

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**JEB BUSH,**  
**Governor of the State of Florida,**

**Appellant,**

**CASE NO.: SC04-925**

**v.**

**MICHAEL SCHIAVO, as Guardian of**  
**the Person of THERESA MARIE SCHIAVO,**

**Appellee.**

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**APPELLANT'S MOTION TO RECALL MANDATE AND  
STAY ISSUANCE OF MANDATE PENDING  
APPELLANT'S PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES SUPREME COURT**

The Appellant, JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA, (the "Governor"), by and through undersigned counsel, hereby moves this Court to recall the mandate and stay issuance of the mandate in this cause pending filing and resolution of Appellant's Petition for Writ of Certiorari to the United States Supreme Court. In support of this motion, the Governor states as follows:

1. On October 21, 2004, this Court entered an order denying the Governor's Motion for Rehearing and Clarification in this matter.
2. Also on October 21, 2004, this Court directed the clerk to issue

the mandate immediately.

3. Counsel for the Governor is preparing a Petition for Writ of Certiorari, seeking to have this Court's order reviewed by the United States Supreme Court.

4. The Governor anticipates filing the Petition for Writ of Certiorari with the United States Supreme Court within the next fifteen (15) days.

5. On October 22, 2004, the Governor's counsel received a copy of correspondence from counsel for Michael Schiavo which indicated that the mandate from this Court having been issued, Mr. Schiavo intended to proceed as quickly as possible with efforts to remove Theresa Schiavo's feeding tube. A copy of this correspondence is attached for the Court's convenience as Appendix 1 hereto.

6. If the mandate is not recalled and this matter stayed, it is very likely that Theresa Schiavo's feeding tube will be removed and that she will die of starvation and dehydration before the Governor is able to seek review of this Court's order.

7. The Governor argues that given this critical importance of the issues presented by this case and given the indisputable fact that Theresa Schiavo's life hangs in the balance, the mandate should be recalled and subsequent issuance stayed pending the filing a resolution of the Governor's

petition to the United States Supreme Court.

8. Furthermore, no irreparable harm will accrue to Mr. Schiavo if the mandate is recalled and a stay issued. Although Mr. Schiavo may argue that any delay inures to the detriment of Terri Schiavo by delaying the exercise of her alleged decision to end her life by starvation and dehydration, it is the Governor's position that he has been denied his due process rights and precluded from presenting competent evidence in this matter demonstrating Terri Schiavo's wishes to remain alive under the present circumstances.

9. Further, the potential for irrevocable harm to Terri Schiavo is real and imminent. Even an erroneous decision not to terminate the withdrawal of sustenance results merely in maintenance of the status quo. In such a case:


...the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life sustaining treatment at least create the potential that a wrong decision will be mitigated. **An erroneous decision to withdraw life-sustaining treatment, however is not subject to correction.**

*Cruzan v. Director, Missouri Dept. of Public Health*, 497 U.S. 261, 283 (1990). (*emphasis added*).

WHEREFORE, Appellant respectfully requests this Court recall the mandate in this matter and stay subsequent issuance of same until such time as the Governor's petition for relief to the United States Supreme Court is resolved.

Respectfully submitted,

Counsel for Jeb Bush, Governor of the State  
of Florida



KENNETH L. CONNOR

Florida Bar No. 146298

CAMILLE GODWIN

Florida Bar No. 0974323

Wilkes & McHugh, P.A.

One North Dale Mabry, Suite 800

Tampa, Florida 33609

Phone: (813) 873-0026

Facsimile: (813) 286-8820

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express Overnight Delivery to **George J. Felos**, Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; to **Thomas J. Perrelli, Robert M. Portman, Nicole G. Berner**, Jenner & Block, LLC, 601 13<sup>th</sup> Street, NW, Suite 1200, Washington, DC 20005; to **Randall C. Marshall**, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd., Suite 340, Miami, Florida, 33137; to **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; and to **James Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, David Cortman**, ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville,

GA 30043; to **Patricia Fields Anderson**, 447 Third Avenue North, Suite 405, St. Petersburg, Florida 33701; to **Max Lapertosa, Kenneth M. Walden, Aliza Kaliski**, Access Living, 614 West Roosevelt Road, Chicago, Illinois 60607; to **George K. Rahdert**, Rahdert, Steele, Bryan & Bole, P.A., 535 Central Avenue, St. Petersburg, Florida 33701; to **William L. Saunders, Jr.**, Center for Human Life and Bioethics at The Family Research Council, 801 G Street, NW, Washington, DC 20001; to **Jan G. Halisky**, 507 S. Prospect Avenue, Clearwater, Florida 33756; to **Mary L. Wakeman, Lauchlin T. Waldoch, Scott M. Solkoff**, The Elder Law Section of the Florida Bar and AFELA, 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32302-0229; to **David S. Ettinger, Jon B. Eisenberg**, Horvitz & Levy, LLP, 15760 Ventura Blvd., 18<sup>th</sup> Floor, Encino, California 91436; to **Bruce G. Howie**, 5720 Central Avenue, St. Petersburg, Florida 33707; to **Gordon Wayne Watts**, 821 Alicia Road, Lakeland, Florida 33801-2113, on this 22nd day of October 2004.



KENNETH L. CONNOR  
CAMILLE GODWIN

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.



KENNETH L. CONNOR  
CAMILLE GODWIN

***FELOS & FELOS, P.A.***  
***Attorneys at Law***  
***595 Main Street***  
***Dunedin, Florida 34698***

**James G. Felos (1921-1995)**  
**George J. Felos**

**Telephone (727) 736-1402**  
**Facsimile (727) 736-5050**  
**E-mail: proofg@aol.com**

October 21, 2004

The Honorable George W. Greer  
Pinellas County Courthouse - Room 484  
315 Court Street  
Clearwater, FL 33756

By FAX No.: (727) 464-5471

Re: Guardianship of Theresa M. Schiavo

Dear Judge Greer:

This is to inform you that we have been advised this date by the Florida Supreme Court that it has denied the Governor's motions for rehearing in *Bush v. Schiavo*, and that we should receive that court's mandate tomorrow. Although we believe the guardian is legally authorized to remove Mrs. Schiavo's feeding tube upon receipt of the mandate, (as more fully explained below), we will not do so until we have received this court's order on the parents' latest 1.540(b)(5) motion, which the court indicated would also be issued tomorrow.

As the court may recall, the February 11, 2000 final judgment, granting the guardian's petition for authorization to discontinue artificial life support, stated that the guardian "is hereby authorized to proceed with the discontinuance of said artificial life support for Theresa Marie Schiavo." That final judgment neither sets a specific date for removal of the feeding tube, nor does it require the guardian to seek such a date from the guardianship court. While the court of appeal, in connection with prior 1.540(b)(5) motions, instructed this court to set a date for the removal of the feeding tube, those 1.540(b)(5) proceedings have been fully concluded. Further, before such instructions were given by the appellate court, the February 11, 2000 final judgment had been stayed. Here, no stay has been entered concerning the pending 1.540(b)(5) motion, and, as held by the court of appeal, "a motion for relief for judgment does not operate to stay a judgment." *Schiavo II*, 792 So. 2d at 561.

In essence, the removal of Mrs. Schiavo's feeding tube on October 15, 2003 was interrupted by the unconstitutional action of the Legislature and Governor. Upon issuance of the Supreme Court mandate affirming Judge Baird's final judgment, we believe the legal status of this case returns to the posture immediately preceding the Governor's unconstitutional action: the ward disconnected from artificial life support. As the Florida Supreme Court ruled in *Bush v. Schiavo*, "the fact that a final judgment may be subject to recall under a rule of procedure, if certain circumstances can be proved, does not negate its finality. Unless and until a judgment is vacated by judicial order, it is 'the last word of the judicial department with regard to a particular case or controversy.'" Slip. Op. at 16-17. Therefore, we believe the guardian is authorized to remove the feeding tube upon issuance of the mandate, without further order of this court.

In order to avoid any confusion: the guardian will not remove the ward's feeding tube until receipt and review tomorrow of this court's order on the pending 1.540(b)(5) motion; if this court grants the motion and sets an evidentiary hearing, the guardian will not remove the feeding tube pending further proceedings; and, if the court denies the motion, the guardian will proceed to remove the feeding tube.

If this court disagrees with the guardian and believes that it must, in its order, state a date for the removal of the feeding tube, the guardian requests that such date be no later than October 29, 2004. That period of time is more than ample for the ward's parents to file a notice of appeal and seek a stay from this court, if they so choose, and should this court enter an order denying a stay, have the appellate court review any such order. Any greater period of time would unduly delay implementation of the ward's constitutional rights and would serve no constructive purpose.

Respectfully,

  
George J. Felos

GJF/fw

cc: David C. Gibbs, III, Esq., by FAX