 So.2d at 641. The court specifically refers to its two prior opinions, "Schiavo I," 780 So.2d 176 (Fla. 2d DCA 2001), *cert. denied*, 789 So.2d 348 (Fla. 2001), and "Schiavo II," 792 So.2d 551 (Fla. 2d DCA 2001). *Id*.

In Schiavo I the court found, "the evidence is overwhelming that Theresa is in a permanent or persistent vegetative state," and found clear and convincing evidence to support the trial court's determination that the ward would have chosen in February 2000 to withdraw artificial life-support. 800 So.2d at 642; 780 So.2d at 177. After Schiavo I the SCHINDLERS alleged in a 1.540(b)(2) and (3) motion--based upon allegations of newly discovered evidence and intrinsic fraud--that Mr. Schiavo lied at trial. The court in Schiavo II affirmed the trial court's denial of the motion as untimely on its face, as the motion was not filed within a year of entry of the judgment. 800 So.2d at 642; 792 So.2d at 555.

In Schiavo II the court also found that the ward's "condition is legally a 'terminal condition'" per section 765.101(17), Florida Statutes (2000), and

permitted the SCHINDLERS to file a motion for relief from judgment under rule 1.540(b)(5) if they could show that it is no longer equitable that the judgment have prospective application. The court cautioned, however, that such motion should not be filed merely to delay an order with which an interested party disagrees or to retry an adversary proceeding, and that "the rule requires the movant to establish that new significant evidence or substantial changes in circumstances *arising after* the entry of the judgment make it 'no longer equitable' for the trial court to enforce its earlier order." 800 So.2d at 642; 792 So.2d at 560, 554, emph. added.

On remand from Schiavo II, the SCHINDLERS filed a motion for relief pursuant to rule 1.540(b)(5) and a petition for examination of the ward. In the motion they restated and expanded upon their allegations that Mr. Schiavo lied at trial, and claimed the ward is not in a persistent vegetative state and that medical treatment exists that could improve her condition. 800 So.2d at 643-44. To support their medical claims, the SCHINDLERS attached affidavits from numerous doctors disputing the diagnosis of persistent vegetative state, the affidavit opinions based upon a brief trial videotape of the ward and her mother, and the ward's then medical records. One such doctor, Webber, claims that a non-vegetative "Mrs. Schiavo has a good opportunity to show some degree of improvement [cognitive and physical items such as speech recovery] if treated with this type of therapy [cardiovascular medication style]." 800 So.2d at 644.

The trial court summarily denied the petition for examination and 1.540(b)(5) motion. 800 So.2d at 643.

The appellate court reversed the trial court, holding that only Dr. Webber's claim "raises the motion to the level of colorable entitlement requiring an evidentiary hearing."[1] 800 So.2d at 646. The court also orders the diagnostic testing of the ward and her examination by five doctors prior to the evidentiary hearing. The court does not limit the hearing to Webber's alleged treatment, but permits discovery--examination and testing--and a hearing on the other alleged treatment for which no colorable entitlement was shown. The court's rationale for permitting the same is that "the opinions of the remaining doctors may have been limited by their inability to examine Mrs. Schiavo or obtain necessary diagnostic information..." 800 So.2d at 646.

As to the claims of intrinsic fraud, the court reviews witness statements and

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[1]While the court describes Webber's treatment as "new," closer examination of the opinion reveals that this does not mean the subject treatment was discovered or utilized subsequent to trial. Rather, it indicates that the treatment was available at the time of trial but not considered. Webber, as to the alleged efficacy of this "treatment" on the ward, bases his opinion on his "years of practice." The court states that the 2000 trial focused on the ward's intent "and not on whether any available medical treatment could improve her condition," and describes the treatment as "new evidence of additional medical procedures." 800 So.2d at 644. While the record definitively shows that the alleged treatment pre-dated the trial by many years, (see Motion for Stay), Petitioner cannot rely on the record, as the same cannot be used to establish jurisdiction. Nevertheless, Petitioner contends that the opinion itself is sufficient to show that the subject "treatment" is not a "change in circumstances 'arising after' the entry of the judgment."

affirms the trial court's conclusion that this evidence failed to present a colorable claim. The court adds, though, "We assume without deciding that such allegation could be sufficient to obtain relief under rule 1.540(b)(5)." 800 So.2d at 643.

The court also lessens the movants' burden of proof on remand from the legally indicated "clearly convincing" standard to a "preponderance" standard. 800 So.2d at 645. Finally, the court asserts it is the possibility that treatment could "restore cognitive function," (Webber's affidavit), that raises the claim to colorable entitlement. According to the court, "increased cognitive function in Mrs. Schiavo's cerebral cortex" is synonymous with "significantly improving the quality of Mrs. Schiavo's life." 800 So.2d at 646, 645.

## SUMMARY OF ARGUMENT

The lower court's opinion expressly and directly conflicts[2] with numerous decisions of other appellate courts, and this Court, that hold: 1.540(b)(2) "newly discovered evidence" cannot serve as the basis for a 1.540(b)(5) motion, nor as the foundation for an expert's 1.540 (b)(5) opinion; limited discovery *follows* a 1.540(b) claim found to demonstrate "colorable entitlement" to relief, it does not

[2]Identification by the lower court of a direct conflict with another Florida appellate decision is not necessary to create an "express" conflict. Discussion by the lower court of the legal principles upon which it bases its opinion supplies a sufficient basis for a petition for conflict review. *Ford Motor Company v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981). "Direct" means that the conflict must appear in the majority decision; neither a dissenting opinion nor the record itself can be used to establish jurisdiction. *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986).

*precede* a claim; a movant's 1.540(b) burden of proof is that of clear and convincing evidence; intrinsic fraud cannot serve as the basis for a 1.540(b)(5) motion; the court cannot impose upon the patient its own quality-of-life beliefs.

## ARGUMENT

1.540(b)(2) "Newly Discovered Evidence." The distinction between Rule 1.540(b)(2), "newly discovered evidence," and 1.540(b)(5) evidence that it is "no longer equitable that the judgment or decree should have prospective application" is: the former "refers to evidence of facts in existence *at the time* of judgment of which the aggrieved party was excusably ignorant..." *Gonzalez v. Gannett Satellite Information Network,* 903 F.Supp. 329, 332 (N.D.N.Y. 1995); while the latter pertains to "matters accruing after entry of the final judgment..." *Pollock v. T & M Investments, Inc.*, 420 So.2d 99, 102 (Fla.3d DCA 1982). Thus, 1.540(b)(2) "new evidence" cannot provide grounds for relief under Rule 1.540(b)(5). *Pollock* cites *Hensel v. Hensel*, 276 So.2d 227, 228 (Fla. 2d DCA 1973), which explains:

> "[T]he equities spoken of in ground No. 5 of the rule are those which come to fruition *after* a final judgment, not those which would theretofore have been available as defenses to the action. That is so because to say, in the language of the rule, that it is 'no *longer* equitable' that a judgment be given prospective effect is to say that it once was equitable that it have such effect. This in turn, of course, presupposes that the judgment was valid to begin with." That is why, here, the lower

court repeatedly cautioned Respondents that any 1.540(b)(5) motion filed must

establish matters *arising after* the entry of the judgment. *Supra* at 2.

Therefore, evidence of alleged treatment existing at the time of trial cannot raise a colorable claim for relief as held by the lower court. The lower court's holding expressly and directly conflicts with the above cases and its own former pronouncements[3] and in essence, does away with the one-year limitation provision governing rule 1.540(b)(2).

Even if Dr. Webber's "treatment" had been developed after the trial, the motion still does not raise a colorable entitlement to relief because it lacks an essential predicate. Dr. Webber does not state that he is able to improve the condition of a patient in a persistent vegetative state. Rather, he states that he has successfully treated "patients with brain deficits similar to Mrs. Schiavo's," who he describes as a patient that exhibits "purposeful reaction to her environment." 800 So.2d at 644. His (and the other doctors') opinion that the Ward has cognizance is based upon trial-contemporaneous information, *supra* at 2, not matters coming to fruition or arising *after* trial, as is required by Rule 1.540(b)(5). As the trial established the Ward's permanent vegetative condition, *supra* at 1, and as the 1.540(b)(5) motion does not facially demonstrate that THERESA SCHIAVO's condition has changed post-trial, the motion lacks a foundation or

[3]While intra-district conflicts cannot serve as basis for conflict jurisdiction, *Pollock*, which cites the Second District's *Hensel* decision, is a Third District case.

predicate--a non-vegetative patient--that can support Dr. Webber's opinion that THERESA SCHIAVO might improve with treatment.[4]

When a predicate "omits a fact so obviously necessary to the formation of an opinion," the opinion is neither sustainable, competent, nor admissible. *Nat Harrison Associates, Inc. v. Byrd*, 256 So.2d 50, 53 (Fla. 4th DCA 1971); *Huff v. State*, 495 So.2d 145, 148 (Fla. 1986); *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868, 873 (Fla. 1st DCA 1993); *Centex-Rooney Const. v. Martin County*, 706 So.2d 20, 28 (Fla. 4th DCA 1997). With an insufficient 1.540(b)(5) predicate to show that the ward is non-vegetative, Webber's affidavit cannot raise "colorable entitlement requiring an evidentiary hearing" as held by the lower court, and such holding again conflicts with *Pollock*, and conflicts with the expert opinion cases.

In essence, what has happened here is that Respondents' doctors have reviewed the trial-related evidence and "dispute the diagnosis of persistent vegetative state based on the records available to them..." 800 So.2d 644. If this is sufficient to warrant a hearing, as ruled by the lower court, *id*., one would also

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[4]Without such a foundational showing, the doctor's opinion regarding possible improvement does not present any competent evidence, because the opinion would not be relevant or material to the condition of *this* patient. For example, if Dr. Webber opined that he could successfully treat TERRI SCHIAVO because he has successfully treated patients in diabetic comas, his opinion would only be competent if combined with a foundational showing that THERESA SCHIAVO was in a diabetic coma.

have to conclude that in any trial involving a conclusion based upon expert testimony, a Rule 1.540(b)(5) motion would raise a colorable claim if an expert found after trial reviews trial evidence and renders a contrary opinion. That is simply not the state of the law. While the lower court notes "it is difficult for judges untrained in any medical specialty to summarily reject their opinions," *id*., that is what the law required of them.

1.540(b) Discovery. Both *Southern Bell Tel. & Tel. Co. v. Weldon*, 483 So.2d 487, 489 (Fla. 1st DCA 1986) and *Dynasty Express Corp. v. Weiss*, 675 So.2d 235, 239 (Fla. 4th DCA 1996) hold that, "*If* the allegations for relief from judgment raise a colorable entitlement to...relief...permissible discovery prior to the hearing, is required." Emphasis added. Limiting discovery to colorable claims is essential, otherwise, Rule 1.540(b) motions would permit fishing expeditions for disgruntled litigants and would promote endless litigation.

Here, the lower court rules that discovery should have been afforded on the medical claims that did not raise colorable entitlement to relief, and on that basis permits a hearing on such claims. *Supra* at 3. This holding expressly and directly conflicts with the above cases.

Burden of Proof. As the lower court indicates, a 1.540(b)(5) challenge is "extraordinary" and under federal law the movant must prove entitlement by clear and convincing evidence. 792 So.2d at 554; 800 So.2d at 645, *citing Stokors v.*

*Morrison*, 147 F.3d 759, 761 (8th Cir. 1998). The federal standard was adopted in Florida in *Wilson v. Charter Marketing Co.*, 443 So.2d 160, 161 (Fla. 1st DCA 1983), and the lower court's reduction of the movant's burden of proof to preponderance of the evidence, conflicts with that decision.[5]

Intrinsic Fraud. A challenge to a judgment on the basis of intrinsic fraud is time barred unless it is brought within one year of the entry of the judgment. *Southeast Bank, N.A. v. Almeida,* 693 So.2d 1015, 1019 (Fla. 3d DCA 1997); *DeClaire v. Yohanan*, 453 So.2d 375, 377-79 (Fla. 1984). Here, the lower court considers the time-barred intrinsic fraud claims under Rule 1.540(b)(5). *Supra* at 3 and 1. This effectively does away with the one-year limitation period, conflicts with the above cases, and conflicts with *Pollock* by considering trial-contemporary matters in conjunction with Rule 1.540(b)(5).[6]

Quality of Life. *In Re Guardianship of Browning*, 568 So.2d 4, 13 (Fla. 1990), rejected decision making in cases like this based upon "objective" or "best interest" standards--factors other than the patient's intentions. This court has been

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[5]While *Wilson* was a 1.540(b)(3) case, the cited federal standard apparently applies to all Rule 60(b) motions where "courts typically require that the evidence in support of the motion for relief be 'highly convincing'..." *Gonzalez v. Gannett Satellite Information Network, supra,* 903 F.Supp. at 331.

[6]This holding arguably is in the form of dicta, and the status of "dicta conflict" is apparently unresolved, *State v. Speights*, 417 So.2d 1168, 1169 n.1 (Fla. 1982). The status of "dicta conflict" should be resolved in favor of review.

particularly careful not to tread on the slippery slope of permitting the State, the family or others to impose upon the patient their judgment as to whether or not there is sufficient quality of life to make the patient's life worth living. *Id*.

The lower court claims that some cognition would significantly improve the ward's quality of life. *Supra* at 4. Who is to say that cognitive function of the patient--with resulting awareness of her predicament and ability to experience pain--would increase the quality of her life? To THERESA SCHIAVO, increased cognitive functioning in this circumstance might be considered a curse rather than a blessing. The lower court, by assuming that improved cognition in and of itself benefits the patient, is entering upon the slippery slope of imposing upon the patient its own determination as to quality of life. This conflicts with *Browning*.[7]

## CONCLUSION

The lower court mandates re-examination of matters litigated and concluded at trial contrary to Rule 1.540(b) and interpreting cases. The decision on many fronts substantially impairs the finality of judgments, and it unwisely treads into quality-of-life determinations. While this is a case of life and death that warrants great care, interminable legal proceeding in and of itself often defeats the patients'

[7] "[W]e fail to see a significant legal distinction" between Mrs. Browning who "was not in a total comatose state" compared to a patient who was. "[T]he right here is one of self-determination that cannot be qualified by the condition of the patient..." *In re Guardianship of Browning*, 568 So.2d 4, 12-13 (Fla. 1990).

constitutional right to withdraw or refuse treatment and discourages others from employing the legal system. "It is important that the decision be prompt..." *Browning*, 543 So.2d at 269. This court should accept jurisdiction.

George J. Felos

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was hand delivered this ____ day of February, 2002, to: Patricia Fields Anderson, Esq., 447 3rd Avenue N., Suite 405, St. Petersburg, Florida 33701; and Lawrence D. Crow, Esq., and Larry D. Crow, Esq., 1247 S. Pinellas Avenue, Tarpon Springs, Florida, 34689..

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## CERTIFICATE OF COMPLIANCE

I CERTIFY that this computer-generated brief is submitted in Times New Roman 14-point font.

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**APPENDIX TO**
**JURISDICTIONAL BRIEF OF PETITIONER**

1. October 17, 2001, Opinion of the District Court of Appeal of the Second District of Florida.