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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Order and Opinion

In Re: Lazaro Gonzalez, as Custodian of Elian Gonzalez, a Minor, Petitioner, and Juan Miguel Gonzalez-Quintana, Case No. 00-00479-FC-28 (Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Florida)

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
FAMILY DIVISION

IN RE: THE MATTER OF

CASE NO. 00-00479-FC-28

LAZARO GONZALEZ, as Custodian of
ELIAN GONZALEZ, a Minor,
Petitioner,
and

JUAN MIGUEL GONZALEZ-QUINTANA,
Respondent.

Final Order

THIS CASE comes to the Court upon various emergency motions brought by Petitioner seeking expedited discovery and an imminent hearing upon his Petition for temporary custody of the minor child, Elian Gonzalez.

For the reasons stated below, and with concern for those on both sides who feel so passionately about this case, the Court finds that this matter is federally pre-empted and that this court further lacks subject matter jurisdiction, and therefore dismisses this action and terminates the order of January 10, 2000 entered by a predecessor judge.

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Case History

Core facts are not in dispute: this extraordinary case began on an evening on a Cuban beach, when fourteen people, including this child and his mother, fled the island in a small boat. Their destination was the shore of Florida and the United States of America. In rough seas, eleven people perished, including the child's mother. The child survived, alone in the ocean, by clinging to a floating tire. He was found at sea by fishermen who immediately contacted the United States Coast Guard, which transported the child to a local hospital. On November 27, 1999, Elian Gonzalez reached America. As an unaccompanied minor alien, Elian Gonzalez was taken into custody by the United States Immigration and Naturalization Service ("INS") and paroled into the loving arms of his great uncle, Petitioner in this matter. Who would have dreamed that the celebration of this child's survival would have been lost so soon in an international tug of war over him?

The child's father, investigation revealed, remained in Cuba. After two interviews in Cuba, the INS determined that Juan Miguel Gonzalez-Quintana was an active, involved and loving father, who freely and voluntarily requested that his son be returned to his home in Cuba.

In the meantime, in Florida, the Petitioner sought to file political asylum petitions on behalf of the child and by the child directly. After the INS determined that the father had the right to control the child's asylum application and wished it withdrawn, INS rejected the asylum applications filed, and announced in early January that the child would be returned to the father in Cuba.

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INS and the United States Attorney General, who is charged with the executive responsibility for immigration, determined that only the father could speak for the child, that there would be no hearing on the asylum petitions filed by Petitioner, and that the child would be returned to the father by January 14, 2000, four months ago.

Petitioner did not agree with INS and the Attorney General that the child should be returned to his father in Cuba. Petitioner objected to the INS procedure and asserted that INS had violated the child's independent due process rights to an political asylum hearing. He wanted the child to stay in the United States, where he would live in a free country. Recognizing that his control over the child extended only to the extent of the grant of the INS parole, Petitioner filed this action in state court on January 7, seeking temporary custody and a protective order prohibiting action by the INS.

The Petitioner, Lazaro Gonzalez, sought the following:

"Petitioner requests temporary custody of the Minor Child for purposes of providing legal consent to all necessary and reasonable medical care for ELIAN GONZALEZ, including psychological care, and to provide for ELIAN's due process rights to seek political asylum in the United States, and for such other things which are necessary for the care of ELIAN, until such time as there is a final disposition of the aforesaid application for political asylum on behalf of the Minor Child." *Petition at p. 6, paragraph h.*

"Petitioner seeks an evidentiary hearing, an Order awarding temporary custody of ELIAN for a period of time sufficient to adjudicate the application for asylum with INS." *Petition at p. 6, paragraph 14.*

The Petition was predicated upon implied consent from Elian's deceased mother, see memorandum of law p. 7, and the argument that the father could not object or consent because he could not freely express his wishes while in Cuba and under the control of Castro.

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See, memorandum of law at l., page 7. ¹

The Petition further alleges that if JUAN MIGUEL GONZALEZ-QUINTANA objects to Petitioner's custody of the child, that Petitioner asserts he is unfit to provide for the care and control of Elian and that he has abused, abandoned, or neglected Elian based on the argument that: "While it is true that his father...is not responsible for the environment existing in Cuba or the violations of humanitarian rights commonplace in Cuba, by insisting that the boy be placed in the aforesaid environment, the father is engaging in conduct which constitutes abuse or neglect, as referred to in Fla. Stat. § 751.05(3) and as defined in Fla. Stat. Chapter 39." *Memorandum of law p. 11.*

A predecessor judge considered the petition's allegations and the motion for protective order on an emergency ex-parte basis, without a response from the INS or the father. On January 10, 2000, she entered a Temporary Protective Order granting Lazzaro Gonzalez temporary custody pending service of process upon the father and a full hearing. The Judge reserved on subject matter jurisdiction. *Order of January 10, 2000, p.4, n.3.* The order also stated that it prohibited the removal of the child from the jurisdiction of the court. *Order of January 10, 2000, p.6, paragraph 3.*

The ruling of January 10, 2000 was based upon the ex-parte motion, in an effort to act as quickly as possible given the urgent nature of Petitioner's allegations. Jurisdiction was

¹"...[T]his Court should not and cannot consider any objection of JUAN MIGUEL GONZALEZ-QUINTANA, the child's father, unless he is removed from his coercive environment and appear [sic] in this Court so that he may speak openly concerning the best interests of the Minor Child." *Memorandum of law at p. 9.*

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primarily justified under the theory of *parens patriae*, the theory that the state has the inherent power to protect children within its borders. The essential nature of the Temporary Protective Order was to give Petitioner the opportunity to pursue legal remedies in federal court with regard to his assertions that INS had violated due process and the child's constitutional rights by failing to give him a political asylum hearing. Petitioner did so. The order also permitted Petitioner to secure necessary health, psychological and material care for the child.

Additional research and developments in the case have caused the examination of relevant case law which was not available to the court in January. After receiving the temporary custody order, Petitioner proceeded to federal district court to seek an injunction prohibiting the INS from removing the child from Lazaro Gonzalez and requiring INS to grant the child a political asylum hearing. The federal district court concluded that Lazaro Gonzalez had standing to bring the action in federal court as the child's next friend, *Order of Judge K. Michael Moore in Gonzalez v. Reno*, 2000 WL 289604 (S.D. Fla. March 21, 2000) and did not reach the validity of the state custody order. *Id.* at fn. 25.

Petitioner attempted to serve the summons and petition upon Juan Miguel Gonzalez-Quintana, Elian's father, in Cuba. However, no additional substantive relief was requested in state court until after the Petitioner lost the federal district court case. Last Saturday night, four months after the state court action was commenced, the Petitioner filed a request to take the deposition of the father within three days, and asked for a trial within 10 days. In sum, only after that loss, and during the currently pending appeal to the federal court of appeals for the Eleventh Circuit, and only since the father has arrived in the United States to seek

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implementation of the federal decision, has Petitioner returned to state court to aggressively seek a hearing in an effort to continue to keep the child in Miami. INS and the Attorney General have decided to move forward on reuniting father and son.

In response to Plaintiff's motions, the court requested Petitioner brief the issues of subject matter jurisdiction, federal preemption, standard of law and their motion for default. As the first two jurisdictional issues are dispositive, the court does not reach standard of law or default.

Some may question the court's decision to rule without oral argument from the attorneys. The court decided to rule on this case without additional hearings for the following reasons: first, Petitioner's lawyers submitted an excellent brief which did an exceptionally thorough job of laying out the legal authority under which Petitioner asks this court to proceed. These are exclusively legal issues. Hearings are generally granted so that the court may take evidence. In this matter, evidence cannot be taken until the court can determine whether it has jurisdiction. It is important to understand that the question before the court at this point is not whether it should hear this case, but rather whether it could hear this case. This is not a discretionary call. Let no one conclude that this case was decided on legal technicalities — jurisdiction is ground zero in court. Without it, judges have no power to intervene.

Finally, this case has inflamed the passions of our community to the point that references to potential riots have been made by our leaders. There is no purpose in prolonging the anxiety of this family and other people who feel so strongly about this case when the law is so clear and when the inevitable result would be ever more crushingly disappointing.

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Holding a hearing would only have raised false hopes that somehow this court could legally act and keep Elian Gonzalez here.

General Principles of Jurisdiction

"Jurisdiction is the oxygen of an action. If present, the action is alive and the court may act." Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Equally if subject matter is not present, the court may not act.

Jurisdiction over the subject matter in a case refers to a court's power to hear and determine a controversy. Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978). Generally, it is tested by the good faith allegations of the pleading, in this case the petition seeking temporary custody. See, Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978), cited in Jefferson v. State, 724 So.2d 105 (Fla. 3rd DCA 1998).

"Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence." [citations omitted] Jesse v. State, 711 So.2d 1179 (Fla. 2nd DCA 1998).

"Subject matter jurisdiction, always essential to the validity of a court's action, can be challenged at any time, and a lack of subject matter jurisdiction should be recognized by a court even if unchallenged; when party or a court's own examination of a case suggests a lack of jurisdiction, the court is duty bound to consider such issue." Walt v. Walt, 574 So.2d 205 (Fla. 1st DCA 1991). This court required the Petitioner to present his position on subject matter jurisdiction because of the independent obligation imposed upon the court to recognize its own limitations; as stated in the briefing order. "Courts are bound to take notice of the

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limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." Greene v. Greene, 432 So.2d (Fla. 3rd DCA 1983).

The issue of preemption is a question of subject matter jurisdiction. Florida Auto. Dealers Industry Ben. Trust v. Small, 592 So.2d 1179 (Fla. 1st DCA 1992). The issue of standing to sue concerns a question of jurisdiction to hear and decide the case pled by a particular party. Rogers & Ford Constr. Corp. v. Carlandia Corp. 626 So.2d 1350 (Fla. 1993).

Lack of Jurisdiction due to Federal Preemption

Elian Gonzalez's physical presence in this country is at the discretion of the federal government. The state court cannot, by deciding with whom his custody should lie, subvert the decision to return him to his father and his home in Cuba. This court is prohibited from acting by the Supremacy Clause of the United States Constitution from acting in this case. Const. Art. I, §8.

Federal Preemption is a principle based on the Supremacy Clause of the United States Constitution: Const. Art. I §8. There are different kinds of preemption, two of which are implicated in this case: field preemption and conflict preemption. "Field preemption" arises when Congress has so thoroughly regulated a field or federal interest is so dominating, that an intent for federal law to occupy the field exclusively may be inferred. Pacific Gas & Electric Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 202, 103 S.Ct. 1713, 1721, 75 L.Ed 2nd 752 (1983). "Conflict preemption" arises where state and federal laws or orders are in direct conflict, particularly here where the state order is intended to

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"prevent or hinder the [federal agency, here the INS] from operating the way Congress intended it to operate." *Id.* at 202. Both field and conflict preemption apply in immigration matters. Hines v. Davidowitz, 312 U.S. 52, 61 (1941).

"Power to regulate immigration is unquestionable exclusively a federal power." Decanas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).; Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, (1941); Nyquist v. Mauclet, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63, (1977). The proposition that courts do not have the authority to second-guess the executive branch's decisions regarding permission of immigrants to enter the country is one of long standing, addressed as far back as 1892 in the case of Eiku v. U.S., 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892).

"The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." [immigration] Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Nowhere is the "delicacy" of the policy judgment implicated more closely than in connection with Cuba.²

The Petition presented to this court's predecessor judge sought the opportunity to go to federal court and seek review of the decision of the INS and the Attorney General that the

² Cuba lays 90 miles from our shores. It which has been the subject of an economic embargo for 30 years. We have transmitted both Radio and TV Mari to it people. Our community remains linked to the island with intimate family ties. Federal immigration policy shifts seismically affected this community in the 1980's with the Mariel Boatlift. The question of interdiction of *bakeros* at sea remains a difficult issue, and current immigration detente with Cuba was reached only after apparently difficult negotiations. Foreign policy toward Cuba continues to shape local issues.

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father speaks for the child and to pursue a claim of denial of due process, by INS, to the child. She granted Petitioner that opportunity through the Temporary Protective Order. The federal district judge determined that Petitioner could pursue the claim as a "next friend" on behalf of the child under federal procedural rules.³ Petitioner can proceed with his appeal to the Eleventh Circuit based upon the district court's ruling as to his standing to sue on behalf of the child. The status of the state court action no longer affects the federal action or appeal.

The Petitioner went to federal district court, and the district court judge rendered a fifty-page carefully and thoroughly reasoned ruling which addressed the issues. Judge Moore determined that the Attorney General conducted the necessary investigation and did not abuse her discretion in coming to the conclusion that the child had a loving and adequate home waiting for him with his father, who desperately wanted his first-born son back in his arms.

The remedy sought in this court is custody of the child. While the court recognizes the many, many authorities that establish that domestic relations, family law, is an area reserved to the state courts, Petitioner fails to recognize the fundamental nature of his case — it is an immigration case, not a family case. See, Jaggiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981): "Recent authority ... seems to favor a broader inquiry into the nature of the claim rather than resolution of the issue by technical appellation" *Id.* at 564.

This case is designed to keep Elian Gonzalez in Miami over the federal government's and his father's objection, and under the name of a custody claim. Petitioner's increased

³The state court order was not the basis of Petitioner's standing to sue in federal court under Federal District Court Judge Moore's analysis..

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level of activity in the state court action correlates with announcements by INS of reunification of the child with his father. The United States through the Attorney General has articulately and bluntly insisted that reunification **will** occur. The basis for the custody claim is that the child should not live in Cuba, with his father, and is better off here. The Court's ability to reach that decision is derailed by the federal government decision that he must return to Cuba, his homeland, and be with his father. This court cannot second guess the INS. In the end, a determination by this court as to who should have custody of Elian Gonzalez would not prevent his deportation to Cuba and his father, because deportation is exclusively the province of the federal government. "Custody is not a statutory factor in determining deportability." Johns v. Department of Justice, 653 F.2d, 884 (5th Cir. 1981).

The cases cited by Petitioner in his brief do not provide guidance under the unique facts of this case. Gao v. Jenifer, 185 F.3rd 548 (6th Cir. 1999) deals with a juvenile alien whose status was addressed by the INS prior to an amendment to the federal immigration law which provided that: "...no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction." 8 U.S.C §1101(a)27(j) (1999) [dealing with illegal and unaccompanied minors placed in foster care and whether the juvenile court has jurisdiction to declare them dependent.] The Johns case, supra, specifically addressed the lack of control the state court has over deportation issues. Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980) involved a U.S. citizen father's attempt to utilize the federal district court to modify a prior custody ruling between him and the U.S. citizen mother

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regarding the U.S. citizen child.

The court finds the reasoning of In Re C.M.K., 552 N.W. 2d 768 (Minn.Ct. App. 1996) of most assistance. In C.M.K., the child was a juvenile Chinese national who was smuggled into the United States. INS found him, and after he was placed with a foster family, moved to deport him. The family filed in state court for dependency. The Minnesota Court of Appeals affirmed the trial court's finding that it was without jurisdiction due to federal immigration preemption, particularly noting that issues of asylum are not subject to state court jurisdiction. Most importantly in that case, the family alleged that the child would be subject to "imprisonment, fines, harassment, and physical assault if he is returned to China." *Id.* at 771. The Court of Appeals found that the family was basing its claim on "... alleged circumstances in another country and therefore, circumstances directly related to the immigration process." *Id.* at 771. "A finding that C.M.K. is in need of protection or services based on circumstances in China would directly conflict with the immigration proceedings and, thus, is preempted by federal law." *Id.* at 771.

Petitioner is not without a remedy to seek delay of the INS action, which has been available to him since March 21, 2000. Federal Rule of Appellate Procedure 8 provides that a party may proceed in federal court to seek a stay of the ruling of the district court which affirmed the authority of the Attorney General and the INS in this matter.

**Lack of Jurisdiction based upon Petitioner's Lack of Standing
to sue under Chapter 751**

The Petitioner sought relief under Florida Statute 751 titled "Temporary Custody of

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Minor Children by Extended Family." If the petitioner does not have standing to sue under Fla. Stat. 751, then this court cannot exercise jurisdiction under Fla. Stat. §61.1308 because there is no viable custody claim. The Act's mission is stated:

The purposes of ss. 751.01-751.05 are to:

(1) Recognize that many minor children in this state live with and are well cared for by members of their extended families. ...Because of the care being provided the children by their extended families, they are not dependent [wards of the state] children.

(2) Provide for the welfare of minor children who are living with an extended family...At present, such family members are unable to give complete care to the child in tier custody because they lack a legal document that explains and defines their relationship to the child, and they are unable effectively to consent to the care of the child by third parties

(3) Provide temporary custody of a minor child to a family member or putative father having physical custody of the minor child to enable the custodian to:

(a) Consent to all necessary and reasonable medical and dental care for the child, including non-emergency surgery and psychiatric care;

(b) Secure copies of the child's records, held by third parties, that are necessary to the care of the child, including, but not limited to:

1. Medical, dental, and psychiatric records;
2. Birth certificates and other records; and
3. Educational records;

(c) Enroll the child in school ...

(d) Do all other things necessary for the care of the child.

Fla. Stat. §751.01

In the definition section of the statute, Fla. Stat. §751.011, The Florida legislature defined the words "Extended family" and "putative father" and stated:

As used in ss. 751.01-751.05, the term:

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(1) "Extended family" is any family composed of the minor child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle or cousin."

The terms "relative" and "family member" are not defined anywhere in Chapter 751. The term "extended family" is not used in the rest of the statute, even though the definition says "as used in ss. 751.01-751.05".

Fla. Stat. §751.02, "Determination of temporary custody proceedings; jurisdiction" provides: "Any relative of a minor child...with whom the child is presently living, may bring proceedings in the circuit court to determine the temporary custody of the child."

Lazaro Gonzalez's petition seeking temporary custody under Chapter 751 reflects that the Petitioner is "Paternal Great Uncle." *Petition, p.g. paragraph 13 (g)*. Despite the limited list of extended family members who may sue under chapter 751, Petitioner asserts that he is a "relative", and therefore has standing to bring this claim to the child. If the statute's effect is limited by the definition of "extended family", then Petitioner is too remotely related to the child to bring this action under chapter 751 and this court has no jurisdiction.

To determine whether the legislature meant to empower any relative to take a child or whether the legislature sought to limit the remedy to the list of "extended family" members that they took the trouble to define is a question of statutory construction.

The legislative intent in passing the law is the polestar by which the court must be guided. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). The rules of statutory construction exist so that a court may determine the legislature's intent and effect the purpose of the law. Barnett Bank of South Florida v. State Dept. of Banking, 571 So.2d 527, 528 (Fla. 3rd DCA 1990).

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1990). The starting point is the clear language of the statute itself; if the language is clear and unambiguous, the court stops there. Barnett Bank, id. at 528. Petitioner argues that the word "relative" used in §751.02 is clear and unambiguous. However, courts must look beyond plain language if applying the literal construction would render other provisions meaningless. Unruh v. State, 669 So.2d 242, 245 (Fla. 1996).

To determine intent, the court must look to other factors in addition to the language used, including the subject matter and the stated purpose of the law. Badaraco v. Suncoast Towers V Assoc., 676 So.2d 502, 503 (Fla. 3rd DCA 1996). The title of the act is important. Carlile v. Game and Fresh Water Comm'n, 354 So.2d 362, (Fla. 1977). The title is deemed to be a "...direct statement by the legislature of its intent." State v. Webb, 398 So.2d 820 (Fla. 1981). The title of this act is "Temporary Custody of Minor Children by **Extended Family**". [emphasis added]

Also of importance is identification of the "evil to be corrected" by the law. Webb, supra. The legislative history reflected in the bill analyses of the Florida House of Representatives and the Florida Senate reflect as follows: the bill summary from the House states: "This bill creates an action for temporary custody of minor children who are currently living with members of their extended family..." Florida House of Representatives, Committee on Judiciary, Final Bill Analysis & Economic Impact Statement CS/HB 1185, 5/3/93. The House's substantive analysis states:

"PRESENT SITUATION: At the present time it has been reported by Florida Legal Services, Inc. that there are minor children living with family members... without an order granting custody. This presents a problem to these family members when a third party

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requires consent to care for or provide services to these children. Currently, the available solution for these families is to initiate a guardianship proceeding in probate court or to initiate a dependency proceeding under Chapter 39, Florida Statutes." Id. at p. 2, "Substantive Analysis." The Senate's summary of the "Present Situation" echoes the House staff analysis. Florida Senate, Senate Staff analysis and Economic Impact Statement, 2/25/93.

The "Comments" section provides: "This bill would provide a relatively simple procedure for extended families and putative fathers to obtain custody of minor children....At the present time there is statutory authority for an adjudication of the custody of a child in a dissolution proceeding, through a paternity action, adoption, and juvenile dependency. In addition, a guardianship action encompasses custody, but the procedure is cumbersome and results in a family law issue being adjudicated in probate court rather than in a family law court. The dependency proceeding requires the showing of abandonment or unfitness of the natural parent. In addition, it results in the continual involvement of the Department of Health and Rehabilitative Services which is costly and not warranted in the types of situations which this bill addresses." Florida House bill analysis, *supra.*, p. 5, 5/3/93.

The Senate's legislative staff analysis acknowledged the definition issue: "The bill defines 'putative father' and 'extended family' for purposes of **its provisions**. [emphasis added]. However, the term 'extended family' is used only in the statement of the act's purpose...not...in the substantive provisions of the bill. Therefore, the bill would probably be clarified if the term 'relative' were defined in lieu of, or in addition to the term 'extended family'." Florida Senate staff analysis *supra.*, p. 4, 2/25/93.

The legislature ignored its staff's advice on clarifying the bill, and passed Chapter 751 with the definition of "extended family". However, during the rush of passage, uncles were omitted from the list. The legislature revisited the statute in 1997 to add "an uncle of a minor child" to the definition of extended family. See, Florida House of Representatives Committee on Judiciary, Final Bill Analysis & Economic Impact Statement CS/HB 1087, 5/20/96. The Bill analysis again refers to Chapter 751 as providing means to place minor children with extended family members, and notes: "This chapter allows those extended family members to seek temporary custody of the child, without which they could not consent to care of the child by third parties. In the 1993 session, the word 'uncle' was inadvertently left out of CS/HB 1185."

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As a result, the definition of extended family does not include the word "uncle". At least two men were denied legal temporary custody because of the current definition of extended family." *Id.* at p. 3. In reviewing the entire legislative history and every staff analysis available, not once does a legislative intent to grant the opportunity to seek custody to any relative outside the extended family definition ever appear.

An additional fundamental rule of construction requires the application of the doctrine of *in pari materia*, which means looking at all the provisions of the chapter together. DeArmas v. Ross, 680 So.2d 1131 Fla. 3rd DCA 1996). Phrases cannot be read in isolation. Instead the phrases at issue must be read in the context of the entire section. Acosta v. Richter, 671 So.2d 149, 154 (Fla. 1994). Whenever possible, a court must adopt a construction of a statute that harmonizes and gives effect to all the provisions within an act, giving effect to the whole statute. Unruh, *supra.*, at 245. Allowing any "relative" to sue for temporary custody under §751.05 would wipe out the definition of extended family in §751.011. Why create a limited list of family members if any relative, no matter how distantly related, can sue? To adopt Petitioner's construction would violate the laws governing the court's obligation in construing the laws passed by the legislature.

"Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations." Reno v. Flores, 507 U.S. 292, 113 S.Ct 1439, 123 L.Ed.2d 1 (1993), fn. 6.

Under case law decided prior to the passage of Chapter 751 in 1993, and of which the legislature is presumed to be aware, the "great-uncle" issue was raised. In Kennedy v.

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Kennedy, 559 So.2d 713 (Fla. App. 1990) a great uncle and aunt were denied custody of their great niece/nephew where there was an attempt to show that the mother was unfit. Certainly the legislature could have included relatives within the second degree of consanguinity, meaning great-aunts, great-uncles, and second or third cousins, if they had wished to exercise the choice to do so.

The single application of this statute in a similar case, Glockson v. Manna, 711 So.2d 1332 (Fla. 2nd DCA 1998) states: "Section 751.05(3) specifies that an award of temporary custody to **an extended family member** over the objection of a natural parent may be granted only upon a finding, by clear and convincing evidence, that the parent is unfit, in which case the trial court must make a finding that the parent has abused, abandoned, or neglected the child as defined by chapter 39, Florida Statutes (1997)." [emphasis added by the court]. The Glockson court applied the definition section to the cause of action. *Id.*

In considering all the rules that apply when a court construes a statute, the court must conclude that as a paternal great-uncle, despite how loving, caring and well-motivated he may be, the law of the state of Florida does not permit the Petitioner to sue under this statute for temporary custody of this child.

The Effect Of This Ruling

A black robe is not a license for a judge to intervene in many of society's tragedies. The most difficult aspect of being a judge is watching horrible situations unfold and knowing that despite the awesome power of the judiciary, you are powerless to intervene. This case is one of those situations. This case has brought out strong feelings, passions, nowhere

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more visibly than in the streets of the city where this courthouse sits. Along with the people of the world, this court has watched the struggle between a family fighting for love and freedom and a father fighting for love and family. Which is more important? In the end, it depends on every person's individual experience.

Lazaro Gonzalez, and his wife Angela, and his daughter Marisleysis, have sacrificed their home, their health, and their peace of mind for this child. They nursed him through his recovery from his ordeal at sea and the loss of his mother. They are afraid for him, and are striving to do what they think is best for this child. This case has torn apart a once-close family. Although this court is constrained by the law to reach this result, but it must recognize the devotion and selflessness of this family.

This court also recognizes that the decision of this family court will be very difficult for those members of the community who had hoped desperately that the child could stay here. As family judges sitting in downtown Miami, we see case after case where families are separated because of the oppression and tyranny in Cuba. We handle divorce cases where fathers and mothers are divorcing spouses and children left in Cuba, whom they may never see. We see the pain in their faces when as we ask them about their children. In miles, this courthouse is roughly as close to Havana as it is to Orlando. This court knows that many in this community are sons and daughters, mothers and fathers, brothers and sisters of those who suffer the political oppression and tyranny of Cuba from the inside of a Cuban prison. They are angry and they are frustrated and they know exactly what the price of freedom is, and they are very afraid for this child. The experience of this community must be respected.

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Equally worthy of respect are those who have reached the opposite conclusion about where Elian Gonzalez should be. Those who believe that the child should be with his father understand the unbearable pain of the loss of a child. There is nothing to compare with the sorrow of an empty home where a child is missing. There are toys that will not be played with, a bed undisturbed. There is an awful silence that comes with the loss of a child that cannot be filled with any degree of noise other than the sound of that particular child. Every parent who has for a moment imagined their world without their child in it, the total fear and overwhelming emptiness, can empathize with Juan Miguel Gonzalez-Quintana. Some feel the father is selfish by insisting his son be returned to him -- but what parent really believes that anyone else could raise his child with the same degree of love and devotion as he? While we may not agree with Juan Miguel Gonzalez-Quintana's decision to live in Cuba, the freedoms which we stand for here in America require that we respect that decision, which the Attorney General has concluded is genuine and not coerced. Seeing the love and devotion to their Cuban homeland in our exile community, perhaps one can understand why Juan Gonzalez does not want to leave a country which many believe is Paradise lost.

The difference between the United States and Cuba is far wider than the 90 miles of the Florida Straits. Here, we live under a system of laws, not a system of men. The law is established by the representatives of our citizens in our legislature. This court is sworn to uphold the laws and the Constitution of the State of Florida, and is not free to substitute her individual opinions. If the law were what any one powerful person decreed it to be, then the differences between Cuba and America which make this case so difficult would vanish. None

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of us would be free. Our nation, and this state, guarantees the precious right to parent your children, in privacy, without the unfettered intrusion of others. That freedom necessitates this result. Courts must "reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve..." quoting United States Supreme Court Justice Warren Burger, in In Re Dubreuil, 603 So.2d 538 (Fla. 4th DCA 1992).

Judges watch television, too. I have watched Elian Gonzalez day after day. This is a beautiful child. He has survived the heart-wrenching loss of a mother and is enmeshed in the terror of a custody fight, and no matter how well-intentioned everyone in this case is, his days are filled with uncertainty. It is axiomatic in family court that six years old is too young to make life-altering decisions. What a lonely place for a six-year old. This is so hard for him. This is so hard for us all.

At this point, this child has become a joke on Letterman and Leno, a skit on Saturday Night Live, and an hourly update on daytime tv. We are losing sight of him as a child and starting to treat him as a thing. We need to stop. We need to turn off the cameras and let him return to the life of a child. The challenge with regard to this court's decision will be the choice of whether Elian Gonzalez will bring out the best in us all, or bring out the worst in us all. He deserves our best.

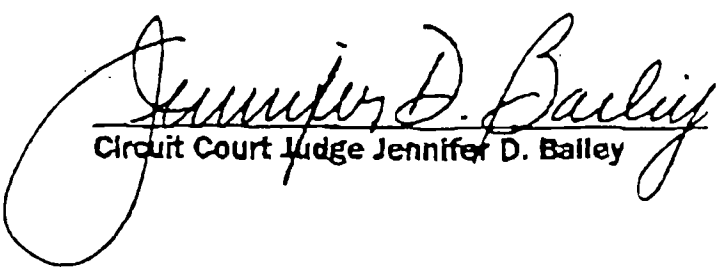
Orders

For the reasons stated above, this court terminates the effect of the order of January 10, 2000, and determines it does not have subject matter jurisdiction in this case, based

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on federal preemption and standing. This matter is dismissed. No motion for rehearing will be entertained.

Done and ordered in chambers at Miami, Miami-Dade County, Florida, this 13th day of April, 2000. *at 12:02 p.m.*



Circuit Court Judge Jennifer D. Bailey

Cc:
Service List & U.S. Attorney

EXHIBIT ONE



Office of the General Counsel

425 I Street NW
Washington, DC 20536

JAN 3 2000

MEMORANDUM FOR DORIS MEISSNER
COMMISSIONER

FROM:

Bo Cooper
Bo Cooper
General Counsel

SUBJECT: Elian Gonzalez

QUESTIONS PRESENTED

1. Who has the legal authority to speak on behalf of the six-year old Cuban national, Elian Gonzalez – his father, his great uncle, or the attorneys claiming to represent Elian?
2. Given Elian's father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his asylum application?
 - A. Is the father able to represent adequately the immigration interests of the child?
 - B. May Elian apply for asylum in direct opposition to the expressed wishes of his father?

SUMMARY ANSWERS

1. The documents and other submitted material indicate that Juan Miguel Gonzalez-Quintana has the legal authority to speak for his son Elian.
2. The INS must determine whether the father has an interest that conflicts with his ability to represent the immigration interests of the child. Specifically, the INS must consider whether the possibility of coercion precludes Elian's father from making his true

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intentions known and speaking on behalf of Elian and whether Elian's asylum application represents a divergence of interests between the father and child.

- A. After evaluating the testimony of the father and the uncle, we believe the father is able to convey to the INS his true intentions regarding Elian and to represent adequately the immigration interests of the child.
- B. At his tender age, Elian does not have the capacity to seek asylum on his own behalf. Since there is no objective basis to believe that Elian is at risk of persecution or torture, the INS should not accept his asylum application against the expressed wishes of his father.

DISCUSSION

1. Who has the legal authority to speak on behalf of the child – his father, his great uncle, or the attorneys claiming to represent him?

Juan Miguel Gonzalez-Quintana has submitted numerous documents establishing that he is the father of Elian Gonzalez. Elian's great uncle, Lazaro Gonzalez, does not dispute this claim. Because the child was born out-of-wedlock, some have questioned whether this fact affects the father's legal rights. Under Cuban law, however, parental rights are unaffected by questions of legitimacy. Constitution of Cuba, Article 37.

In immigration matters, relationships are generally assessed under the law of the jurisdiction where the relationship arose. See e.g., Matter of Hosseinian, Int. Dec. 3030 (BIA 1987). Cuban law also reinforces the right of both parents to exercise parental authority. Articles 82 and 83 of the Family Code of Cuba provide that minor children shall be under the authority of their parents and that parental authority is shared jointly by both parents. Should one parent die, as in this case, the surviving parent becomes the sole individual authorized to speak for the child. The specific rights and duties of a parent, enumerated in Article 85 of the Family Code, include the obligation to represent the child in all legal transactions and acts in which they have an interest (Article 85, clause 5). While a person may lose the right to exercise such authority, the absence of any evidence showing that a court has deprived or suspended such authority would indicate that the parent's rights continue in force. (See attached Opinion from Library of Congress.)

Without the consent of the surviving parent, the great-uncle, Lazaro Gonzalez, has no legal basis to act on behalf of Elian in immigration matters. Although attorneys in this case have characterized him as Elian's legal guardian, he has submitted no evidence and made no claim that he is actually a court-appointed guardian. While INS has placed the child into Lazaro Gonzalez's care, the fact that Elian has been released to him does not authorize him to speak for the child in immigration matters. Instead, he has agreed to care for the child and ensure that he appears at all immigration proceedings. 8 CFR 236.3(b)(4). Given these factors, Lazaro Gonzalez has no legal basis at this time to represent Elian in immigration matters.

Three attorneys have submitted Form G-28, Notice of Entry and Appearance as Attorney or Representative, with Elian's signature. They assert that they represent Elian, and not Lazaro, though they have conceded that this representation is through the consent of Lazaro Gonzalez, as well as by the apparent direct consent of Elian. The attorneys have also indicated that Elian wishes to pursue his application for admission in the United States. Although the attorneys claim to have the authority to speak on Elian's behalf, the law does not appear to support this claim. While there is no absolute prohibition against a minor signing a Form G-28, the ability to do so must be evaluated against general questions of capacity. In the state of Florida, for instance, a minor under the age of 18 is not considered competent to enter into contracts. See Section 743.07, Florida Statutes (1973). Under INS regulations, the parent or legal guardian may sign the application or petition of someone under the age of fourteen. 8 CFR 103.2(a)(2). Thus, while it appears that Elian may sign the Form G-28, the INS generally assumes that someone under the age of 14 will not make representation or other immigration decisions without the assistance of a parent or legal guardian. Here, the father has expressly stated that he does not authorize the attorneys to represent Elian, and that he does not want Elian to seek asylum. Unless the INS has direct evidence of Elian's capacity, Elian's signature on the Forms G-28 does not bear much weight.

Further, the attorneys appear to have a potential conflict of interest. In their letter of December 15, 1999, they stated that they represent Elian, "by direct consent, as well as through the consent of Lazaro Gonzalez, Elian's custodian, who is currently his legal guardian in the United States." As stated above, Lazaro Gonzalez has no legal basis to represent the immigration interests of Elian. Thus, his personal interests in this matter are separate and apart from Elian's immigration interests. Since Lazaro Gonzalez appears to have retained the services of the attorneys on Elian's behalf, any fiduciary duty they owe to Lazaro presents a potential conflict of interest.

The INS has no basis to reject the father's parental authority. Therefore, we presume that he has the legal authority to speak on behalf of the child in immigration matters.

2. Given the father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his claim for asylum?

On December 14, 1999, attorneys retained on behalf of Elian Gonzalez by Lazaro Gonzalez submitted an asylum application, under Elian's signature, claiming that Elian would be persecuted on the basis of his social group if he were returned to Cuba. The attorneys assert that the child is raising the asylum claim independently, rather than through a guardian or representative. The father has expressly stated that he does not want Elian to seek asylum. The attorneys have also indicated that Elian wishes to pursue his application for admission in the United States while Elian's father has stated he wants Elian returned to Cuba.

The attorneys have asserted that Elian's father cannot speak for him in immigration matters because he is under the control and jurisdiction of the country from which Elian fears

persecution. Because the father outwardly supports the regime, the attorneys claim that he cannot represent the child's best interests. They also claim that the Cuban government has prevented the father from expressing his actual wishes for his son.

While we do not regard the attorneys as authorized to represent the immigration interests of Elian, their assertions call into question the father's ability to represent adequately the immigration interests of the child. The underlying question goes to whether the father's personal interests conflict with his representation of the immigration interests of the child to a degree sufficient to justify interference with his parental authority. In this case, the possibility of a conflict has been raised based on allegations that the father is not free to express his wishes and the assertion that the child is free to raise an asylum claim regardless of the father's wishes.

A. Father's ability to represent the immigration interests of the child

Immigration law presents little guidance on the resolution of a parent's ability to adequately represent the interest of the child. In Johns v. DOJ, 624 F.2d 522 (5th Cir. 1980), the Fifth Circuit held that the government violated the due process rights of a five-year old Mexican national when it issued a deportation order against her, because the attorney retained to represent her spoke for her alleged parents, rather than the child. In that case, the court found a clear divergence between the interests of the child and those of the "parents," who had no legal authority over the child. The court further found that the Mexican birth mother, who claimed her child had been kidnapped, did not necessarily represent the interests of the child given that she had not seen the child since the day she was born. In making its finding, the court noted that the child had been raised in a different culture, spoke a different language, and would, if deported, be returned to her natural mother's home to reside with two older siblings who had never seen her and with whom she could not communicate. Id., at p. 524. The Fifth Circuit remanded the case to the district court with instructions to appoint a *guardian ad litem* to represent the child in all further proceedings. Id.

In this case, the alleged inability of the father to adequately represent the interests of the child rests not on any estrangement between father and child or the father's inability to adequately assess the best interests of his child. To the contrary, evidence in the record, including the interview of the father and the numerous affidavits he provided, establish that the father and child share a close relationship, and that the father has exercised parental responsibility and control for example, in the education and health care of the child. Instead, the alleged inability of the father to adequately represent the interests of the child is based on the possibility that the father has been coerced. If coerced, the father's representation of the immigration interests of the child may conflict with the father's interest in his own personal safety, rendering him unable to adequately represent the child in immigration matters. Following Johns, this inability would require the appointment of a *guardian ad litem* to represent Elian's immigration interests. Accordingly, it is necessary to evaluate the possibility of coercion and to determine whether the father's ability to adequately represent the interests of the child in immigration matters is impeded to such a degree as to justify an interference with the father's assertion of parental authority.

On December 13, 1999, the Officer in Charge for the INS Havana sub office (accompanied by the First Secretary and Chief of the Political/Economic Section of the US Interests Section) interviewed Juan Miguel Gonzalez-Quintana at his home. Mr. Gonzalez-Quintana described in great detail his close relationship with his son. He submitted affidavits from several neighbors, family friends, physicians, and Elian's teacher attesting to the affection between the father and son as well as the responsibility the father has taken in his son's life. He expressed his wishes that Elian be returned to him, that Elian not be allowed to apply for asylum, and that Elian not be represented by the attorneys purporting to represent him in the United States. Mr. Gonzalez-Quintana was also asked to express his wishes without speaking (in writing) in order to protect against the possibility of auditory monitoring of the interview by Cuban officials. Mr. Gonzalez-Quintana again expressed, in writing, his wish for the child to return to Cuba. The Officer in Charge found that "the honesty, concern and truthfulness on the part of Mr. Gonzalez-Quintana was palpable . . ." Thus, Mr. Gonzalez-Quintana's demeanor, as assessed in person by the Officer in Charge, supports the conclusion that the father's expressed wishes are not motivated by outside influences. The numerous affidavits attesting to the close relationship between the father and son lend further credence to the father's request that his son be returned to him.

On December 20, Elian's great uncle, Lazaro Gonzalez, was interviewed at the INS District Office in Miami. Lazaro Gonzalez expressed his opinion that the father's statements were coerced. He based this conclusion on four factors. First, Lazaro Gonzalez stated that Mr. Gonzalez-Quintana, in two phone calls, asked that Lazaro Gonzalez and his family take care of Elian. The first of these conversations occurred prior to Elian's arrival in the United States¹, and the second occurred on the day Elian was found at sea and brought to a hospital in Ft. Lauderdale. In subsequent conversations, Elian's father demanded the boy's return. The father never mentioned to INS a conversation prior to Elian's arrival in the United States and never acknowledged that he had ever asked his uncle to care for the child. Next, Lazaro Gonzalez, as well as his daughter, noted the tone of the subsequent telephone conversations with the father, and opined that he did not appear to be speaking freely. Third, Lazaro Gonzalez stated that, according to family members living in Cuba with whom he has spoken, Cuban officials are present at the father's home and have prevented him from leaving. Fourth, one of the attorneys stated that he was told by a reporter in Cuba that, according to sources in Mr. Gonzalez Quintana's neighborhood, the father had applied with the U.S. Interest Section for the lottery program to come to the United States. Because of the manner in which the DOS and the INS record applications for various immigration programs, it would be impossible to use government records to rule out completely that possibility.

In order to ensure that we have examined fully the question of coercion, the INS sought a second interview with Juan Miguel Gonzalez-Quintana. At the request of both the US and Cuban governments, a neutral site was selected, the home of the representative of the United Nations International Children's Emergency Fund (UNICEF). The INS officer in charge who had conducted the first interview also conducted this interview which was held on December 31, 1999. As was the case at the December 13, 1999 interview, Mr. Gonzalez was accompanied by

~~the parents who were present for the interview, they asked a number of questions by the OIG and~~

¹ It should be noted here that we have found no evidence that the father consented to Elian's travel to the United States prior to his departure.

was also given a set of written questions. The OIC concluded that Mr. Gonzalez "spoke truthfully." The OIC was convinced that Mr. Gonzalez "appeared honest and concerned for the well being of the child and in wanting the child with them [the Gonzalez family] in Cuba immediately."

The statements of Lazaro Gonzalez, as well as a general understanding of the practices of the Castro regime, make it essential that the INS closely examine the voluntariness of the father's statements. The evidence of coercion, however, is far from compelling when weighed against the personal interviews of the father and the interpretation of those interviews by the INS officer. Equally important, the existence of political pressure does not necessarily mean that the father's expression of his wishes is not genuine. If the father's statements truly reflect his belief as to the best interests of his child, then there is no divergence of interests. His statements would reflect his assessment of his child's best interests and should generally be given effect, notwithstanding any political pressure he may feel. Accordingly, it is important to evaluate all available evidence with an eye toward determining not merely whether the father is subject to political pressure or even coercion, but whether he is acting against his true belief as to the best interests of his child.

First, the opinions of Lazaro Gonzalez and his daughter, based on the tone of telephone conversations, conflict with the INS officer's interpretation of her interview with the father. Because the INS officer interviewed the father in person and was convinced that the father is speaking truthfully and freely, we believe that her interpretation carries more weight than the opinions of Lazaro Gonzalez and his daughter.

Second, the telephone conversations, recounted by Lazaro Gonzalez, wherein the father asked him to take care of the child do not establish a belief on the part of the father that the child should remain in the United States permanently. If true, the first of these conversations occurred prior to Elian's arrival in the United States and prior to any knowledge on the part of the father that Elian's mother had perished at sea. Her tragic death fundamentally changed the circumstances such that any prior statements of the father create no inference as to his true beliefs after the event. The second conversation with the father occurred while Elian was being examined and treated at a hospital in Ft. Lauderdale. The father's alleged request that Lazaro Gonzalez take care of the child is subject to varying interpretations. At the second interview, the OIC asked the father to discuss his earlier conversations with Lazaro Gonzalez. He disputed Lazaro's version. Elian's father stated "At all times I asked that Elian be returned to me." Elian's grandfather interjected and the OIC summarized his view "At no time during his conversation with his brother did he ask him to take care of Elian. As a family they did not have to say such a thing. It's humane and as family, it is an obligation." Assuming Elian's father made the statement, we believe the most reasonable interpretation is that it was a normal reaction of a father to the circumstances of his five year-old son's lone arrival and medical treatment in a foreign country following the tragic death of his mother, rather than a request that the child remain with Lazaro Gonzalez indefinitely.

Third, the statements of the attorney concerning the father's alleged applications under the United States lottery program carry little weight. We asked Elian's father in the written questions whether he had applied either in person or by mail to the US Interests Section for permission to go to the United States. He indicated in writing that he had not. The statements

that he had applied for an immigrant visa are based on hearsay and cannot be confirmed or denied by the U.S. Interests Section or the INS. Even if we assume the father had applied under the lottery program, there is no information concerning the circumstances of those applications, including his intentions concerning Elian.² Moreover, the circumstances faced by the father and his child have drastically changed from the time of any such application.

Fourth, Elian's great uncle and the attorneys argued that father's freedom of movement has been restricted by his government. We questioned Mr. Gonzalez-Quintana at the second written submission about this allegation and he indicated that his movements are not restricted by the Cuban government. We recognize that Cubans do not enjoy the freedom of movement we have in our own country and that Mr. Gonzalez-Quintana is certainly under a lot of scrutiny by the press and by the Cuban government. We have not, however, found evidence that he is unable to move as freely as other Cuban citizens or that his movements are restricted in order to punish or intimidate him or to influence his parental decisions. We have assumed for purposes of the recommendation that there are limitations on the father's freedom and that he is being monitored both by the Cuban government and by the Cuban press, but we do not believe that leads to an inference that the father's request for his child's return is not genuine.

Finally, the father's loving and active relationship with his child, as established by his interview and numerous affidavits, coupled with the circumstances under which he now finds his six year-old son, separated from his only surviving parent in a foreign country immediately following the tragic death of his mother, strongly suggests that the father's request for his child's return is genuine. After considering the totality of the information currently before the INS, we believe that the most reasonable inference is that the father is able to represent adequately the child's interests in immigration matters.

After weighing the information we have gathered, we believe the father is able to represent adequately the child's immigration interests. Accordingly, we believe the INS should give effect to the father's request for the return of his child by treating it as a request for a withdrawal of Elian's application for admission. Since we believe Elian's father is able to speak on behalf of his son, we should add that were Elian's father to come to the United States to assert his parental authority, we believe that the INS would be required to recognize Elian's father's interests with respect to all immigration matters involving Elian. Elian's father's arrival would necessarily change the custody arrangement we sought with his uncle in his absence. Under the INS regulations, a child is released in order of preference to 1) a parent; 2) legal guardian; or 3) an adult relative. 8 CFR 236.3 In the December 13th interview, our officer in charge indicated to Mr. Gonzalez-Quintana that visas to visit the United States are generally granted for persons in his situation. Mr. Gonzalez-Quintana indicated he was uninterested in applying for such a visa.

² No one has claimed and we have no indication in INS records that Elian's father ever applied under the refugee program. Therefore we must assume that the father did not base any such immigration application on a fear of persecution for himself or his family.

B. Elian's asylum application

While an application for asylum and a request for withdrawal of an application for admission are inherently contradictory requests, the acceptance of a parent's request for the withdrawal of his child's application for admission does not necessarily preclude a child from applying for asylum independent of his parent. INS must determine whether it will accept an asylum application prepared by one of the attorneys claiming to represent Elian and filed under Elian's signature. The INS has instructed its Texas Service Center to hold the application until this determination is made.

A child's right to seek asylum independent of his parents is well established. Section 208(a)(1) of the INA permits any individual physically present in the United States or who arrives in the United States—including any alien who has been brought to the United States after having been interdicted in international or United States waters—to apply for asylum. While Section 208(a)(2) of the INA describes certain exceptions to this right, those exceptions are not applicable to this case. There are no age-based restrictions on applying for asylum. Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances even a very young child may be considered for a grant of asylum. The INS need not, however, process such applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes. Further, the United Nations Convention on the Rights of the Child requires state parties to:

take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.

United Nations Convention on the Rights of the Child, Article 22, 28 L.L.M. 1448, 1464 (1989).³

Neither section 208 of the INA, nor the Convention on the Rights of the Child, however, addresses whether a child may assert a claim for asylum contrary to the express wishes of a parent. We believe, in keeping with the United States' obligation of *nonrefoulement* under the 1967 Protocol Relating to the Status of Refugees, certain circumstances require the United States to accept and adjudicate a child's asylum application, and provide necessary protection, despite the express opposition of the child's parents.

The Seventh Circuit helped define those circumstances in Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985). The Court held that the significant rights of parents to direct the life of their child did not preclude the child from raising an asylum claim, despite the parents' opposition. The parents' significant interests entitled them, however, to participate in all immigration matters regarding their child. In that case, the INS accepted an asylum application by a twelve-year old

³ The United States is a signatory to the United Nations Convention on the Rights of the Child, not a party.

boy and granted asylum without notice to the parents. The Seventh Circuit held that the government had erred because it failed to ensure that both parties received an adequate opportunity to assert their interests. The Court found it persuasive that the boy, who was twelve, was sufficiently mature to articulate a desire for asylum apart from his parents' wishes.

In assessing the parents' rights, the Court applied the balancing test established by Matthews v. Eldridge, 424 U.S. 319 (1976), which provides a mechanism for assessing the level of procedural due process necessary in a given proceeding. Under that test, the government must assess the private interest affected by the proceeding, the risk of error inherent in the chosen proceeding, and the interest of the government in using a particular proceeding. Based on that analysis, the Polovchak court found that the involvement of the parents must be weighed against any competing procedural interests, ultimately concluding that the parents' risk — the loss of their ability to direct their child's interests — significantly outweighed the burdens imposed on the government by providing the parents with notice and opportunity to participate in the procedure.

The Supreme Court has applied the same balancing test in assessing the standard of proof necessary to permit the termination of parental rights. Recognizing "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," the Court held that parental rights could not be severed absent clear and convincing evidence of a basis to terminate. Santosky v. Kramer, 455 U.S. 745, 753 (1982). The Court noted that the child and the parents "share a vital interest in preventing erroneous termination of their natural relationship." Id. at 760. Consequently, applying the Eldridge factors, the Court determined that the private interest affected by proceedings to terminate parental rights is commanding, the risk of error in using a preponderance of the evidence standard is substantial, and the countervailing government interest in using the preponderance of the evidence standard, rather than the clear and convincing evidence standard, was slight.

The issue here — whether the INS should accept and adjudicate Elian's asylum application in direct opposition to his surviving parent and legal guardian — does not result in the termination of parental rights. It carries the potential, however, of significantly prolonging, perhaps indefinitely, Elian's separation from his father, resulting in a substantial interference with the father's parental rights. So, while Santosky is not directly applicable to this case, the INS must keep in mind the potential interference with the father's parental rights when determining whether to accept and adjudicate Elian's application for asylum. In Polovchak, the Seventh Circuit addressed the competing interests of the twelve-year old boy who had clearly expressed his desire to apply for asylum and of the parents in asserting their parental rights by requiring the government to allow the parents to participate in their child's immigration matters. Here, the father may not have an opportunity, in a meaningful way, to participate in the adjudication of Elian's asylum application because his residence in Cuba may preclude him from travelling to the United States or because he is unwilling to do so. In order to respect the parental rights of the father, the INS must first determine whether a true divergence of interests exists with respect to Elian's asylum application. Is Elian truly seeking asylum? If not, would his return violate United States' international obligations? If the answer to either question is yes, the INS must adjudicate the application, but in a way that provides the father with a meaningful opportunity to participate.

(i) Elian's capacity to assert a claim for asylum on his own behalf

While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved. The Polovchak case recognized that a twelve-year-old boy was sufficiently mature to be able to articulate a claim in express contradiction to the wishes of his parents. It did not specifically reach issues relating to the capacity of a younger child, but opined that a twelve-year old was probably at the low-end of maturity necessary to sufficiently distinguish his asylum interests from those of his parents. Elian's tender age is clearly one of the factors that must be considered in assessing whether he can assert an asylum claim. At age six, well below the lower end of necessary maturity described by the Seventh Circuit in Polovchak, we have serious doubts as to Elian's capacity to possess or articulate a subjective fear of persecution on account of a protected ground. There is no indication from the information INS has received that Elian possesses or has articulated a subjective fear of persecution on a protected ground, or that he has the ability to do so. Moreover, we do not believe that Elian, at age six, is competent to affirm that the contents of his asylum application accurately reflect his fear of returning to Cuba, if any. We believe, therefore, that despite his signature on his application for asylum, Elian lacks the capacity to raise an asylum claim. Thus, we do not consider Elian to be seeking asylum or refugee status on his own behalf.

(ii) Objective basis for a valid asylum claim

Capacity is only one of the issues that must be assessed, however. In cases involving unaccompanied minors who may be eligible for asylum, the INS Children's Guidelines, following the recommendations of the UNHCR, advise adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the degree of an adult. In recommending a course of action for evaluating a child's fear, the Children's Guidelines note that the adjudicator must take the child's statements into account, but it is far more likely that the adjudicator will have to evaluate the claim based on all objective evidence available. The UNHCR notes that the need for objective evidence is particularly compelling where there appears to be a conflict of interest between the child and the parent. UNHCR Guidelines, para. 219.

Thus, while Elian appears to be too young to raise an asylum claim on his own behalf, if objective information demonstrates that there is an independent basis for asylum, notwithstanding the father's stated interests, the INS would be obliged to consider the claim. In evaluating whether such information exists, the INS should first consider the allegations contained in his asylum application.

Elian's application for asylum bases his claim on two grounds. First, the application describes past persecution to members of Elian's family, including detention of Elian's stepfather, imprisonment of his great-uncle, and harassment of his mother by the communist party. Second, the application describes the potential for political exploitation of Elian, based on a political opinion imputed to him by the Castro regime, resulting in severe mental anguish and suffering tantamount to torture. The application includes a request for protection under the

Convention Against Torture. When attorney Roger Bernstein first submitted the application on December 10, he reserved the right, in his cover letter, to supplement the application with supporting documentation. In a meeting prior to the interview of Lazaro Gonzalez, Mr. Bernstein stated that he has spoken to witnesses who could attest to the allegations of past persecution and the likelihood of political exploitation.

None of the information provides an objective basis to conclude that any of the experiences of Elian's relatives in Cuba bear upon the possibility that Elian would be persecuted on account of a protected ground. Further, while we are troubled about the possibility of political exploitation and resulting mental anguish, it does not appear to form the basis of a valid claim for asylum. There is no objective basis to conclude that the Castro regime would impute to this six-year old boy a political opinion (or any other protected characteristic), which it seeks to overcome through persecution. See INS v. Elias-Zacarías, 502 U.S. 478, 112 S.Ct. 812 (1992) (holding that an applicant for asylum based on political opinion must show that the alleged persecutors are motivated by the applicant's political opinion).

Finally, the allegation that any political exploitation of Elian requires protection under the Convention Against Torture is without objective basis. The assertion that the mental anguish Elian might face would be sufficiently severe to constitute torture under the Convention is purely speculative. Additionally, to merit protection under the Convention, the applicant must demonstrate that the torture would be inflicted intentionally. Even if the Castro regime seeks to exploit Elian for political gain, there is no reason to believe that it has any intention of inflicting severe mental anguish or any other form of harm recognized by the United States as torture upon Elian. Further, under U.S. law, the definition of mental suffering that can constitute torture is very narrow: it must be prolonged mental harm caused by the intentional infliction of severe physical pain or suffering, the administration or threatened administration of mind altering substances, or the threat of imminent death to the victim or another person. 8 CFR 208.18(a). Again, there is no indication that any political exploitation of Elian by the Castro regime would involve such tactics.

We do not believe Elian has the capacity to form a subjective fear of persecution on account of a protected ground. Further, there appears to be no objective basis for a valid claim for asylum or protection under the Convention Against Torture. Therefore, we believe that there is no divergence of interest between the father and child with respect to Elian's asylum application which warrants interference with the father's parental authority. Elian's return to Cuba would not violate the United States' obligations under the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture, or the Convention on the Rights of the Child. The INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature.

Disapproved: _____

Approved for the reasons stated in the memorandum _____

Louis Murrin

1/5/2000



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OFFICE OF THE LAW LIBRARIAN

OFFICE: (202) 707-5065
FAX: (202) 707-1820

LOC # 012-00
LL File No. 99-8098
December 17, 1999

Dear Ms. Podolny:

In response to your request for information on the Cuban laws relating to custody and legitimation of children, enclosed please find a report we have prepared for you entitled "Parental Authority in Cuba."

We hope this information is helpful. If we may be of further assistance, please let us know.

Sincerely,

Norma C. Gutiérrez
Senior Legal Specialist

Enclosure

Janice Podolny
Chief, Examination Officer
Immigration and Naturalization Services
425 I St., N.W.
Washington, D.C. 20536

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PARENTAL AUTHORITY IN CUBA

The requester, the Immigration and Naturalization Services (INS), asks for an opinion on provisions of Cuban family law relating to custody and legitimation. Briefly, the facts of the case are as follows: A child was born out of wedlock and, when his mother died, the minor was under her *de facto* custodianship. According to the requester, the child's custody was not assigned by the court, but the parents had a friendly, informal shared custody arrangement. The requester states that the child used to spend at least 50% of his time with his father.¹

Specifically, INS seeks to ascertain the following: (1) if the custodial parent dies, whether the non-custodial parent automatically gets custody; (2) whether it matters that the parents were not married when the child was born.

The INS has not furnished the Law Library with the birth certificate of the child nor with any other legal document pertaining to the minor.

The inquiry raises the following issues under the laws of Cuba:

- Paternity and filiation
- Parental authority

Paternity and filiation

The INS asks for an opinion on the law pertaining to legitimation. The Constitution of Cuba² provides as follows:

Article 37. All children have equal rights, whether they were born in or out of wedlock. Any classification of the nature of the relationship is abolished.

No statement shall be put on record making any distinction regarding births, or the civil status of parents, in the certificates registering children, nor in any other document pertaining to the relationship.

¹ Telephone interview with James F. Delany, Chief Examination Officer at the Immigration and Naturalization Services (Dec. 16, 1999).

² CONSTITUTION OF CUBA, as amended, Gaceta Oficial (G.O.), August 1, 1992, translated by Foreign Broadcast Information Service, FBIS-LAT-92-226-S.

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The State guarantees the determination and recognition of paternity through suitable legal procedures.¹

In view of the above article and based on the principle of constitutional supremacy, the old categories of legitimacy and illegitimacy are no longer operative and, therefore, have no effect in the reciprocal rights and obligations between parents and children.

The registration in the Office of the Civil Registry of acts concerning the civil status of individuals—i.e., birth, marriage, death, acquisition and loss of Cuban nationality—is governed by the Law on the Civil Registry.⁴

Article 55 of the Law on the Civil Registry provides as follows:

Article 55. Parentage of children shall be proved with the certification of the birth registration issued with the formalities established by law.⁵

The lack of a birth certificate limits the Law Library's ability to ascertain the parentage relationship of the father and child in the case at hand. The INS states, however, that it has the child's birth certificate wherein the alleged father is named as the child's father.⁶

Parental Authority

Parental authority in Cuba is governed by the Family Code of Cuba.⁷ The provisions of the Code relevant to this inquiry provide the following:

Article 82. Minor children shall be under the parental authority of their parents.⁸

Article 83. The parental authority belongs to both parents jointly.

¹ *Id.* art. 37.

⁴ Ley No. 51 de Julio, 15, 1925, Del Registro del Estado Civil (G.O. Aug. 22, 1925), art. 3.

⁵ *Id.* art. 82.

⁶ *Supra* note 1.

⁷ Código de la Familia, Anotado y Concordado (Divulgación Ministerio de Justicia, Cuba, 1927).

⁸ *Id.* art. 82.

[Parental authority] belongs to only one parent on the death of the other, or due to the fact that the exercise of such right has been suspended or deprived from him/her [by the pertinent authority].⁹

Article 85. The parental authority comprises the following rights and duties of the parents:

- 1) to have their children under their custody and care; to make an effort to provide them a stable dwelling and adequate nourishment; to care for their health and personal hygiene;...
- 2) to care for the education of their children;...
- 3) to direct the formation of their children for social life;....
- 4) to administer and care for the personal and real property [*bienes*] of their children in the most industrious way;....
- 5) to represent their children in all legal transactions and acts in which they have an interest;...¹⁰

Extinction and suspension of the parental authority

Article 92. The parental authority is extinguished:

- 3) due to the death of the parents or the child;
- 4) due to the child's arrival at legal age;
- 5) due to the marriage of the child who has not arrived at the legal age;
- 6) due to the adoption of the child.¹¹

Article 93. Both parents, or one of them, shall lose the paternal authority over their children

⁹ *Id.* art. 83.

¹⁰ *Id.* art. 85.

¹¹ *Id.* art. 92.

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- 1) when it is imposed as a sanction upon them by a final court decision in a criminal process;
- 2) when it is assigned to one of them or when both are deprived of the paternal authority by a final court decision issued in a divorce or nullity of marriage proceeding.¹²

Article 94. Parental authority is suspended by incapacity or absence of the parents when declared by the court.¹³

Article 95. The courts, taking in consideration the circumstances of the case, may deprive both parents, or one of them, of parental authority, or suspend them from its exercise in the cases of articles 93 and 94, or by a judgment issued in a trial brought about by the other [parent] or the government attorney [*fiscal*], when one or both parents:

- 1) gravely fail[s] to comply with the duties provided in article 85;
- 2) induce[s] the child to perform an act which constitutes a crime;
- 3) abandon[s] the national territory and, thus, their children;
- 4) engage[s] in a behavior which is antisocial [*conducta viciosa*], corruptive, criminal or dangerous, which is not compatible with the exercise of parental authority;
- 5) commit[s] a crime against the person of the child.¹⁴

Conclusion:

- Articles 82 and 83 of the Family Code of Cuba grant the parental authority of children to both parents jointly.
- Article 83 grants parental authority to only one parent on the death of the other, or when such right has been suspended or deprived to one of the parents by the pertinent authority.
- In the case at hand, as stated above, the Law Library does not have the birth certificate of the minor. Assuming that the parentage relationship between the father and child has been legally

¹² *Id.* art. 93.

¹³ *Id.* art. 94.

¹⁴ *Id.* art. 95.

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established, and assuming that no prior ruling has been issued by a Cuban court under Articles 94 and 95 of the Family Code depriving or suspending the right of the child's father to exercise the parental authority granted to him by articles 82 and 83 of the Code, the father has never lost it. Furthermore, if the above two assumptions are correct, under article 83 of the Family Code, such parental authority right belongs entirely to the father from the moment that the child's mother died.

Prepared by Norma C. Gutiérrez
Senior Legal Specialist
Law Library of Congress
Legal Research Directorate
December 1999

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EXHIBIT TWO



Office of the Attorney General

Washington, D. C. 20530

January 12, 2000

Linda Osberg-Braun, Esq.
Roger A. Bernstein, Esq.
Hackley, Bernstein & Osberg-Braun, P.L.
Turnberry Plaza
2875 NE 1st Street
Penthouse 1B
Aventura, Florida 33180

Spencer Eig, Esq.
420 Lincoln Road
Suite 379
Miami Beach, Florida 33139

Dear Messrs. Eig and Bernstein and Ms. Osberg-Braun:

I have reviewed your letter of January 5 concerning the case of Elian Gonzalez, as well as the issues that Mr. Bernstein raised when he and others met with me on the evening of January 7, including the fact that you have filed a custody action on behalf of Lazaro Gonzalez in the Miami Dade County Circuit Court. I understand that court has granted a temporary protective order to Lazaro Gonzalez. While I am always open to considering new information that might arise, I am not currently aware of any basis for reversing Commissioner Meissner's decision that Juan Gonzalez Elian's father--has the sole authority to speak for his son on immigration matters.

As you know, the United States is not a party to the action you have filed in Florida court, nor is it named in the temporary protective order that the Florida Circuit Judge issued January 10. Indeed, the question of who may speak for a six-year-old child in applying for admission or asylum is a matter of federal immigration law. Nothing in the temporary protective order changes the government's determination that Juan Gonzalez can withdraw applications for admission and asylum relating to Elian and that he has done so. In the Department's judgment, the Florida court's order has no force or effect insofar as INS's administration of the immigration laws is concerned.

In our meeting last Friday evening, Mr. Bernstein said that the INS itself had originally announced that state courts could resolve Elian's status in the United States. I think it is important to clarify, therefore, this Department's view.

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the possible role of state courts in a case such as this. In the first few days after Elian's arrival in the United States, when it was suggested that INS's placement of Elian in the care of his great-uncle amounted to a grant of custody, INS indicated that it could not grant custody and that such a request would have to be put before the state courts. As the case evolved, it became clear that Elian's father, who was still in Cuba, was asserting a parental relationship with Elian and had adequately expressed his wish, under the immigration laws, for Elian's petition for admission to this country to be withdrawn. In these circumstances, INS was obliged to determine whether the father was the appropriate person to speak for Elian on immigration issues. That question, as I have said, remains one of federal, not state, law. The Commissioner's resolution of that question--as well as of other immigration matters--may be challenged, if at all, only in federal court. We are prepared to litigate in that forum. Accordingly, Commissioner Meissner has determined that the January 14 date should be extended to accommodate any federal court proceedings. This little boy has been through so much, and it is therefore imperative that all of us do what we can to resolve his case as soon as possible.

With respect to the issues raised in your January 5 letter, I would make the following observations. Elian Gonzalez is a six-year-old child who has lost his mother. As a general matter, when dealing with a child this young, the immigration law, like other areas of law, looks to the wishes of the surviving parent. One circuit court case indicated that a twelve-year-old child may apply for asylum over the wishes of his parents in some circumstances. See *Polovchak v. Meese*, 774 F.2d 731, 736 (7th Cir. 1985). That case also makes it clear, however, that a twelve-year-old child is "near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents." Commissioner Meissner has determined that, under applicable law, Elian is too young to make legal decisions for himself, and that his father has the legal authority to speak for him in immigration matters.

Commissioner Meissner reached her decision through a careful and thorough process. All of the available information was considered, including the reports from two lengthy and private interviews with Elian's father, Juan Gonzalez, and the report from the December 20 meeting with Elian's great uncle and cousin and each of you. Commissioner Meissner also carefully considered the allegation that Juan Gonzalez was under some form of coercion, and is confident, based on her representative's direct contact with Juan Gonzalez, that the latter's very close relationship

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with Elias, and the other evidence provided, that the father has expressed his true wishes in asking that his son be returned to him.

The INS does not rule out the possibility of a case in which an asylum application would be accepted from a young child against the wishes of a parent. In that regard, the INS Guidelines for Children's Asylum Claims provide a useful framework. In particular, they provide for a review of the objective circumstances relating to possible torture or persecution in the child's home country in cases where a child is too young to express a competent view on these matters. The INS reviewed the asylum application you sought to file on Elian's behalf, considered all other relevant available information, and found no objective basis for overriding the father's wishes for his son. In particular, the INS found no credible information indicating that the child would be at risk of torture or persecution if returned to his father, and thus concluded that it had no reason to question the father's decision not to assert an asylum claim.

The specific language you cite from the INS Inspector's Field Manual is not applicable here. It is designed to protect an unaccompanied minor who arrives here illegally, has no parent to speak for him, and is also capable of speaking for himself. In those circumstances, if the child indicates a wish to return voluntarily to his country of origin, he would normally be allowed to withdraw the application for admission and be sent home, rather than being placed into removal proceedings. If the child expresses a fear of persecution, however, the Field Manual provides that the child should be placed not in expedited removal proceedings, but rather in conventional removal proceedings before an immigration judge.

Nothing in the field guidance suggests that a father's wishes regarding his six-year-old child should be overridden. On the contrary, in a related provision you do not cite, the Field Manual makes it clear that the first responsibility of the INS when confronted with an unaccompanied minor is to attempt to remedy the situation by finding the child's parent or legal guardian, even if that person is outside the United States. It is only when that effort is unsuccessful that the Field Manual provisions you cite even come into play.

Even if it were applicable in this situation, the provision you cite would not answer the basic question presented by this case: What speaks for the child? If Elian is not competent to indicate a fear of persecution or intention to apply for

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asylum, then someone would have to decide in his behalf whether to do so. That someone, under universally accepted legal norms, is his father. And his father has stated, in no uncertain terms, that he does not wish for Elian to make an asylum claim. As noted above, the INS considered relevant information, including the statements of Elian's Miami relatives and information in the asylum application, and determined that there is no objective basis for a valid asylum claim. Consequently, it found no conflict between Elian and his father. Under these circumstances, the appropriate course of action was to honor the desires of the father regarding Elian's applications for admission and asylum. It is not appropriate to commence removal proceedings against this six-year-old boy. The Field Manual does not suggest otherwise.

Once again, it is my strong hope that we can work together to resolve this child's status as soon as possible.

Sincerely,

A handwritten signature in dark ink, appearing to read "Janet Reno", written in a cursive style.

Janet Reno

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EXHIBIT THREE



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

April 7, 2000

Mr. Lazaro Gonzalez
2319 N.W. 2nd Street
Miami, Florida 33125-5207

Re: Elian Gonzalez

Dear Mr. Gonzalez:

On January 5, 2000, the Commissioner announced her decision that Juan Miguel Gonzalez has the sole legal authority to speak on behalf of his son in immigration matters. This decision was reached after a thorough inquiry that included two interviews with Juan Miguel Gonzalez and an interview with you and your daughter. At the conclusion of that process, the Commissioner determined that Juan Miguel Gonzalez had clearly requested that Elian be allowed to withdraw his application for admission and return to Cuba, that Juan Miguel's request represented his true wishes, and that she would honor that request. Since her decision was announced, the Immigration and Naturalization Service (INS) has had the authority to implement its decision by terminating Elian's parole and returning him to his father in Cuba. The INS refrained from taking those steps while you presented your objections to the Attorney General and then sought review in the federal district court.

As you are no doubt aware, Elian's father has now arrived in the United States and has requested that Elian's parole be transferred to his care. We will honor his request. Our decision today honors the bond between a father and son who have been separated for over 4 months, and recognizes the legal right of a father to have his child with him, to care for the child, and to speak on his behalf. This decision is consistent with the Commissioner's January 5 decision that Juan Miguel Gonzalez is Elian's proper legal representative in immigration matters, with the Attorney General's ratification of that decision, with the federal district court's ruling, and with INS regulations that provide for the release of minors into the care of their parents. See 8 CFR § 236.3(b)(1)(i).

In the interest of ensuring that Elian's transfer will take place in the most appropriate manner, we have sought the advice of two eminent psychiatrists and an eminent psychologist. These experts have all advised that Elian should return to his father's care as soon after his

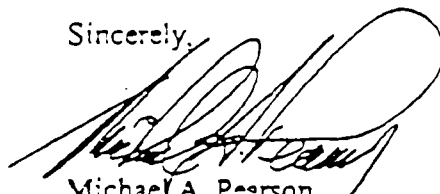
father's arrival in this country as possible. They have also emphasized how important it is that Elian's primary caregivers over the past four months both prepare the child in advance and accompany him at the time of the transfer. We urge your cooperation in assisting Elian and all concerned to prepare for and carry out this transfer so that it will occur in a manner that is most appropriate and most supportive of Elian under the circumstances.

To that end, the experts we have consulted have offered to meet with you, and to meet separately with Juan Miguel Gonzalez, to discuss how to prepare for the upcoming transfer and to assist Elian in making a smooth transition. These experts have told us that the best way to ensure a smooth transition that is most sensitive to Elian's needs would be to talk with you and the adult members of your family about how you can assist in a transfer that is cooperative. Dr. Jerry M. Weiner (Professor Emeritus in Residence of Psychiatry and Pediatrics at The George Washington University Medical School), Dr. Paulina F. Kernberg (Professor of Psychiatry at the Weill Medical College of Cornell University and Director of the Child and Adolescent Psychiatry Residency Training at New York-Presbyterian Hospital) and Dr. Lourdes Rigual-Lynch, (Director of Mental Health Services at the Division of Community Pediatrics of Montefiore Medical Center), will come to Miami on Monday, April 10 in order to meet with you and the adult members of your family. The experts have said that it would not be advisable to bring Elian to this meeting. Drs. Kernberg and Rigual-Lynch are fluent in Spanish. District Director Bob Wallis and I request that you and your family attend this meeting, which will occur at the Jackson Memorial Hospital, 1695 N.W. 9th Ave., at the University of Miami School of Medicine. We will contact you over the weekend to confirm a time for Monday's meeting.

We are also open to discussing with you other specific measures that can ensure a peaceful and orderly transfer that is most sensitive to Elian's needs. Following the April 10 meeting, we plan to issue instructions to you as to the time and manner of transferring Elian's parole to the care of Juan Miguel Gonzalez.

Should you have any questions, please contact Mr. Wallis at 305-762-3680.

Sincerely,



Michael A. Pearson
Executive Associate Commissioner
for Field Operations

cc: Juan Miguel Gonzalez
Linda Osberg-Braun, Esq.
Roger A. Hernandez, Esq.
Spencer Eig, Esq.
Kendall Coffey, Esq.
Manual Diaz, Esq.
Barbara Lagoa, Esq.
Jose Garcia Pedrosa, Esq.
Gregory Craig, Esq.

EXHIBIT FOUR



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

April 12, 2000

Mr. Lazaro Gonzalez
2319 N.W. 2nd Street
Miami, Florida 33125-5207

Dear Mr. Gonzalez

The goal of the Department of Justice and the Immigration and Naturalization Service is to ensure that Elian's transition to his father's care is as peaceful as possible. We must all do everything in our power to see that the transfer is accomplished in a thoughtful, constructive manner.

We understand from your attorneys and various other representatives that you would like an opportunity to meet with Juan Miguel Gonzalez. We are prepared to accommodate that request as part of an orderly transfer of the care of Elian to his father.

To that end, please present Elian at Opa-Locka Airport, 1500 N.W. 42nd Ave., Opa-Locka, Florida, where you should proceed to the Main Coast Guard Gate at 2 p.m. Thursday, April 13. Rosa R. Urquiola, a bilingual INS official experienced in immigration matters involving children, will be there to accompany you, Elian, your daughter Marisleyxis, and an agreed number of other members of your family to Washington, D.C., for this meeting. Before the meeting, Juan Miguel Gonzalez will have an opportunity to meet privately with his son. During the meeting, Elian will remain with Ms. Urquiola, and INS will have custody and care of Elian during that time. After the meeting, care and parole of Elian will be transferred to Juan Miguel Gonzalez. These successive transfers of parole and care are being ordered pursuant to 8 C.F.R. §§ 212.5, 235.2, 236.3 (1999).

If you do not wish to meet with Juan Miguel Gonzalez as described above, District Director Bob Wallis and I hereby instruct you to present Elian at the same time and place, i.e., the Main Coast Guard Gate at Opa-Locka Airport, at 2 p.m. on Thursday, April 13. At that time,

the parole of Elian into your care will be revoked, and care of Elian will be temporarily transferred to Ms. Urquiola, who will bring Elian to Washington, D.C. Once Elian has arrived in Washington, D.C., he will be paroled into the care of his father. These successive transfers of parole and care are being ordered pursuant to 8 C.F.R. §§ 212.5, 235.2, 236.3 (1999).

You and your representatives have frequently stated in the last several weeks that while you did not agree with the Department of Justice's determination in this case or the federal judge's ruling upholding it, you would nevertheless abide by the law. The time has now come to carry through on that commitment, above all for the sake of a boy who deserves to have his reunion with his father take place without any further conflict or stress.

Please contact Mr. Wallis at 305-762-3680 with your response to this letter.

Sincerely,



Michael A. Pearson
Executive Associate Commissioner
for Field Operations

cc: Linda Osberg-Braun, Esq.
Roger A. Bernstein, Esq.
Spencer Eig, Esq.
Kendall Coffey, Esq.
Manuel Diaz, Esq.
Barbara Lagoa, Esq.
Jose Garcia Pedrosa, Esq.

EXHIBIT FIVE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as next
friend, or alternatively as temporary legal
custodian, of ELIAN GONZALEZ, a minor,

Appellants,

v.

JANET IRENO, Attorney General of the
United States, *et al.*,

Appellees

No. 00-11424-D

DECLARATION OF PAULINA F.
KERNBERG, M.D.

1. My name is Paulina F. Kernberg, M.D. I make this declaration in connection with the Appellees' Opposition to Appellant's Motion for an Injunction Pending Appeal in the above-captioned action. I am currently (a) a Professor of Psychiatry at Weill Medical College of Cornell University, New York; (b) Director of the Child and Adolescent Psychiatry Residency Training Program at the New York-Presbyterian Hospital, Weill Cornell Westchester; and (c) a Training and Supervising Analyst, Adult and Child, Columbia University Center for Psychoanalytic Training and Research, New York. My professional address is The New York Hospital-Cornell Medical Center, Westchester Division, 21 Bloomingdale Road, White Plains, New York 10605. Attached to this declaration is my curriculum vita, which accurately reflects my educational background, training, professional experience, and publications that I have contributed to the medical literature.

2. My testimony in this case relates to my advice and recommendations to

Immigration and Naturalization Service Commissioner Doris Meissner concerning the impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez. My opinion is based on my interview of Elian's father, Juan Gonzalez, and his wife, Niercy; my interview with Lazaro Gonzalez, Elian's great-uncle; and my own knowledge of the psychiatric care of children, particularly where they have suffered separation from their parents and/or have experienced traumatic events.

3. I met with Juan and Niercy Gonzalez and their infant son on April 9, 2000 in the office of Mr. Gonzalez's attorney. Also present was Lourdes Rigual-Lynch, Ph.D. Both Dr. Lynch and I speak Spanish, and the meeting was conducted in that language. The interview left us with the impression of a well-functioning, nuclear family with a support network of extended family members.

4. I met with Lazaro Gonzalez on April 10, 2000. Also present were Lourdes Rigual-Lynch, Ph.D., and Jerry M. Wiener, M.D. The purpose of that interview was to discuss the impact of the current situation on Elian and to talk about how to implement the transfer of Elian to his father in a manner that would minimize stress and anxiety for the child.

5. We reported to Commissioner Meissner our impression that Mr. Lazaro Gonzalez does not recognize the extent of the negative impact of the current circumstances on the well-being of Elian. It was our advice to her that it is crucial for Elian to be clear about who has authority for him, namely his father. Not to return to his father as soon as possible may make him feel that he has lost not only one parent, but two parents. Separation of a young child from a parent is a stress, and when preceded by the death of the other parent would be considered traumatic. A six-year-old child craves stability and a sense of safety. Critical to a child's psychological well-being is the notion that somebody is and will remain responsible for his care.

and that adults in his life can compromise and negotiate their differences.

6. — It is my opinion that the immediate, definitive, and unambiguous transfer of Elian into the custody of his father, Juan Gonzalez, preferably in a neutral setting, would make an essential contribution to Elian's mental and emotional well-being. This is especially so given that Elian is aware that his father has been in the United States for nearly one week. An immediate transfer of custody to Juan Gonzalez would reassure Elian of his father's love for him, and allow him to begin to reconstitute a sense of safety and security. Any further delay in reuniting Elian with his father or any action that would create a sense of ambiguity or uncertainty as to who will be responsible for Elian's care and well-being could be expected to cause increasing stress and psychological harm to Elian. I recommend that Elian's reunion with his father take place outside Miami. A transfer in a neutral setting would be preferable so as to avoid the intense media and community attention.

7. While it is clear that continued contact or visitation between Elian and his Miami relatives, including Marileysis Gonzalez, would benefit Elian, the most important consideration at this time is Elian's immediate and unambiguous reunion with his father.

I declare under penalty of perjury that the foregoing Declaration of Paulina F. Kernberg, M.D., is true and correct.

Executed on: April 13, 2000

By:

Paulina F. Kernberg
Paulina F. Kernberg, M.D.

CURRICULUM VITAE

PAULINA F. KERNBERG, M.D.

February, 2000

PAULINA F. KERNBERG, M.D.

BIOGRAPHICAL INFORMATION SKETCH

Dr. Paulina F. Kernberg was born in Santiago, Chile, South America. She completed her medical education at the University of Chile, and her psychiatric and psychoanalytic education at The Menninger Foundation in Topeka, Kansas. Dr. Kernberg speaks fluent Spanish and French.

Dr. Kernberg is Professor of Psychiatry at Weill Medical College of Cornell University, New York, and Director of the Child and Adolescent Psychiatry Residency Training Program at the New York-Presbyterian Hospital, Weill Cornell Westchester. Dr. Kernberg is also a Training and Supervising Analyst, Adult and Child, Columbia University Center for Psychoanalytic Training and Research, New York, and Faculty Member, Committee on Child Committee on Child Analysis, Columbia University Center for Psychoanalytic Research and Training, and the Director of the Postgraduate Psychotherapy Institute for Child and Adolescent Psychiatrists.

In 1994, Dr. Kernberg was the recipient of "The Hulse Award" given by THE NEW YORK COUNCIL ON CHILD AND ADOLESCENT PSYCHIATRY and was named the 1995 winner of the American Academy of Child and Adolescent Psychiatry's *First Psychotherapy Research Award* for significant contributions to the field of psychotherapy research over the past several years. She has written 92 scientific communications on the following topics: clinical and psychotherapeutic aspects of borderline conditions in children; narcissistic personality disorders in childhood; psychoanalytic perspectives of psychosis; child and adolescent psychoanalysis; friendships; adoption; sibling relations; parent/child interactions and mirror behavior. In 1991, Dr. Kernberg and her colleagues published CHILDREN WITH CONDUCT DISORDERS: A PSYCHOTHERAPY MANUAL (Basic Books, Inc., NY). In 2000 Dr. Kernberg and her colleagues published PERSONALITY DISORDERS IN CHILDREN AND ADOLESCENTS (Basic Books, Inc., NY).

Dr. Kernberg has lectured extensively in the United States, Europe, and South America.

== QUEENS COUNTY NEUROPSYCHIATRIC INSTITUTE, Jackson Heights, NY

Psychotherapist, January 1978 - August 1979

Part-time employment as a psychotherapist and psychodiagnostician. Caseload included children, adolescents and adults.

PUERTO RICAN FAMILY INSTITUTE, INC., New York City, NY

Psychodiagnostician, September 1977 - October 1978

Part-time work conducting psychological evaluations (both children and adults) as well as in-service training.

VOCATIONAL EDUCATION AND EXTENSION BOARD, Hempstead, NY

Researcher, September 1975 - August 1976

Worked on a research project under the direction of Dr. George Stricker, Adelphi University. Project title: DEVELOPMENT OF TESTING BATTERY FOR SPANISH SPEAKING APPLICANTS. This project was aimed at developing a testing battery to be used with Spanish speaking individuals seeking educational and/or vocational counseling/training. Responsibilities included administering the selected battery of tests to a Spanish speaking population in attendance at various training agencies in Nassau County. Involved in collecting and developing appropriate statistical normative data.

SUPERVISED PRACTICUM EXPERIENCE

ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK, New York, NY

Clinical Psychology Internship, September 1976

St. Vincent's Internship Program offered a variety of supervised individual and group psychotherapy experience (inpatient and outpatient), as well as further training in psychological testing. This internship also included training in the treatment of alcoholism.

VETERANS ADMINISTRATION, FRANKLIN DELANO ROOSEVELT HOSPITAL, Montrose, NY

Trainee in Psychology service, September 1975

Third year level clinical stipend (1,200 hours requirement). Responsibilities included individual and group psychotherapy, psychodiagnostic evaluation, attendance and dull participation in psychiatric team meetings (Re: patient disposition, treatment planning, etc.); participation in training seminars (Interview Techniques, Individual Psychotherapy Seminar, Behavior Therapy Seminar, etc.)

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- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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CURRICULUM VITAE

Paulina F. Kernberg, M.D.

SOCIAL SECURITY NUMBER:

(b)(6)

DATE OF BIRTH:

(b)(6)

FAMILY:

Husband: Otto F. Kernberg, M.D.

Son: Martin (d.o.b. 1954)

Daughters: Karen (d.o.b. 1958)
Adine (d.o.b. 1969)

[001]

PLACE OF BIRTH:

Santiago, Chile

NATURALIZED U.S. CITIZEN:

December 4, 1968

PROFESSIONAL ADDRESS & TELEPHONES:

The New York Hospital-Cornell Medical Center,
Westchester Division
21 Bloomingdale Road
White Plains, New York 10605
Office: (914) 997-5951 Fax: (914) 682-6988

HOME ADDRESS & TELEPHONE:

8 Murray Hill Road
Scarsdale, New York 10583
(914) 723-1830

MEDICAL LICENSES HELD:

1959 Chile
1969 Kansas
1973 New York

CERTIFIED BY SPECIALTY BOARD:

1971- Psychiatry, American Board of Psychiatry & Neurology
1973- Child Psychiatry, American Board of Psychiatry
& Neurology.

EDUCATIONAL BACKGROUND:

1952 Bachelor of Science (Biology), University of Chile, Santiago, Chile
1953-1959 M.D., University of Chile
(includes rotating internship 1/58 - 4/59, Hospital San Juan de Dios, Santiago, Chile).
1959-1960 Resident in Psychiatry, Sheppard and Enoch Pratt Memorial Hospital,
Towson, Maryland.
1961-1962 Resident in Psychiatry, Topeka State Hospital, Topeka, Kansas.
1962-1963 Resident in Psychiatry, C.F. Menninger Memorial Hospital, Topeka, Kansas.
1963-1965 Post-Residency Fellowship in Hospital Psychiatry, C.F. Menninger Memorial
Hospital, Topeka, Kansas.
1965-1967 Post-Residency Fellowship, Child Psychiatry, Children's Division,
The Menninger Foundation.
1969 Psychoanalyst, Topeka Institute for Psychoanalysis, Topeka, Kansas
1970 Child Psychoanalyst, Topeka Institute for Psychoanalysis, Topeka, Kansas

Special Post Graduate Training Activities:

- 1968 Participant, Group Relations Conference, A.K. Rice Institute, Univ. of Leicester, United Kingdom.
- 1972 Participant, Group Relations Conference, A.K. Rice Institute and Washington School of Psychiatry, Amherst College, Amherst, Massachusetts.
- 1977-1983 Training Analyst Group on Supervision, Columbia University Center for Psychoanalytic Training and Research.
- 1969 Expert Witness, divorce case, New York Supreme Court.
- 1997- present
Leader of the Faculty Group on Divorce and Marriage
- 1998- present
Course on Divorce Mediation Training, The Association of the Bar of New York
- 1999- present
Instructor: Parent Education and Custody Effectiveness (PEACE). Hofstra University School of Law and Hofstra University School of Education and Allie Human Services/Manhattan Bar Association.

PROFESSIONAL POSITIONS:

ACADEMIC POSITIONS:

- 1967-1973 Faculty, Director of Therapy, The Menninger School of Psychiatry, Topeka, Kansas.
- 1970-1973 Faculty, Child and Adult Analysis, Topeka Institute for Psychoanalysis, Topeka, Kansas.
- 1974-1976 Associate Clinical Professor of Psychiatry, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
- 1974-1976 Associate Supervising Child Analyst, Columbia University Center for Psychoanalytic Training and Research; New York, NY.
- 1977-1978 Associate Professor of Psychiatry, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
- 1978-1995 Associate Professor of Psychiatry, Cornell University Medical College; NY. (Tenured position effective as of November 3, 1981.)
- 1977 - present Training and Supervising Analyst (Adult and Child), Columbia University Center for Psychoanalytic Training and Research; New York, NY.
- 1974 - present Lecturer in Psychiatry, Columbia University College of Physicians and Surgeons, Center for Psychoanalytic Training and Research.
- 1985 - present Visiting Associate Professor of Psychiatry, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
- 1995 - present Professor of Psychiatry, Cornell University Medical College.
- 1997 - 1998 Lecturer in Psychiatry, Columbia University College of Physicians and Surgeons, New York, NY

HOSPITAL POSITIONS:

1967-1972	Staff Psychiatrist, Children's Div., The Menninger Foundation, Topeka, Kansas.
1972-1973	Director of Therapy, Children's Division, The Menninger Foundation, Topeka, Kansas.
1969-1973	Consultant, Topeka State Hospital, Child Development Center, Topeka, Kansas.
1973-1975	Chief, Child Outpatient Psychiatry Clinic, Bronx Municipal Hospital Center, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
1975-1978	Associate Attending Psychiatrist, Child and Adolescent Psychiatry, Bronx Municipal Hospital, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
1975-1978	Director, Child and Adolescent Psychiatry, and Director, Child Psychiatry Training Program, Bronx Municipal Hospital Center, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
1978 - 1995	Associate Attending Psychiatrist, The New York Hospital-Cornell Medical Center, New York, New York.
1978 - 1996	Director, Division of Child and Adolescent Services, The New York Hospital-Cornell Medical Center, Westchester Div., White Plains, New York.
1978 - present	Director, Residency Training Program in Child and Adolescent Psychiatry at The New York Hospital-Cornell Medical Center, Westchester Division, White Plains, New York.
1995 - present	Attending Psychiatrist, The New York Hospital-Cornell Medical Center, New York, NY.

PROFESSIONAL MEMBERSHIPS:

1962 - present	The Menninger School of Psychiatry, Alumni Association, Full Member.
1964 - 1973	American Psychiatric Association, Associate Member.
1969 - 1982	Center for Advanced Psychoanalytic Studies (CAPS), Member.
1971 - present	American Psychoanalytic Association, Member.
1971 - present	International Psychoanalytic Association, Full Member.
1972 - present	Association for Child Psychoanalysis, Inc., Full Member.
1973 - present	Westchester Psychoanalytic Society, Member.
1973 - present	Association for Psychoanalytic Medicine, Columbia University, Full Member.
1973 - present	New York County Medical Society, Member.
1973 - present	American Academy of Child and Adolescent Psychiatry, Member.
1973 - present	American Group Psychotherapy Association, Full Member.
1974 - present	American Psychiatric Association, Fellow.
1974 - 1975	Center for Psychoanalytic Studies at Aspen, Colorado.
1975 - present	David Levy Lectureship Committee Foundation, Member.
1976 - present	Board Member, Margaret Mahler Foundation.
1976 - 1978	Secretary, Association for Child Analysis, Inc.
1977 - present	Member, World Association for Infant Mental Health (WAIMH)

PROFESSIONAL MEMBERSHIPS: (con't.)

- 1977 - present Society for Psychotherapy Research, Member.
- 1977 - present New York Council on Child Psychiatry, Inc., Member.
- 1979 - 1982 The Association for Child Psychoanalysis Inc., Councilor.
- 1979 - present Board Member, Parent's Place, Inc., White Plains, New York.
- 1986 - present American Society for Adolescent Psychiatry, Member.
- 1988 - present Group for the Advancement of Psychiatry, Member, Committee on Adolescence.
- 1997 - present Member, Manhattan Interdisciplinary Law Forum.
- 1997 - present Member, American Academy of Psychiatry and the Law.

HONORS AND AWARDS:

- 1985 Honorary Member, Finnish Psychiatric Society.
- 1988 Gerald H.J. Pearson Lectureship, The Institute of the Philadelphia Association for Psychoanalysis.
- 1989 V. Hulse Lectureship, The New York Council of Child Psychiatry.
- 1990 Best Teacher of the Year Award in Child Psychiatry, Cornell University Medical College, Department of Psychiatry, The New York Hospital, Westchester Division.
- 1991 Honorary Member, Asociacion de Psicoterapia de Ninos, Lima, Peru.
- 1991 Chosen by peers in a Special Report as one of The Best Doctors in New York for Psychiatry, under the heading of Pediatric Specialists (New York Magazine, November 11, 1991).
- 1991 Member, New York Psychiatric Society.
- 1992 Invited Speaker, Residents Symposium, American Academy of Child and Adolescent Psychiatry Annual Meetings.
- 1992 Invited Speaker, "The Anna Freud Lecture," sponsored by the University of Vienna, Department of Psychotherapy and by The Vienna Psychoanalytic Society.
- 1994 Listed in The Best Doctors In America, 1994-95 Second Edition, and 1992-93 First Edition, published by Woodward/White, Inc., Aiken, South Carolina.
- 1994 Wilfred C. Hulse Award, from The New York Council on Child and Adolescent Psychiatry.
- 1995 Recipient of the American Academy of Child and Adolescent Psychiatry's first *Psychotherapy Research Award*
- 1997 Member, Memorials and Awards Committee, American Academy of Child and Adolescent Psychiatry (through October 1, 2000).
- 1997 Recipient of the Annual Achievement Award given by The Society of the Institute for Child, Adolescent and Family Studies (SICAFS) to an outstanding member of the field (Honoree/Lecture, June 12, 1997).
- 1998 Ramon Parres Lecture - Society of Neurology and Psychiatry, Mexico City, Mexico (March 26, 1998).

INSTITUTIONAL RESPONSIBILITIES:

- | | |
|--------------------------|-----|
| 1. Teaching | 40% |
| 2. Clinical Care | 20% |
| 3. Administrative Duties | 20% |
| 4. Research | 20% |

1. Teaching:

A. 3rd Year Medical Students: Course Instructor

1. Developmental Perspectives of Borderline Pathology.
2. The Role of Friendships.
3. Play Therapy.

B. 3rd Year Residents in General Psychiatry: Course Instructor

1. The Pre-School Years.
2. The School Age Child.
3. Borderline and Narcissistic Personality Disorders in Children.
4. Gender Identity Disorders in Children.
5. Play - Its Functions in Child Development and Its Uses in Therapy.

C. Child and Adolescent Psychiatry Residents: Course Instructor

1. Child and Adolescent Psychotherapy Workshop: 2 year weekly seminar includes psychotherapy techniques of the main child psychiatric syndromes, mother-infant interventions, adolescent psychotherapy, research in psychotherapy, and child psychotherapy supervision.
2. Child Observation Course: 1 year weekly seminar.
3. Supervision of 1 Borderline Research Project Adult Resident (weekly).
4. Supervision of 3 Child and Adolescent Psychiatry Residents (weekly).

D. Psychoanalytic Candidates, Columbia University Psychoanalytic Institute: Course Instructor

1. Psychoanalytic Perspectives of Childhood Psychosis
2. Play in Normality and Pathology
3. Defense Mechanisms: Current Concepts, Developmental Perspectives
4. Psychoanalytic Process: Verbal Interventions and Technique
5. Child Development: Course: Friendships, Siblings, 1st Year of Life, and 2nd Year of Life
6. Supervision of 2 candidates (1 adult, 1 child)
7. Child Observation Seminar: 8 sessions
8. Ethical Professional Conduct Seminar: 8 sessions

E. Financial Support for Educational Programs:

1. N.I.M.H. Clinical Training/Human Resource Development, 1978 - 1983, Principal Investigator: Paulina F. Kernberg, M.D.

Amount: \$35,000 - 47,000

2. N.I.M.H. Clinical Training/Human Resource Development, 7/1/84 - 6/30/87. Principal Investigator: Paulina F. Kernberg, M.D.
Amount: \$19,367

- 3. Abramson Fund, 1993-1994. Support for Post-graduate Psychotherapy Institute for Child and Adolescent Psychiatrists co-sponsored by the American Academy of Child and Adolescent Psychiatry and The New York Regional Council of Child Psychiatry.
Amount: \$15,000

2. Clinical Care:

- A. Consultant to Child and Adolescent Division clinical case conferences (weekly).
B. Consultant, Adult Division clinical conferences (weekly), 1980-1985.

3. Administrative Duties:

- A. General Administrative Duties (Division of Child and Adolescent Psychiatry)
1. Steering Committee, The New York Hospital, Westchester Division, Member.
 2. Committee on Continuity of Care, The New York Hospital, Westchester Division, Member.
 2. Division of Child and Adolescent Psychiatry Council, Chairman.
 3. Division of Child and Adolescent Psychiatry Education Council, Chairman.
 4. Chairman, Committee on Ethics, New York Hospital-Cornell Medical Center, Westchester Division.
 5. Recruitment and Assessment of Faculty.
 6. Meeting with parents of hospitalized children for grievances.
 7. Organizing activities for international visiting professionals.
 8. Boundary functions with the community: speaker, board member, White Plains Special Education Liaison.
 9. Development of new programs (e.g., Adolescent After-School Day Program, Families of Divorce Program, School Consultation Program).
- B. Educational Administrative Duties (Child and Adolescent Psychiatry Training Program)
1. Recruitment of Child and Adolescent Psychiatry Residents.
 2. Supervisory Assignments for Child and Adolescent Psychiatry Residents.
 3. Mini-Boards in Child and Adolescent Psychiatry.
 4. Yearly curriculum review and update.
 5. Recruitment of Voluntary Faculty.
 6. Bi-annual meetings with Full-Time and Voluntary Faculty.
 7. Assessing and documenting training program implementation, according to A.C.G.M.E. standards.
 8. Bimonthly administrative meetings with Child Residents.
 9. Mock Boards, Senior Examiner.
 10. Coordination with the Payne Whitney Clinic Residency Training Program in Child and Adolescent Psychiatry.

11. Coordination with General Residency Program.
12. Individual Administrative meetings with Child Residents.

4. Research Activities:

- A. Friendship and Peer Relations in Different Diagnostic Categories: Validation Study, 1992-present. I.R.B. approved. Principal Investigator: Paulina F. Kernberg, M.D. Co-Investigators: Jonathan Cohen, Ph.D., Audrey Clarkin, Ph.D., and Lina Normandin, Ph.D.

Project Role: 1-2 hours a week, train raters and interviewers, data analysis and interpretation.

- B. Dynamic Psychotherapy of Children with Conduct Disorders: Cross National Study on Process and Outcome, 1991-1993. Paulina F. Kernberg, M.D.: Co-Investigator.

Overall proposal, design, and selection of instruments with:

I. Kolvin, Principal Investigator
John Bowlby Professor of
Child & Family Mental
Health, The Royal Free Hospital
Hospital School of Medicine,
The Tavistock Clinic, London, England

J. Tsiantis, M.D., D.P.M., F.R.C.
Director, Department of
Psychological Pediatrics,
Aghia Sophia Children's Hospital
Athens, Greece

Project Role: 8 hours per month, consultant, design,
providing instruments for process

- C. Health-Sickness Rating Scale for Children - Construction of Anchoring Scale, Reliability Study, 1985-1988. Jerome Liebowitz, M.D., James Rembar, Ph.D., and Paulina Kernberg, M.D.

Project Role: Contribute concepts for design, participating
in vignettes, and as an independent rater

Observational Criteria of Change Within the Sessions, (1985). Paulina F. Kernberg, M.D.

Project Role: 4 hours per month, building the instrument

- D. Personality Assessment in Adolescents, 1987-1989.
Principal Investigator: Barbara Marcus, Ph.D.
Co-Investigators: Paulina F. Kernberg, M.D., Michael Selzer, M.D.,
Theodore Cherbuliez, M.D., and Saverio Morati, M.D.

Project Role: 3 hours per week, interviewer, rater, theorist

- E. Co-Investigator in N.I.M.H. Prevention Grant: Dynamic and Family Therapy with Borderline Hispanics: A Grant Proposal, 1991.
Jose Szapocznik, Ph.D.: Principal Investigator
Professor and Director, Spanish Family Guidance Center
Department of Psychiatry / School of medicine
University of Miami, Miami, Florida

Project Role: 20 hours, drafted technical outline for individual psychodynamic psychotherapy with Borderline adolescents

- F. Mirror Behaviors in Young Children: A Developmental Study, 1992 - present.
I.R.B. approved. Paulina F. Kernberg, M.D.: Principal Investigator.
Co-Investigators: Lina Normandin, Ph.D., Alejandra Wortman, M.D., Lois Macri, B.A., Patricia Harteneck, B.A.

Project Role: instrument on mirror behaviors, validity, building and revising Mirror Behavior Checklist, prediction of mother-child interaction from mirror behaviors and attachment classification

- G. The Diagnostic Interview for Narcissism: Adolescent Adaptation for Record Review, 1992-1994. Principal Investigator: Paulina F. Kernberg, M.D., with Fady Hajal, M.D., and Lina Normandin, Ph.D.

Project Role: 1 hour per week, instrument adaptation for adolescent record review, rating of records, data analysis

- H. Play in Therapy: Instrument Development, 1991 - 1997.
Principal Investigator: Paulina F. Kernberg, M.D., with Saralea Chazan, Ph.D., Elsa Blum, Ph.D., Lina Normandin, Ph.D. and R. Kruger, Ph.D.

Project Role: 3 hours per week, conceptualized instrument, theoretical concepts of its uses for diagnostic assessment and therapist change

RESEARCH SUPPORT:

- A. Cornell Interview for Children's Friendships and Peer Relations: Reliability and Validity Study, 1985-1986. Principal Investigator: Paulina Kernberg, M.D., with Audrey Clarkin, Ph.D., Edward Greenblatt, Ph.D., and Jonathan Cohen, Ph.D., Co-investigators. Funding by the Saul Z. and Amy Scheuer Cohen Family Foundation, Inc.

Amount: \$ 20,000

Project Role: 2-4 hours per week, contributor of the idea for the study, building the instrument, provided all data gathered from children's letters on friendships, interviewing children, rating interviewers, training interviewers

1. Research groups are currently carrying out this protocol in the following countries:
 - a. Mexico, Dr. Pedro Colin Alvarez, Universidad Iberoamericana, Mexico City.
 - b. Sweden, Dr. Ann-Charlotte Smedler, Stockholms Universitet, Stockholm.
 - c. Brazil, Drs. Machado & Rohde, Universidade Federale Rio Grande Du Sol, Porto Alegre.
 - d. Canada, Lina Normandin, Ph.D., Universite Laval, Quebec City.
 - e. Canada, Dr. Ruth Stirtzinger, Toronto, Ontario.
 - f. Italy, Graziella Fava Vizziello, Ph.D., University of Padua, Padua.
 - g. U.S.A., David J. Kolko, Ph.D., Western Psychiatric Institute, Pittsburgh.
 - h. U.S.A., Suzy Krueckeberg, Ph.D., University of Illinois at Chicago.
2. Doctoral dissertations in progress based upon this research instrument:
 - a. Friendship Patterns Among Regular and Special Education Students, by Donna Robin Murray, M.A., Ferkauf Graduate School of Psychology, Yeshiva University (seeking Psy.D.)
 - b. Validating the Cornell Interview of Peers and Friends for Adolescents, by Marianna Wainer, State University of New Jersey, Rutgers (seeking Psy.D.)
 - c. Friendship Patterns and Peer Relations of Bi-Racial Girls, by Rachel Hannah Fields, The Professional School of Psychology, San Francisco, California

- B. Child Therapist Verbal Interventions Instrument, 1985 - 1989. Paulina F. Kernberg, M.D., Principal Investigator, with co-investigators Chazan, Saralea, Ph.D., Cohen, Jonathan, Ph.D., Scholl, Hannah, Ph.D., Kruger, Robert, Ph.D., Frankel, Alice, M.D. Grant funding from the Cornell University Medical Center, Department of Psychiatry.

Amount: \$ 5,000

Project Role: 2 hours per week, conceptualized original idea, trained raters, collected material for training tape

- C. Psychoanalytic Psychotherapy of the Borderline Patient, 1987-1989.
John Clarkin, Ph.D., and Harold Koenigsberg, M.D.-- Co-Principal Investigators.
Paulina F. Kernberg, M.D., Member, Cornell Borderline Personality Disorder
Research Group. Funding by The Fund for Psychoanalytic Research, American
Psychoanalytic Association.

Amount \$ 12,000 (1st year)
12,000 (2nd year)

1. Pilot Study on a comparison of adolescent inpatients and non-patients on the Self Report Instrument for Borderline Personality Organization (1984-1986).

Project Role: participated in production of instrument, collected data

2. Therapist Attitudes Instrument - Interrater Reliability Study. Dr. P.F. Kernberg with Dr. H. Koenigsberg, and Dr. T. Smith (1991-1994). Collaboration with Carolinska Institute: Danutta Wasserman. Principal Investigator, 95-97.

Project Role: 2 hours per week, participated in building instrument, rated fifteen, 22-minute videotaped segments.

3. Senior Research Psychotherapy Supervisor: Joanne Parks, M.D. (1984-1992)

- D. Psychotherapy of Borderline Personality Disorder Patients, Dec, 1994-Nov., 1996.
John Clarkin, Ph.D., and Harold Koenigsberg, M.D.-- Co-Principal Investigators.
Paulina F. Kernberg, M.D., Member, Cornell Borderline Personality Disorder
Research Group. Funding by an N.I.M.H. Grant

Amount \$ 88,631 (1st year)
64,254 (2nd year)

Project Role: 5 hours per week, research psychotherapist

- E. Mirror Behaviors and Mother/Child Interactions in Young Children: A Pilot Study, 1993-1994.

Principal Investigator: Amy Lynn Bloch, M.D., with co-investigators: Paulina F. Kernberg, M.D., Lynn Yanuck, B.A., Barbara Milone, R.T., M.S.W., and Laurie Olson, O.T.R. Grant Funding from The Cornell University Medical Center, Department of Psychiatry.

Amount: \$ 9,500

Project Role: 2 hours per week, mentor, provided original idea, co-wrote grant, recruited subjects, recruited research assistant, administered protocol, rated videotapes, individual feedback interview with mothers

EXTRANETURAL PROFESSIONAL RESPONSIBILITIES:

- 1993 - present Director, Post-Graduate Psychotherapy Institute for Child and Adolescent Psychiatrists, funded by The Abramson Fund, co-sponsored by The American Academy of Child and Adolescent Psychiatry and The New York Council on Child and Adolescent Psychiatry, Inc.
- 1990 - 1995 Chairperson, Ethics Committee, International Psychoanalytic Association.
- 1981 - 1985 Co-Chairman, Child Analysis Program, Columbia University Center for Psychoanalytic Training and Research, New York, New York
- 1985 - 1995 Chairperson, Child Psychotherapy Committee, American Academy of Child and Adolescent Psychiatry.
- 1989 - 1995 Associate Co-Editor: The Grade School Child, Volume 2 of 7, The Handbook of Child and Adolescent Psychiatry, Editor-in-Chief, Joseph Noshpitz, M.D., John Wiley & Sons, 1995.
- 1981 - 1988 Board Examiner in Adult Psychiatry. American Board of Psychiatry and Neurology, Inc.
- 1970 - 1973 Senior Psychotherapy Supervisor, C.F. Menninger Foundation, Topeka, Kansas.
- 1970 - 1973 Co-Instructor, Course on Child Development, Topeka Institute for Psychoanalysis, Topeka, Kansas.
- 1971 - 1973 Associate Supervisor of Child Analysis, Topeka Institute for Psychoanalysis.
- 1971 - 1973 Instructor, Child Psychotherapy, The Menninger School of Psychiatry, Topeka, Kansas.
- 1971 - 1973 Instructor, Continuous Case Seminar in Child Analysis, Topeka, Institute for Psychoanalysis, Topeka Kansas.
- 1974 - 1976 Associate Supervising Child Analyst, Psychoanalytic Clinic, Columbia University, New York.
- 1970 - 1973 Chairman, Program Committee, The Psychotherapy Service, C.F. Menninger Foundation, Topeka, Kansas.
- 1972 - 1973 Senior Consultant, C.F. Menninger Foundation, Topeka, Kansas.
- 1979 - present Board Examiner, Committee on Certification in Child Psychiatry. American Board of Psychiatry and Neurology.
- 1991 - present Member, Curriculum Committee, Columbia University College of Physicians and Surgeons, Center for Psychoanalytic Training & Research.
- 1982 - present Reader, Journal of Hospital and Community Psychiatry.
- 1983 - present Reader, American Journal of Psychiatry.
- 1984 - 1987 Member, Editorial Board, International Journal of Psychoanalytic Psychotherapy.
- 1989 - present Reader, American Journal of Orthopsychiatry.
- 1991 - present Reviewer, Journal of the American Academy of Child and Adolescent Psychiatry. John McDermott, Jr., Editor.
- 1991 - present Reviewer, Journal of Psychotherapy: Practice and Research, Jerald Kay, Ed.
- 1991 - present Editorial Board, American Journal of Psychotherapy.
- 1991 - present Co-Editor, Acta Paedopsychiatrica, Springer-Verlag, Heidelberg, Germany.
- 1997 - present Editorial Board, Journal of Child Psychoanalytic Therapy.

EXTRAMURAL PROFESSIONAL RESPONSIBILITIES (con't):

1992 - present	Member, Scientific Board, <i>Kinderanalyse: Zeitschrift für die Anwendung der Psychoanalyse in Psychotherapie und Psychiatrie des Kindes - und des Jugendalters</i> (Journal for the Practice of Psychoanalysis in Psychotherapy and Psychiatry with Children and Adolescents), Technischen Universität München, Munich, Germany.
1992 - present	Member, International Scientific Committee, <i>Italian Journal of Child and Adolescent Psychoanalysis: "Richard and Piggie, Studi psicoanalitici del bambino e dell'adolescente,"</i> of Rome, Italy.
1994 - present	Reviewer, <i>International Journal of Psychoanalysis</i> , Arnold M. Cooper, Editor for North America.
1974 - 1976	Secretary Elect, Association for Child Psychoanalysis, Inc., New York.
1976 - 1978	Secretary, Association for Child Psychoanalysis, Inc., New York.
1976 - 1981	Committee on Infant Psychiatry, American Academy of Child Psychiatry, member.
1977 - 1988	Chairperson, Rado Advanced Psychoanalytic Studies (RAPS) Seminar on Child Analysis.
1981 - 1986	Member, Editorial Board, <i>The Psychiatric Hospital, Journal of The National Association of Private Psychiatric Hospitals</i> .
1982 - 1985	Committee on Child Psychotherapy, American Academy of Child Psychiatry, Member.
1982 - 1985	Committee on Child Psychotherapy, American Academy of Child Psychiatry, Member.
1982 - 1986	Member, Program Committee, American Orthopsychiatric Association.
1984 - 1991	Child Analysis Committee, American Psychoanalytic Association; New York, NY.
1986 - 1989	Consultant, Program Committee, The American Orthopsychiatric Association, Inc.
1988 - 1997	Group for the Advancement of Psychiatry, Committee on Adolescence.
1989 - 1997	Member, Senate Standing Committee on Mental Hygiene, State of New York, Senator Nicholas A. Spano, Chairman.
1989 - 1990	Member, Board of Assessors, Intl. Psychoanalytic Association Congress, Rome, Italy.
1989 - present	Member, Ethics Committee, International Psychoanalytic Association.
1990 - present	Member, Advisory Committee on Children's and Adolescents' Mental Health Services, The Mental Health Association of Westchester County, Inc.
1991 - 1997	Chairperson, Human Development Track, Columbia University College of Physicians and Surgeons, Center for Psychoanalytic Training and Research.
1991 - 1997	Member, Foundations' Fund Prize Board for Research in Psychiatry, American Psychiatric Association.
1991 - present	Member, International Advisory Board, Hellenic Psychiatric Association; Athens and Delphi, Greece.
1992 - present	Member, Ethics Committee, American Psychoanalytic Association.
1994 - present	Member, Subcommittee to revise Ethics Code & Procedures, American Psychoanalytic Association, William O'Brien, Chairman.

EXTRAMURAL PROFESSIONAL RESPONSIBILITIES (con't):

- 1999 - present Member, Work Group on Quality Issues and Practice Parameters
Authors, American Academy of Child & Adolescent Psychiatry.
- 1999 - present Member, Memorials and Awards Committee, American Academy of
Child & Adolescent Psychiatry.

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3. Kernberg P.F., Rousey C.: Variation in Speech Sounds During Psychotherapy: An Independent Indicator of Change. J. Amer. Acad. Child Psychiatry 9:762-777, 1970.
4. Kernberg P.F.: The Course of the Analysis of a Narcissistic Personality with Hysterical and Compulsive Features. J. Amer. Psychoanal. Assoc. 19:451-471, 1971.
5. Kernberg P.F.: Referral of Hospitalized Patients for Psychotherapy. Bull Menninger Clin 38 (6): 559-564; 1974.
6. Kernberg P.F., Ware L.: Understanding child development through group techniques and play. Bull. Menninger Clin. 39:409-419, 1975.
7. Kernberg P.F.: Countertransference reaction in work and adoptive children and their families. Revista Brasileira de Psicanalise, Vol. XII, pp. 439-448 1978.
8. Kernberg P.F.: Use of latency-age groups in the training of child psychiatrists. International Journal of Group Psychotherapy, 28:95-108, 1978.
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15. Liebowitz J., Kernberg P.F., Rembar J., Frankel A., Kruger R.: Judging mental health-sickness in children: development of a rating scale. J. Amer. Acad. Child Adolesc. Psychiatry 1988; 27, 2:193-199.
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18. Kernberg P.F.: Rol de las amistades en el preadolescente. Revista de Psiquiatría, III: 193-197, Chile, 1986.
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Kernberg P.F.: Entrevista Para La Evaluación de la Personalidad. Revista de Psiquiatría. Año 5 No. 3, pp 217-222. Santiago, Chile, 1988.
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26. Kernberg P.F.: Troubles narcissiques de la personnalite dans l'enfance expose theorique. Journal de la Psychoanalyse de L'enfant. Vol. 7, pp. 39-76. Centurion, 1989.
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Appendix A

Extramural Presentations for January 1, 1996 - December 31, 1997

- 1996 San Diego Psychoanalytic Society and Institute, San Diego, California.
Presentations on the Theme: The Clinical Faces of Hatred (February 2)
- 1996 New Jersey Psychoanalytic Society, Hackensack, New Jersey. Presentation: Notes on Integrating Research Findings in the Psychotherapy of Gender Identity Disorders (March 21).
- 1996 American Psychoanalytic Association, Los Angeles, California. Presentation: Play Activity in Therapy: A Look at its Multiple Meanings (May 2)
- 1996 American Psychiatric Association Annual Meeting, New York, New York. Presentation: Borderline Pathology in Childhood: An Overview within the Symposium Borderline Pathology in Latency Aged Children led by Joel M. Paris, M.D., McGill University (May 8).
- 1996 American Society of Hispanic Psychiatry, Mt. Sinai Hospital, New York, New York. Presentation Discussant: Education and Training: The Place of Research in Child Psychiatry (May 9).
- 1996 24th Annual Conference on The Leadership Role of the Psychiatric Chief Resident, Tarrytown, New York. Led Small Discussion Groups with Residents (June 7-9).
- 1996 1st Congress of the World Council for Psychotherapy, Vienna, Austria. Workshop: Cornell Play Therapy Instrument and Child Psychotherapy: Assessing the Process (July 1-5).
- 1996 Fourth Joint Clinical Conference between European and North American Analysts, Glasgow, Scotland. Case Study Presentation: What Constitutes Psychoanalytic Process? (July 18-21).
- 1996 4th Delphi International Psychoanalytic Symposium, Delphi, Greece. Chair and Discussant: Jocasta's Complex (July 23-29).
- 1996 Federacion Psicoanalitica de America Latina (FEPAL), Monterrey, Mexico. Discussion Group Coordinator (July 30-August 4).
- 1996 Primer Congreso Internacional sobre Psicoterapia, Fundacion Universidad del Norte Division de Humanidades y Ciencias Sociales, Baranquilla, Columbia. Presentation: Difference between Child Psychotherapy and Child Psychoanalysis (September 5-8).
- 1996 Primer Congreso Internacional sobre Psicoterapia, Fundacion Universidad del Norte Division de Humanidades y Ciencias Sociales, Baranquilla, Columbia. Presentation: Psychoanalytic Psychotherapy with Children (September 5-8).

- 1996 Primer Congreso Internacional sobre Psicoterapia, Fundacion Universidad del Norte Division de Humanidades y Ciencias Sociales, Baranquilla, Columbia. Presentation: Children of Borderline Mothers (September 5-8).
- 1996 The New York Hospital-Cornell Medical Center, Westchester Division. Child and Adolescent Psychiatry Rounds Panel Presentation: The Quiet Borderline Extensive Identity Diffusion(September 13).
- 1996 The New York Freudian Society and Psychoanalytic Training Institute Conference, New York, NY. Discussant: The Family Crucible of High Conflict Divorce (September 28).
- 1996 Zon en Schild Psychiatrisch Centrum, Amersfoort, Holland. Workshop: Antisocial Personality Disorder in Children and Adolescents (October 10).
- 1996 Zon en Schild Psychiatrisch Centrum, Amersfoort, Holland. Case Study Presentation: Psychotherapy Interview with a 14 Year Old Girl (October 10).
- 1996 Istituto di Psicoterapia del Bambino e dell'Adolescente, Milan, Italy. Presentation I: Psychotherapy in Play (October 12).
- 1996 Istituto di Psicoterapia del Bambino e dell'Adolescente, Milan, Italy. Presentation II: Cornell Play Therapy Instrument (October 12).
- 1996 Universita Degli Studi di Padova, Dipartimento di Psicologia, Padova, Italy. Presentation: Narcissistic Personality Disorder in Adolescents (October 13).
- 1996 1st European Congress of the Psychopathology of the Child and the Adolescent, Venice, Italy. Presentation 1: Specificity and Mechanisms of Change During the First Year of Life. Presentation 2: Trauma, Its Effects and the Process of Change in The Pre-School Child (October 17-19).
- 1996 Istituto D Neuropsichiatria e Psipedagogia Dell'Eta Evolutiva, Pisa, Italy. Presentation: Personality Disorders: Diagnosis and Treatment (November 11).
- 1996 Istituto D Neuropsichiatria e Psipedagogia Dell'Eta Evolutiva, Pisa, Italy. Presentations: Play Therapy Instrument: Measuring Change; Ethical Issues in Psychotherapy with Children and Adolescents; Mother-Child Attachment and Mirror Behavior Instrument; Update on Gender Identity Disorders (November 11-12).
- 1996 Universita degli Studi di Pavia, Pavia, Italy. Developmental Perspectives on Personality Disorders: An Overview (November 14).
- 1996 University Laval, Quebec City, Canada. Presentations: Evaluating Children and Adolescents; Psychotherapy and Treatment of Children and Adolescents; Child Psychotherapy and Working with Parents (December 7).

- 1996 Mt. Sinai Hospital, New York, New York. Grand Rounds Presentation: Cornell Play Therapy Instrument (December 12).
- 1996 The Anna Freud Centre, New York, New York. Panel Presentation: Eating Disorders in Late Adolescence (December 14).
- 1996 American Psychoanalytic Association Annual Meetings, New York, New York. Presentation: Child Analysis and Psychoanalytically Oriented Psychotherapies: A Look at the Process of Play and its Relation to Defense Mechanisms (December 19)
- 1997 April 4, The New York Hospital-Cornell Medical Center, Westchester Division. Child and Adolescent Psychiatry Rounds Presentation: Madonna and Child Configurations.
- 1997 April 10-13, The International Psychoanalytic Association, Interdisciplinary Symposium, Florence, Italy. Presentation: Madonna and Child Configurations.
- 1997 April 18, Department of Psychiatry, University of Virginia, Charlottesville, Virginia. Presentation: Clinical Case Study & Discussion with Residents.
- 1997 April 18, Department of Psychiatry, University of Virginia. Presentation: Identity Diffusion in Adolescence: Psychotherapeutic Approaches to 'As if' Personalities.
- 1997 April 19, Virginia Psychoanalytic Society. Clinical Workshop: Identity Diffusion in Adolescence: Psychotherapeutic Approaches to 'As if' Personalities.
- 1997 May 14, American Psychoanalytic Annual Meetings, San Diego. Presentation: A Look at the Process of Play and its Relation to Defense Mechanisms.
- 1997 May 15, American Psychoanalytic Annual Meetings, San Diego. Panel Presentation: The Psychoanalytic Study of Divorce: Clinical and Legal Implications.
- 1997 May 23-24, San Francisco Psychoanalytic Institute, San Francisco, California. Presentations: Working with Borderline Personality Disorder Children; Anorexia.
- 1997 May 30-June 1, Berlin Psychotherapy Institute, Berlin, Germany.
- 1997 June 3-7, San Francisco, California: Second World Congress on Family Law and the Rights of Children and Youth.
- 1997 June 5-7, Centro de Psiquiatria Infanto-Juvenil de Uribe, Bilbao / Madrid, Spain. Workshop Presentation: Play: Function, Assessment and Measurement of Play in Psychotherapeutic Treatment of Children.
- 1997 June 12, Annual Achievement Award given by The Society of the Institute for Child, Adolescent and Family Studies (SICAFS). Honoree's Lecture Presentation: Play Therapy with Children. The Cosmopolitan Club, New York, New York.

1997 June 19-21, Aspen Child & Adolescent Institute, Aspen, Colorado:
Characteristics of Traumatic Play.

Academic Year 1997-1998

1997 July 24-31, 8th Annual I.P.A. Conference for Training Analysts, Barcelona, Spain.
Clinical Case Conference Presentation: Identity Diffusion.

Extramural Presentations for January 1, 1998 - December 31, 1999

1998 January 16-19, Sociedade Mexicana de Neurologia y Psiquiatria, A.C. Workshop:
The Diagnosis and Treatment of Oppositional and Socialized Conduct Problems in
Children. Mexico City, Mexico.

1998 May 27-31, 87th Annual Meeting, The American Psychoanalytic Association, New
York, New York.

Academic Year 1998 - 1999

1998 August 14-29, Congress FEPAL, Cartagena, Columbia. Presentation: The Small
House: Educational Uses of Play.

University of Buenos Aires, Psychiatry and Neurology Society, Argentinean
Psychoanalytic Association. Presentation: Psychopathology in Childhood and
Adolescence.

Psychoanalytic Society of Buenos Aires. Presentation: Research and Its
Applications to Gender Identity Disorders

University of Montevideo, Department of Psychology. Presentation: Play
Assessment in Diagnosis and as a Measure of Change.

University of Puerto Alegre Brazil. Presentation: The Forms of Play With
Traumatized Children; Madonna and Child Configurations: Clinical
Consultations.

Psychoanalytic Association, Sao Paulo, Brazil. Presentation: Gender Identity
Disorders in Children: Clinical Consultations.

1998 September 16, University of Pisa, Stella Maris Foundation, Pisa, Italy.
Presentation: Madonna and Child: Configurations.

1998 October 16-17, European Psychopathology Conference, Seville, Spain.

1998 December 4-5, Amsterdam, Holland. Presentation: Friends & Peer Relations
Instrument - Play Instrument.

- 1999 January 7, Chilean Psychoanalytic Association. Presentation: Mirror Behavior Instrument: Its Relations to Attachment.
- 1999 January 15, University of Basel. Presentation: Child and Adolescent Symposium - Forms of Play.
- 1999 February 12, Mexican Psychoanalytic Association. Presentation: Mirror Behaviors: Clinical Implications, 1st Baby Observation Symposium.
- 1999 March 3, Grand Rounds, St. Lukes Hospital NYC - Forms of Play.
- 1999 March 26, Society of Neurology and Psychiatry, Mexico. Presentation: Personality Disorders in Children. Antisocial Personality.
- 1999 March 27, Society of Neurology and Psychiatry, Mexico. Presentation: The Personality Assessment Interview.
- 1999 April 16-17, Hospital de Clinicas, Montevideo University. Presentation: The Children's Play Therapy Instrument (CPTI).
- 1999 May 7, ALTXA, Bilbao, Spain. Presentation: Play in Sexually Abused Children.
- 1999 July 30, 41st IPA Congress, Santiago, Chile. Presentation: "Trauma in dreams and in Play." Workshop: Dreams, Play and Affects in Abused Children.
- 1999 August 5, University de los Andes, Santiago, Chile. Presentation: "Play instrument and its applications."
- 1999 August 23, Reflections on mirrors. Clinical application. American Psychological Association. Boston, Massachusetts.
- 1999 September 2, Bispebjerg Hospital, Copenhagen, Denmark. Presentation: "Methods of Assessment of Personality Disorder (the Neurotic Personality Organization, the Borderline Personality Organization)."
- 1999 September 3 and 4, Bispebjerg Hospital, Copenhagen, Denmark. Course in the Institute. Clinical consultations.
- 1999 September, Child Rounds. New York Presbyterian Hospital. Weill Medical College of Cornell University, Weill Cornell Westchester.
- 1999 October 1 and 2, Sociedad Psicoanalitica de Caracas, Venezuela. Presentations:
 "Trastornos de Personalidad Narcisista en Niños y Adolescentes."
 "Trastornos de Personalidad Antisocial en Niños y Adolescentes."
 "Abordaje Diagnóstico y Terapéutico a Través del Juego en Niños abusados sexualmente."
 "Las Formas del Juego en la Situación Terapéutica."
 "El Juego Como Instrumento de Evaluación."
 "El Juego en Niños Con Abuso Sexual: Un Proyecto de Investigación."

- 1999 October 11, XVI Congreso Estudiantil, Universidad Iberoamericana, Santa Fe Ciudad de Mexico. Presentation: "El juego en niñza; aproximaciones al tratamiento" Talleres: "El juego en niños abusados sexualmente."
- 1999 October 12, XVI Congreso Estudiantil, Universidad Iberoamericana, Santa Fe Ciudad de Mexico. Talleres: "Formas de juego en la normalidad y la patología" with Aula González Uribe.
"Desórdenes de Identidad de Género."

Exhibit Six

APP-13-2020 14:33 THE GENERAL COUNSEL 202 514 5044 7/26/02

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as next
friend, or alternatively as temporary legal
custodian, of ELIAN GONZALEZ, a minor,**

Appellants,

v.

**JANET RENO, Attorney General of the
United States, et al.,**

Appellees

No. 00-11424-D

**DECLARATION OF JERRY M.
WIENER, M.D.**

1. My name is Jerry M. Wiener, M.D. I make this declaration in connection with the Appellees' Opposition to Appellant's Motion for an Injunction Pending Appeal in the above-captioned action. I am currently Emeritus Professor in Residence of Psychiatry and Pediatrics at The George Washington University School of Medicine and Health Services in Washington, D.C. I am the immediate past chairman (1977-1997) and Leon Yochelson Professor of the Department of Psychiatry and Behavioral Sciences. My professional address is The George Washington University Medical School, 2150 Pennsylvania Avenue, N.W., Washington, D.C. 20037. Attached to this declaration is my curriculum vita, which accurately reflects my educational background, training, professional experience, and publications which I have contributed to the medical literature.

2. My testimony in this case relates to my advice and recommendations to Immigration and Naturalization Service Commissioner Doris Meisner concerning the impact of

a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez. My opinion is based on the interview with Lazaro Gonzalez, Elian's great-uncle; my extensive discussion with Dr. Kernberg and Dr. Rigual-Lynch regarding their interview with Juan Miguel Gonzalez; and my own knowledge of psychological care of children and my experience in the consequences to a young child of separation from and/or loss of a parent.

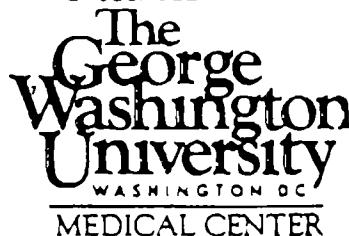
3. I attended a meeting with Lazaro Gonzalez on April 10, 2000, which was conducted primarily by Paulina F. Kernberg, M.D. and also attended by Lourdes Rigual-Lynch, Ph.D. The purpose of that interview was to discuss the impact of the current situation on Elian and to talk about how to implement the transfer of Elian to his father in a manner that would minimize stress and anxiety for the child.

4. I have reviewed Dr. Kernberg's declaration concerning our advice and recommendations to Commissioner Meissner, and I concur with that declaration.

I declare under penalty of perjury that the foregoing Declaration of Jerry M. Wiener, M.D., is true and correct.

Executed on: April 13, 2000

By: Jerry M. Wiener
Jerry M. Wiener, M.D.



DEPARTMENT OF PSYCHIATRY AND BEHAVIORAL SCIENCES

CURRICULUM VITAE

September, 1999

JERRY M. WIENER, M.D.

Emeritus Professor of Psychiatry and Pediatrics
The George Washington University Medical School
2150 Pennsylvania Avenue, N.W.
Washington, D.C., 20037

E-mail: psyjmw@gwu.edu

Jerry M. Wiener, M.D. is the immediate past-chairman (1977-1997) and Leon Yochelson Professor of the Department of Psychiatry and Behavioral Sciences and is currently Emeritus Professor in Residence of Psychiatry and Pediatrics, The George Washington University School of Medicine and Health Sciences, Washington, D.C.

Dr. Wiener received his undergraduate education at Rice University and medical degree at the Baylor College of Medicine ('56), Houston, Texas. His postgraduate training was initially in internal medicine ('56-'58) and then in psychiatry (Mayo Clinic, '58-61), child and adolescent psychiatry ('61-'62) and psychoanalysis ('64-'68) at the Columbia-Presbyterian Medical Center, New York City.

Academic and clinical positions before coming to The George Washington Medical Center included Columbia/St. Luke's Hospital (N.Y.C.), Emory University Department of Psychiatry (Atlanta), and Children's National Medical Center (Washington, D.C.). He is a Fellow of the American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry and The American College of Psychiatrists.

In addition Dr. Wiener has served as President of the Association of Chairmen of Departments of Psychiatry ('81-'82), President of The American Academy of Child and Adolescent Psychiatry ('87-'89), President of The American Psychiatric Association ('94-'95), Chairman of the Board of the American Psychiatric Press, Inc. (1995-), and as Guest Scholar at the Woodrow Wilson International Center jointly with the Holocaust Memorial Museum ('96-'97), as Senior Psychiatric Consultant to the Federal Bureau of Prisons (Fall, 1996), and since 1997 as a member of the House of Delegates of the American Medical Association. He also serves on the Medical Advisory Boards of the Magellan Behavioral Health Corporation and the Charter Behavioral Health Services.

At George Washington Dr. Wiener has served as Chairman of the Education, Student Evaluation and Appointment and Promotion Committees, as Vice-Chair of the Medical Faculty Associates Governing Board and as a member of the Medical Center Management Committee.

Dr. Wiener has lectured and published extensively on clinical, educational and health policy issues; is most recently the Editor-in-Chief of the leading Textbook of Child and Adolescent Psychiatry (1996), and serves on the Editorial Board of several journals, including (1995-1998) *The Proceedings of the Mayo Clinic*.

Phone: 202 994 8308 Fax: 202 994 6377 E-Mail: psyjmw@gwumc.edu

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. profile	Jerry M. Wiener, M.D.; RE: Personally Identifiable Information [partial] (1 page)	00/00/0000	b(6)

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General Files
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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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RR. Document will be reviewed upon request.

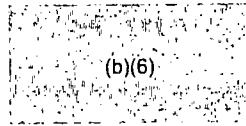
Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CURRICULUM VITAE

Name: Jerry M. Wiener, M.D.

Date of Birth:

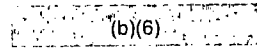


[002]

Birthplace:

Citizenship: United States

Soc. Sec. No:



I. Education

1949 - 1952	Rice University, Houston, TX
1952 - 1956	Baylor University College of Medicine, Houston, TX, M.D. Degree
1956 - 1957	Jefferson Davis Hospital, Houston, TX - Intern in Medicine
1957 - 1958	Resident in Medicine, Mayo Clinic, Rochester, MN
1958 - 1961	Resident in Psychiatry, Mayo Clinic, Rochester, MN
1961 - 1962	Columbia-Presbyterian Medical Center, New York, NY - Resident in Child Psychiatry
1964 - 1968	Psychoanalytic Clinic for Training and Research, Columbia University, Certificate - 1968

II. Board Certified in Psychiatry (1963) and Child and Adolescent Psychiatry (1965)

III. Professional Positions

1962 - 1971	Director, Division of Child and Adolescent Psychiatry, St. Luke's Hospital Center, New York, NY
1963 - 1971	Psychiatric Consultant, The Riverside Church Nursery School, New York, NY
1968 - 1971	Psychiatric Consultant, The Trinity School, New York, NY
1965 - 1971	Director, The Riverside Church Therapeutic Nursery School, New York, NY

- 1971 - 1973 Director, Division of Youth, Georgia Mental Health Institute, Atlanta, GA
- 1971 - 1975 Director, Division of Child and Adolescent Psychiatry, Emory University College of Medicine, Atlanta, GA
- 1973 - 1975 Chief, Psychiatry Service, H. Eggleston Hospital for Children, Woodruff Medical Center, Emory University, Atlanta, GA
- 1976 - 1977 Chairman, Department of Psychiatry, Children's Hospital National Medical Center, Washington, D.C.
- Acting Chairman, Department of Psychiatry and Behavioral Sciences, George Washington University Medical School, Washington, D.C.
- 1977 - 1997 Chairman, Department of Psychiatry and Behavioral Sciences, George Washington University Medical School, Washington, D.C.

IV. Academic Appointments

- 1961 - 1971 Instructor and Assistant Professor of Psychiatry, Columbia College of Physicians and Surgeons, New York, NY
- 1963 - 1965 Lecturer in Child Psychiatry, New York Academy of Medicine Post-Graduate Division
- 1968 - 1971 Senior Lecturer in Human Development, Columbia College, New York, NY
- 1971 - 1975 Associate Professor (1971 - 1974) and Professor of Psychiatry, Emory University, Atlanta, GA
- 1973 - 1975 Geographic Training and Supervising Analyst, Columbia University Psychoanalytic Clinic at Emory University, Atlanta, GA
- 1976 - 1998 Professor of Psychiatry and Behavioral Sciences and Pediatrics, George Washington University School of Medicine, Washington, D.C.
- 1977 - 1995 Teaching Analyst, The Washington Psychoanalytic Institute, Washington, D.C.
- 1982 - 1996 Leon Nicholson Professor of Psychiatry, George Washington University School of Medicine, Washington, D.C.

1990	Visiting Professor, The Postgraduate School in Psychiatry, Budapest, Hungary
1995	Visiting Professor, Semmelweis Medical School, Department of Behavioral Sciences, Budapest, Hungary
1996-97	Guest Scholar, The Woodrow Wilson International Center, Washington, D.C.
1996	Senior Psychiatric Consultant, Federal Bureau of Prisons, Washington, D.C.
1998	Emeritus Professor of Psychiatry and of Pediatrics, George Washington University School of Medicine, Washington, D.C.

V. Elected and Appointed Offices

1966 - 1970	Board of Directors, New York Council on Child Psychiatry
1966 - 1967	Board of Directors, New York Society for Adolescent Psychiatry
1967 - 1990	Examiner for Boards in Child and Adolescent Psychiatry
1969 - 1993	Examiner and Senior Examiner for Boards in General Psychiatry
1972 - 1974	Founder and President, Georgia Council on Child and Adolescent Psychiatry, Inc.
1973 - 1977	Chairman, Program Committee, American Academy of Child Psychiatry
1974 - 1977	Steering Committee, Society of Professors of Child Psychiatry
1977 - 1979	Board of Directors, Hillcrest Children's Center, Washington, D.C.
1980 - 1981	Treasurer, American Association of Chairmen of Departments of Psychiatry
1981 - 1982	President, American Association of Chairmen of Departments of Psychiatry
1981 - 1983	Treasurer, American Academy of Child Psychiatry
1982 - 1995	Executive Committee and Representative to Council for Academic Societies, American Association of Chairmen of Departments of Psychiatry

1986 - 1991	Residency Review Committee in Psychiatry
1987 - 1989	President, The American Academy of Child and Adolescent Psychiatry
1987 - 1992	American Psychiatric Association Council on Medical Education and Career Development (Vice-Chair, 1988 - 1989)
1990 - 1993	Trustee-at-Large, The American Psychiatric Association
1993 - 1995	President-Elect and President, The American Psychiatric Association
1995 -	Board of Trustees, American Psychiatric Association
1995 -	Chairman of the Board, The American Psychiatric Press, Inc.
1997 -	Board of Directors, Community Psychiatric Clinics Health Corporation (non-profit)
1997 -	APA Delegate to AMA

VI. Licensed: Texas, Minnesota, New York, Georgia, District of Columbia (current), Maryland (current)

VII. Memberships

American Medical Association
American Psychiatric Association (Fellow)
American Academy of Child and Adolescent Psychiatry (Fellow)
American College of Psychiatrists (Fellow)
American Academy of Psychoanalysis
American Psychoanalytic Association
Medical Society of the District of Columbia
Washington Psychoanalytic Society

VIII. Previous Committee and Other Appointments (selected)

1. Specialty Site Visitor, Residency Review Committee in Psychiatry
2. American Psychiatric Association
 - a) Committee on Quality of Psychiatric Residency Training Programs
 - b) Committee on Manpower Data (Chair)

- c) Committee on Biographical Directory and Data Collection
 - d) Budget Committee
 - e) Task Force on Managed Care Contract Review
3. N.B.M.E. Task Force on Part I Behavioral Science Examination (1982 -1983)
 4. George Washington University Medical Faculty
 - a) Educational Evaluation Committee (Chair)
 - b) Appointment, Promotion and Tenure Committee (Chair)
 - c) Faculty Senate (Executive Committee)
 - d) Medical Faculty Associates Governing Board, Vice-Chair and Acting Chair
 - e) George Washington University Hospital Executive Committee
 - f) Education Council (Chair)
 5. National Health Advisory Committee, The American Mental Health Fund
 6. National Leadership Forum, NIMH
 7. Professional Advisory Board, Magellan Health Corporation (1998 -)
 8. Medical Advisory Board, Charter Health Care Corp. (1996 -)
 9. Policy Review Committee (Chair), American Academy of Child and Adolescent Psychiatry (1997 -)
 10. Joint Commission on Government Relations, American Psychiatric Association

IX. Editorial Positions

1. Editorial Board, The Journal of the American Academy of Child & Adolescent Psychiatry, 1977-1982, 1984-1986.
2. Editorial Board, Journal of Child & Adolescent Psychopharmacology, 1990 -.
3. Editorial Board, The Journal of Psychiatric Practice, 1994 -.
4. Editorial Board, Proceedings of the Mayo Clinic, 1996-1999.
5. Editorial Board, Clinical Psychiatry News, 2000 -.

X. Publications

1. An EEG Study of Delinquent & Non-delinquent Adolescents, with Delano, J G and Klass, D.W., Arch. Gen. Psych.: 15:9, August, 1966
2. Psychological & Social Factors in a Pediatric-Gynecology Clinic, with Altek, A. and Stevenson, S , N.Y. State J. Med., 69:24, December, 1969
3. Children Who Set Fires, with Vandersall, T., Arch. Gen. Psych.: 22, January, 1970
4. Outcome of Re-referrals from a Child Psychiatric Clinic, with Bader, J., and Kresch, R , N.Y. State J. Med., 70:6, March, 1970
5. Attitudes of Pediatricians Toward the Care of Fatally Ill Children, J. Pediatrics, 76:5, May, 1970
6. Psychological Disturbances in Pediatric Gynecology, Bull of Sloane Hospital for Women, XVI, 3, Fall, 1970
7. Direct Child Observation in Psychiatric Residency Training, with Michels, R.: American J. Psychiatry, 127:12, June, 1971
8. The Rights of Children, Psychiatric Annals, September, 1972
9. Heroin Addiction in an Adolescent Population, with Egan, J., J. of Am. Acad. of Child Psych.; 12:1, January, 1973
10. Anorexia Nervosa in One of Identical Male Twins, J. Am. Acad. of Child Psych.: 15:3, 1976
11. Adolescent Depression and Suicide, Clin. Proceedings, Children's Hospital National Medical Center, 33:6, June, 1977
12. Psychotropic Drug Therapy in Children and Adolescents, Psychosomatics, 23:5, May, 1982
13. Childhood Depression, with Hendren, R., Journal of Developmental Behavioral Pediatrics, 4:2, March, 1983
14. Introductions, Grand Rounds in Child Psychiatry, J. Am. Acad. of Child Psych., 22, July, 1983; 1986, 1987, 1989
15. The Future of Child & Adolescent Psychiatry: If not Now, When?, J. Am. Acad. of Child Psych., 27:1, January, 1988
16. ADHD: An Introduction, Psychiatric Annals, 19:11, November, 1989

Jerry M. Wiener, M.D.

17. Roots, Diversity and Professional Identity, Journal of the American Psychiatric Association, 151:9, September, 1994
18. Encompassing Diversity & The Future of Psychiatry, Journal of the American Psychiatric Association, 152:9, September, 1995
19. The relationship between mental illness and violence in adolescents in Review of Psychiatry, Ed. R. Hendren, v.18; American Psychiatric Press, 1999.
20. Early Recognition in Schizophrenia: The Prodromal Stages, with Duzyurek, S., Journal Practical Psychiatry and Behavioral Health, 5:4, 187-196, July, 1999

XI. Books and Chapters

1. Response of Medical and Paramedical Personnel to the Fatal Illness & Death of a Child, in Loss & Grief: Psychological Management in Medical Practice, eds. W. Kutscher, B. Schoenberg, D. Peretz, A. Carr, New York, Columbia Univ. Press, 1970
2. Response of the Family to the Fatal Illness & Death of a Child, op. cit.
3. Psychopharmacology of Childhood and Adolescence, (Ed.), Basic Books, New York, 1977
4. History of Drug Therapy in Childhood & Adolescent Psychiatric Disorders, with S. Jaffe, M.D., in Psychopharmacology of Childhood and Adolescence, Ed. J.M. Wiener, Basic Books, New York, pp. 9-40, 1977
5. Conclusion and Prospect: Summary, op. cit., 217-222
6. Organic Therapies in Comprehensive Textbook of Psychiatry, Third Edition, eds Kaplan, H., Freedman, A., Sadock, B., Baltimore, Williams & Wilkins, 2: 2679-84, 1980
7. Psychopharmacology of Childhood Disorders, in Psychiatric Clinics of North America, Raymond Lake (Ed.), 6:3, December, 1984
8. Diagnosis and Psychopharmacology of Childhood and Adolescent Disorders, (Ed.), John Wiley & Sons, Inc., New York, 1985, Second Edition 1995
 Chapters:
 1. Historical Overview of Childhood and Adolescent Psychopharmacology, with Jaffe, D., Goldstein, G., Schooler, L., Justice, L. pp. 3-70
 2. A Review of DSM-IV Categories, pp. 71-79
9. Summary & Prospect; op. cit.

Jerry M. Wiener, M.D.

XIII Lectures and Visiting Professorships (Selected sites)

1. Psychiatry Grand Rounds, Columbia University College of Physicians and Surgeons, New York, NY
2. Psychiatry Grand Rounds, Cornell University School of Medicine, New York, NY
3. Visiting professor, University of Louisville School of Medicine, Louisville, KY
4. Invited Speaker, 40th Anniversary Dedication, Baylor College of Medicine, Houston, TX
5. Psychiatry Grand Rounds, Emory University College of Medicine, Atlanta, GA
6. Visiting Professor, Department of Psychiatry, University of Colorado School of Medicine, Denver, CO
7. Grand Rounds, Department of Psychiatry, Mayo Clinic and Graduate School of Medicine, Rochester, MN
8. Psychiatry Grand Rounds, University of South Carolina School of Medicine, Charleston, SC
9. Psychiatry Grand Rounds, Jefferson Medical College, Philadelphia, PA
10. Psychiatry Grand Rounds, University of Kansas School of Medicine, Kansas City, KS
11. Psychiatry Grand Rounds, University of New Mexico School of Medicine, Albuquerque, NM
12. Invited Speaker, Yale University College of Medicine, Department of Psychiatry Alumni Day, New Haven, CT
13. Psychiatry Grand Rounds, University of Oregon School of Medicine, Portland, OR
14. Psychiatry Grand Rounds, University of Utah School of Medicine, Salt Lake City, UT
15. Psychiatry Grand Rounds, University of Utah School of Medicine, Salt Lake City, UT
16. Psychiatry Grand Rounds, University of Tennessee School of Medicine, Memphis, TN
17. Psychiatry Grand Rounds, Mt. Sinai School of Medicine, New York, NY

18. Psychiatry Grand Rounds, University of South Florida, Tampa, FL
19. Distinguished Visiting Professor, Department of Psychiatry, University of Nebraska School of Medicine, Omaha, NE
20. Invited Speaker, Regional Meeting, World Psychiatric Association, Bariloche, Argentina
21. Keynote Speaker, Annual Meeting, Royal College of Psychiatry, Sheffield, England

Exhibit Seven

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as next
friend, or alternatively as temporary legal
custodian, of ELIAN GONZALEZ, a minor,

Appellants,

v.

JANET RENO, Attorney General of the
United States, *et al.*,

Appellees

No. 00-11424-D

DECLARATION OF LOURDES
RIGUAL-LYNCH, PH.D.

1. My name is Lourdes Rigual-Lynch, Ph.D. I make this declaration in connection with the Appellees' Opposition to Appellant's Motion for an Injunction Pending Appeal in the above-captioned action. I am currently the Director of Mental Health Services and Case Management for the Division of Community Pediatrics of Montefiore Medical Center (MMC) and an Assistant Professor of Pediatrics at the Albert Einstein College of Medicine, which is affiliated with MMC. My professional address is 308 E. 84th Street, New York, New York, 10028. Attached to this declaration is my curriculum vita, which accurately reflects my educational background, training, and professional experience.

2. My testimony in this case relates to my advice and recommendations to Immigration and Naturalization Service Commissioner Doris Meissner concerning the impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez. My opinion is based on my interview of Elian's father, Juan Gonzalez, and his wife, Niercy; my

interview with Lazaro Gonzalez, Elian's great-uncle; and my own knowledge of and experience in the psychological care of children, particularly where they have suffered separation from their parents and/or have experienced traumatic events.

3. I participated in a meeting with Juan and Niercy Gonzalez and their infant son on April 9, 2000 in the office of Mr. Gonzalez's attorney. Also present was Paulina F. Kernberg, M.D. Both Dr. Kernberg and I speak Spanish, and the meeting was conducted in that language. The interview left us with the impression of a well-functioning, nuclear family with a support network of extended family members.

4. I participated in a meeting with Lazaro Gonzalez on April 10, 2000. Also participating were Paulina F. Kernberg, M.D., and Jerry M. Wiener, M.D. The purpose of that interview was to discuss the impact of the current situation on Elian and to talk about how to implement the transfer of Elian to his father in a manner that would minimize stress and anxiety for the child.

5. I have reviewed Dr. Kernberg's declaration concerning our advice and recommendations to Commissioner Meissner, and I concur with that declaration.

I declare under penalty of perjury that the foregoing Declaration of Lourdes Rigual-Lynch, Ph.D., is true and correct.

Executed on: April 13, 2000

By: Lourdes Rigual-Lynch, Ph.D.
Lourdes Rigual-Lynch, Ph.D.

LOURDES RIGUAL-LYNCH, Ph. D.

308 E. 84th Street ■ New York, NY 10028 ■ 212-717-7864

EDUCATION

INSTITUTE OF ADVANCED PSYCHOLOGICAL STUDIES, ADELPHI UNIVERSITY, Garden City, NY

Ph. D. Clinical Psychology

Doctoral Dissertation: Self-Esteem and Puerto Rican Migrant

Awarded a grant from the Ford Foundation for the year 1978-1979 to aid in completing dissertation.

August 1979

Thesis completed and Ph. D. awarded

1973-1975

INSTITUTE OF ADVANCED PSYCHOLOGICAL STUDIES, ADELPHI UNIVERSITY, Garden City, NY

M.A. Clinical Psychology

NIMH Fellowship

1969-1973

MARYMOUNT COLLEGE, Tarrytown, NY

Bachelors Degree

Majors in Psychology and French; Marymount scholarship (4 years); Magna Cum Laude; Psychology Award Winner.

EMPLOYMENT

THE NEW YORK CHILDREN'S HEALTH PROJECT, New York City, NY

Director of Mental Health Services, January 1990 - Present

Director of the Mental Health Services section of the Division of Community Pediatrics. This innovative program is designed to provide primary health care to homeless, indigent children via the use of mobile medical vans staffed by pediatricians, pediatric nurse practitioners and nurses. Psychological assessments, crisis intervention, case management, treatment, and specialty referrals are provided to the children and their families.

MANHATTAN CHILDREN'S PSYCHIATRIC CENTER, Wards Island, NY

Staff Psychologist, September 1979 - January 1990

Worked on a interdisciplinary treatment team (children ages 5-12). Responsible for coordinating the complete treatment (clinical, social, educational) of a caseload of 10 children in a day hospital program. Duties also included psychological testing and psychodiagnostic supervision of two psychology interns.

PRIVATE PRACTICE, New York City, NY

Psychologist, January 1980 - Present

This part-time work involves seeing patients in individual and family counseling. Specialization in psychoanalytic oriented psychotherapy and psychodiagnostic evaluations of children.

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LOURDES RIGUAL-LYNCH, Ph.D.

Lourdes Rigual-Lynch, Ph.D., is the Director of Mental Health Services and Case Management for the Division of Community Pediatrics of Montefiore Medical Center (MMC) and a clinical psychologist. Dr. Rigual-Lynch is also an Assistant Professor of Pediatrics at the Albert Einstein College of Medicine, which is affiliated with MMC. Dr. Rigual-Lynch has worked with homeless children and families for the past 10 years, and her interests include early childhood development and assessment, the effects of domestic violence on children and the impact of homelessness on children and families. She obtained her Ph.D. from The Institute of Advanced Psychological Studies, Adelphi University.

Departure Control Order



U.S. Department of Justice
Immigration and Naturalization Service

Office of the District Director

7880 Biscayne Boulevard
Miami, FL 33138

APR 14 2000

Mr. Juan Miguel Gonzalez,
as legal custodian of
Elian Gonzalez
7105 Millwood Rd.
Bethesda, MD 20817

Re: Elian Gonzalez

Dear Mr. Gonzalez:

Pursuant to 8 C.F.R. § 215.3(k), the Immigration and Naturalization Service (INS) has determined that the departure of your son, Elian Gonzalez, would be prejudicial to the interests of the United States. This determination is based upon the pending appeal to the United States Court of Appeals for the Eleventh Circuit in Gonzalez v. Reno, No. 00-11424-D. In accordance with 8 C.F.R. § 215.2, Baltimore District Director Louis Crocetti and I hereby order your son, Elian Gonzalez, not to depart or attempt to depart from the United States, and order you not to depart or attempt to depart with your son from the United States, until the Eleventh Circuit Court of Appeals panel has issued its decision on plaintiff's appeal of the district court's ruling in that case.

This departure control order will become effective upon the presentation of your son, Elian Gonzalez, to the INS by Lazaro Gonzalez, as directed by the INS. We understand that you do not oppose this order.

Sincerely,

Robert Wallis
District Director

cc: Gregory Craig, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as next
friend, or alternatively as temporary legal
custodian, of ELIAN GONZALEZ,
a minor,

Appellants,

v.

JANET RENO, Attorney General of the
United States, *et al.*,

Appellees.

No. 00-11424-D

[District Court Case
No. 00-0206-CIV-MOORE]

APPELLEES' OPPOSITION TO
APPELLANT'S EMERGENCY
MOTION FOR AN
INJUNCTION PENDING
APPEAL OR ALTERNATIVELY
FOR STAY OF
ADMINISTRATIVE ACTION

Appellees, Janet Reno, *et al.* ("the government"), hereby oppose the motion by Lazaro Gonzalez, filed in his asserted capacity as next friend of Elian Gonzalez, for an injunction prohibiting the government from transferring Elian Gonzalez to the care and custody of his father, Juan Gonzalez and preventing Elian's return to Cuba or to any place under Cuban government control during the pendency of this appeal. The Court should deny the motion. There is no basis in law under the Immigration and Nationality Act or in the principles of equity governing injunctive relief for this Court to prevent the reunion of a father and son at the behest of a mere distant relative into whose care Elian was only temporarily placed under federal law.

As we explain below, appellant Lazaro Gonzalez has failed to make the showing

required to obtain the extraordinary remedy of injunction pending appeal. First, appellant has failed to establish a substantial likelihood of success on the only issue on appeal, which is whether the Commissioner of the INS, ratified by the Attorney General and sustained by the district court, permissibly decided to give effect to the determination of Juan Gonzalez, Elian's sole surviving parent, not to file an application for asylum for Elian in the United States. That decision respects the bond parent and child that is sacred in human history and experience, protected by the Constitution of the United States, given expression in the laws and practices of this Nation since its founding, and recognized as a fundamental principle in the international community — including the goal of family reunification under both U.S. immigration laws and international conventions.

Second, the balance of equities weighs heavily against the granting of an injunction pending appeal. Juan Gonzalez, who has had a major role in raising Elian for the first six years of his life, is now in the United States. He wants to be with his son again. Elian has lost his mother at sea. His father is his sole surviving parent, and he has a close extended family in Cuba who have also cared for him. The Attorney General, in whom Congress has vested responsibility for interpreting and implementing the immigration laws, has concluded that Juan Gonzalez properly speaks for his son under the immigration laws, and Juan and Elian therefore should be reunited. It is, moreover, essential to the United States' place in the world community that the requirement of prompt reunification of parent and child be respected by this Nation, in order to promote

reciprocal respect for that requirement by other countries to which U.S. children travel or are taken.

We recognize the relationship that has developed between Elian and his Miami relatives, their love for him, and the care they have given him. But Elian has a father who also loves him, and an extended family that does as well, and they have been with Elian for the first six years of his life. It is not uncommon for more distant relatives, like Lazaro Gonzalez and his family in Miami, to form a strong emotional attachment to a child at a particular time. But under the Constitution, laws and human experience of this country, that attachment does not give the relatives a right to keep the child from his parent, or allow a court to impose such a separation. Elian Gonzalez has been in the care of Lazaro Gonzalez and his family since his arrival in the United States only because he was temporarily paroled into Lazaro Gonzalez's care by the INS under federal law. That parole was subject from the outset to such conditions and instructions as the INS might impose, and it was subject to revocation at any time. Governing regulations provide that the first priority in releasing a juvenile alien from INS custody in the United States is to the juvenile's parent. Now that Elian's father is in the United States, the purposes of his temporary parole into the care of Lazaro Gonzalez and his family have ended, and federal law requires that Elian be transferred to his father.

The expert psychiatrists and psychologists who have assisted the Commissioner and the Attorney General in this matter have all concluded that, now that Juan Gonzalez is in

the United States, it is very important to Elian's long-term well being that Elian be transferred to his father's care as soon as possible, that the transfer be unambiguous, that his care-givers since his arrival in the United States prepare him for and participate in the transfer in a supportive manner, and that the transfer occur at a neutral location. The Commissioner and the Attorney General have gone to extraordinary lengths to bring about that result in a cooperative manner over the past week. But Elian's Miami relatives have refused to agree to those simple, clear undertakings. That refusal was most striking on April 13, when, after efforts at a cooperative arrangement failed, Lazaro Gonzalez defied an INS directive to present Elian to the INS at an airport in Miami so he could be transferred to his father's care. The temporary parole of Elian into Lazaro's care under federal law has therefore been revoked. In these circumstances, Lazaro Gonzalez comes to this Court with very unclean hands in seeking the extraordinary equitable relief of injunction pending appeal.

For the foregoing reasons, and as more fully explained below, we believe there is no basis for granting an injunction pending appeal. The principle concern reflected in the motion appears to be that if Elian and Juan are reunited, Juan Gonzalez might leave the United States with Elian during the pendency of the appeal. But aliens normally have the right to leave the United States and return home, and there is no reason under our laws

~~why Juan Gonzalez should not be free to do so — especially given the decision by the~~
Commissioner and the Attorney General, which is unchallenged by Lazaro Gonzalez in

this case, to allow Juan to withdraw the application for Elian's admission to the United States for the very purpose of allowing his return to Cuba to be with his father and extended family there. In a parallel situation involving a U.S. child abroad, the U.S. Government would object to any requirement imposed by a foreign government that the U.S. parent travel to the foreign country as a condition to having his child returned to him, much less that the parent remain in the other country with his child during the pendency of legal proceedings brought by more distant relatives to keep the child there. Freedom from such a requirement is a basic human right that the United States seeks both to honor and protect around the world. And here, because there is no merit to Lazaro Gonzalez' underlying appeal on the narrow issue of the asylum applications submitted by Lazaro Gonzalez, it is especially clear that Juan Gonzalez and Elian Gonzalez should not be compelled to remain in the United States, away from extended family, friends, and a familiar life, during the pendency of an appeal.

However, if the Court nevertheless believes that an assurance that Juan Gonzalez will remain in the United States pending the decision of this Court on the appeal is necessary and justified in these proceedings, that assurance is at hand. In a letter to the Attorney General dated April 13, 2000, counsel for Juan Gonzalez has formally notified the Attorney General that his client is willing to remain in the United States during the pendency of the appeal, so long as he has custody of his son, Elian. He further states that, once Elian is turned over to him, Juan Gonzalez would not oppose and would not

challenge the imposition of a departure control order issued by the INS requiring Elian to remain in the United States until the appeal is decided. The INS is authorized to issue such an order under Immigration and Nationality Act Section 215, 8 U.S.C. § 1185. If restrictions are to be placed on the travel of Juan and Elian Gonzalez once Elian is placed in Juan's care, those restrictions should be imposed by the Executive Branch, not the courts, pursuant to the statutory provision Congress has enacted for that purpose. But the United States would impose such an order only with substantial reluctance, because of serious concerns that other nations might impose similar restrictions on U.S. parents and children.

The fundamental and most pressing requirement in this matter is that Elian be reunited with his father in the United States. Indeed, as a response to Lazaro Gonzalez' concerns, a departure control order would be called for as a means of assuring that Elian will remain in the United States pending appeal only if Elian is in Juan Gonzalez' custody. Moreover, as noted above, Lazaro Gonzalez comes to this Court with very unclean hands in seeking the extraordinary equitable relief of an injunction pending appeal after refusing to agree to reasonable conditions for a cooperative transfer, then defied a specific INS directive that he present Elian to the INS at the Opa-Locka Airport on April 13, for transfer to Elian's father, and now continues to keep Elian with him despite the revocation

of parents of Elian into the federal court. On principle submission is that there is

no basis for an injunction pending appeal at all. At the very least, however, there is no

basis for imposing restrictions on the departure of Elian with his father unless Lazaro Gonzalez first cleanses his unclean hands by presenting Elian Gonzalez to the INS, as directed by the INS, for re-parole into the care of his father.

Accordingly, if the Court concludes that some greater assurance that Elian will remain in the United States is necessary and justified, then due to the particular circumstances of this case, the appellees consent to the entry by the Court of an order requiring the appellees to issue a departure control order barring the departure of Elian Gonzalez from the United States (and barring the departure of Juan Gonzalez with Elian Gonzalez) pending the issuance of a decision by this Court on the instant appeal, conditioned upon the Court's entry of an order directing Lazaro Gonzalez to present Elian Gonzalez to the INS, as directed by the INS, for transfer of care to Juan Gonzalez. The departure control order shall be effective upon the presentment of Elian Gonzalez by Lazaro Gonzalez, as directed by the INS.

I. BACKGROUND

Lazaro Gonzalez, asserting next friend status on behalf of appellant six-year-old Elian Gonzalez, comes to this Court seeking an injunction pending this Court's consideration of the appeal. The government hereby opposes Lazaro Gonzalez' motion for an injunction pending appeal or in the alternative for stay of administrative action.

~~Lazaro Gonzalez seeks to enjoin defendants from revoking Elian Gonzalez's parole and~~

reuniting him with his father, Juan Gonzalez, by re-paroling Elian into his father's care in

Maryland and ~~father~~ to prevent Elian Gonzalez from leaving the United States during this appeal.

As the Supreme Court made clear in Reno v. Flores, 507 U.S. 292, 310 (1993), however, INS regulations governing the release of juvenile aliens from INS custody pending immigration proceedings require that such juveniles be released to their parents, see 8 C.F.R. § 236.3(b)(1) (1999), “whom our society and this Court’s jurisprudence have always presumed to be the preferred and primary custodians of their minor children.” 507 U.S. at 310. By contrast, Lazaro Gonzalez falls in the last category of adults to whom juveniles may be released from INS custody, and release to such adults is entirely discretionary with the INS. See 8 C.F.R. § 236.3(b)(4) (1999). Elian Gonzalez has been in the temporary care of Lazaro Gonzalez only because he was paroled by the INS, and that parole has at all times been subject to such conditions as the INS might require — including the requirement that Lazaro present Elian to the INS as directed by the INS for transfer of care. Thus, quite aside from the issue on this appeal of whether the Commissioner of the Immigration and Naturalization Service and the Attorney General permissibly determined that Juan Gonzalez properly speaks for his son with respect to asylum, the regulations governing the release of juvenile aliens from INS custody while they are in the United States unambiguously authorize the Attorney General to revoke the ~~temporary parole of Elian into Lazaro Gonzalez’s care in Florida, require that Lazaro~~ present Elian to the INS in Florida, and re-parole him into the care of his father in

Maryland.

Lazaro seeks this injunction pending his appeal of the district court's March 21, 2000, decision in this matter granting appellees' motion to dismiss or alternative motion for summary judgment. *See Gonzalez v. Reno, et al.*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000). He had brought suit, challenging the decision of the Commissioner, a decision the Attorney General ratified, to honor Juan Gonzalez' decision not to pursue the asylum applications submitted on Elian's behalf by Lazaro Gonzalez. *See* Exhibit One, Memorandum for INS Commissioner Meissner, January 3, 2000; Exhibit Two, Letter from the Attorney General to appellant's counsel, January 12, 2000. Lazaro Gonzalez did *not*, however, challenge the Commissioner's separate decision, under 8 U.S.C. § 1225(a)(4) (Supp. IV, 1998), ratified by the Attorney General, to allow Juan Gonzalez to withdraw the application for the admission of Elian to the United States in order to give effect to Juan's desire that Elian be returned to him in Cuba. A decision allowing the withdrawal of an application for admission is, in any event, discretionary, and judicial review of such decisions therefore is barred by 8 U.S.C. § 1252(a)(2)(B)(ii) (Supp. IV, 1998). Thus, insofar as appellant seeks an order from this Court barring Juan Gonzalez from returning to Cuba with his son, that relief is barred by appellant's failure to challenge the decision of the INS Commissioner and the Attorney General allowing the withdrawal of the application for admission for that very purpose, and by the statutory prohibition of review of that decision in any event. This appeal is directed instead to the distinct and

narrow issue of the disposition of the asylum applications submitted by Lazaro Gonzalez for as long as Elian remains in the United States.

The Commissioner refused to accept the asylum applications because she concluded that only Juan Gonzalez could speak for Elian on immigration matters, and he had refused to assert Elian's statutory right to apply for asylum. The Commissioner also determined that there was not an objective basis for adjudicating those asylum applications notwithstanding his father's decision. In sustaining the Commissioner's decision, the district court observed:

In light of the Attorney General's clearly articulated views on the matter of whether Elian Gonzalez should return home, as well as the reality that each passing day is another day lost between Juan Gonzalez and his son, the Court can only hope that those on each side of this litigation place the interests of Elian Gonzalez above all others.

86 F. Supp. 2d at 1194.

Since the district court's decision on March 21, 2000, appellees have exercised patient restraint, and made extraordinary efforts to resolve this matter in a prompt, fair, and orderly manner. Their efforts have been repeatedly and aggressively rebuffed. On March 23, 2000, before Juan Gonzalez arrived in the United States, the government proposed an agreement wherein it would withhold enforcement action and continue the present temporary parole arrangement during the instant appeal, and Lazaro Gonzalez would agree to turn the care of Elian over to the INS (for the return of Elian to Cuba) in a prompt and orderly manner if this Court affirmed the district court's decision (and barring

any stay from the Supreme Court). The agreement failed, however, because Lazaro Gonzalez refused to provide even this basic assurance to produce Elian as directed by the INS, which is a long-standing requirement of federal law with respect to any alien who is paroled into the United States and any adult to whom a juvenile alien is released pending immigration proceedings. See 8 C.F.R. §§ 212.5, 236.3(b)(4) (1999).

Although INS was willing to leave the temporary care of Elian with Lazaro Gonzalez pending appeal if Lazaro made that basic commitment, The INS made it clear at the same time that if a material change occurred in the circumstances surrounding the temporary parole -- most particularly, if Juan Gonzalez came to the United States for his son -- the temporary parole would change. This is what occurred when, on April 6, 2000, Juan Gonzalez, his wife, and their infant son, Elian's half-brother, came to the United States.

The Attorney General personally met with Juan Gonzalez and his wife and son without the presence of any Cuban officials on April 7, 2000. Juan Gonzalez reiterated that he wanted his son back and wanted to return to Cuba. After that meeting, the Attorney General expressed her intent to move forward with the reunification of father and son in the United States. Also on April 7, 2000, the INS informed Lazaro Gonzalez that it was moving forward with steps to transfer Elian's parole to Juan Gonzalez; that it

and sought the advice of two eminent psychiatrists and a prominent psychologist to assess, assess, and facilitate the transfer; and that these experts were to meet separately with Juan Gonzalez

and Lazaro Gonzalez and his family. See Exhibit Three, April 7, 2000 letter. These experts met with Juan Gonzalez on April 9, 2000, and with Lazaro Gonzalez on April 10, 2000.

On Wednesday, April 12, the Attorney General and the INS Commissioner flew to Miami to meet with Lazaro Gonzalez. The Attorney General and the Commissioner sought to "work out a cooperative agreement" to "resolve this matter in a way least damaging to the child." See Statement of Attorney General Janet Reno, April 12, 2000. She met with Lazaro Gonzalez and his family for two and a half hours, but was unable to reach an agreement. Shortly thereafter, the INS transmitted a letter by facsimile to Lazaro Gonzalez that directed him to bring Elian to the Opa-Locka Airport at 2:00 p.m., April 13, 2000, at which time he had two alternatives: he could either (a) travel to Washington, D.C. with Elian, his daughter Marisleysis, and members of his family, in the company of an INS officer experienced in immigration matters involving children for a meeting with Juan Gonzalez, after which parole of Elian would be transferred to Juan Gonzalez; or (b) if he did not want to meet with Juan Gonzalez, present Elian at the Airport at the same time, at which point Elian's care would transfer to the INS officer who would then escort Elian to Washington, D.C., and thereafter parole would transfer to Juan Gonzalez. See Exhibit Four, April 12, 2000 letter.

In the aftermath of the unsuccessful meeting, Lazaro Gonzalez spoke to the news media. He characterized appellees' lawful directive as "a traitorous act," and he

challenged appellees to send federal officers to his home to take Elian "by force," stating "Our position is that we will not turn over the child — anywhere." See Andres Viglucci, Jay Weaver and Ana Acle, *Reno Wants Elian Today, Great-Uncle Challenges U.S. to Take Boy 'By Force,'* Miami Herald, April 13, 2000 (available on the World Wide Web at <http://herald/archive/news/rafters99/docs/087403.htm>).

Lazaro Gonzalez has now sought an injunction from this Court preventing appellees from enforcing the INS's lawful directive and preventing Elian from returning to Cuba once he is reunited with his father. Notwithstanding the March 21, 2000, decision of the district court that sustained the Attorney General's decision and left her free to order the revocation of temporary parole even before Juan Gonzalez had arrived in the United States — and notwithstanding the Attorney General's clear pronouncement on April 7, 2000, that Elian would be promptly reunited with his father now that he is in the United States — Lazaro Gonzalez waited until less than one hour before the scheduled time at which he was required to present Elian to the INS at Opa-Locka Airport on April 13, 2000, to seek relief from this Court. The Court should deny Lazaro Gonzalez's last-minute request to delay once again the reunion of Elian with his father, after he refused to comply with the clear requirement of federal law that he both agree to present Elian to the INS as directed and then, at 2:00 p.m. yesterday, actually present Elian when ordered to

⁴Approximately two hours before appellant filed his emergency application in this Court, the state family court dismissed the action appellant filed in that court in an effort to mount a

II. THE COURT SHOULD DENY APPELLANT'S REQUEST FOR AN INJUNCTION PENDING APPEAL

A. STANDARD OF REVIEW FOR GRANTING INJUNCTION PENDING APPEAL

An injunction pending appeal, like a stay pending appeal, is considered "extraordinary relief" for which the moving party bears a "heavy burden." *Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). "Such relief should be sparingly granted." *Atlantic Richfield Company v. Federal Trade Commission*, 398 F. Supp. 1 (S.D. Texas 1975) (citing *F.M.C. v. New York Terminal Conference*, 373 F.2d 424, 426 (2d Cir. 1967)). "The burden on those seeking an injunction pending appeal is a heavy one, much heavier than when an interlocutory injunction is sought in the trial court before the trial court has entered judgment." *Overbrook Egg Nog Corporation v. Miller, Secretary of Treasury*, 488 F. Supp. 156, 176 (D. Md. 1980) (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.*, 550 F.2d 189, 194 (4th Cir. 1977)).

In determining whether to grant an injunction pending appeal, a court must

collateral attack on the Attorney General's decision to give effect to Juan Gonzalez's desire to be reunited with his son in Cuba. The family court held that the state court action was preempted by federal law, which gives the federal government exclusive authority to determine when an alien will return to another country. See In Re: Lazaro Gonzalez, as Custodian of Elian Gonzalez, a Minor, Petitioner, and Jose Miguel Gonzalez Quintana, Case No. 03-03-176-FG-28 (Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Florida) (Order and Opinion attached). Although that case had been pending in family court for more than three months after the court issued a temporary custody order on January 10, 2000, appellant sought to revive the case on an emergency basis on the evening of Saturday, April 8, by filing a motion for a full trial on the question of whether Elian should be with his father in Cuba. *Id.* at 5-6.

examine the following factors: (1) whether the movant has made a strong showing that he is likely to prevail on appeal; (2) whether the movant will suffer irreparable injury; (3) whether granting the injunction will substantially injure the nonmoving parties; and (4) where the public interest lies. See *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986), cert. denied, 479 U.S. 889 (1986); *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968); *Johnson v. Mortham*, 926 F. Supp. 1540, 1541 (N.D. Fla. 1996). An injunction may be issued on a lesser showing of a "substantial case on the merits" when "the balance of the equities weighs heavily in favor of" the moving party. *Isaly Co. v. Kraft, Inc.*, 622 F. Supp. 62, 63 (M.D. Fla. 1985) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981));² see also *Garcia-Mir*, 781 F.2d at 1453.

**B. LAZARO GONZALEZ HAS NOT DEMONSTRATED THAT HE IS
LIKELY TO PREVAIL ON THE MERITS OF HIS APPEAL**

**(1) Appellant Must Make A "Strong Showing" That The Agency Decision
Is Not "Facially Legitimate And Bona Fide" or An Abuse of Discretion**

Lazaro Gonzalez has fallen far short of making the required "strong showing," *Hilton*, 481 U.S. at 776, that he is likely to succeed on the merits. In order to consider the question of likelihood of success on the merits, it is important to bear firmly in mind both what the narrow issue on appeal is and the narrow standard of review that applies to that

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), this circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981.

issue.

(a) The appeal of the district court's decision concerns the permissibility of the Attorney General's determination that the asylum provisions of the Immigration and Nationality Act, 8 U.S.C. § 1158, permit her to conclude that a sole surviving parent speaks for his or her child with respect to an asylum application when the child is too young to comprehend the significance of those matters.

In order even to be eligible for asylum, an alien must make a specific type of showing: the alien must show that he is a "refugee," *see* 8 U.S.C. § 1158(b)(1) — i.e., that he is unable or unwilling to return to his country of nationality, and to avail himself of the protection of that country, because of past persecution or a well-founded fear of future persecution based on one of five factors, including political opinion. *See* 8 U.S.C. § 1101(a)(42)(A).² Lazaro Gonzalez' arguments concerning whether it would be in the best interests of Elian to return to Cuba with his father, general standards of living in Cuba, and Elian's relationship with Lazaro or Marisleysis Gonzalez are simply not relevant to the narrow issue on this appeal concerning the Commissioner's and Attorney General's disposition of the asylum applications submitted by Lazaro Gonzalez.

Furthermore, this appeal furnishes no basis for the Court to enjoin INS's transfer of temporary parole and care of Elian from Lazaro Gonzalez to Elian's father, Juan Gonzalez, as is required by INS regulations governing the transfer of parole aliens in the

²The other criteria are race, religion, nationality, or membership in a particular social group.

United States. And the pendency of this appeal furnishes no basis whatever for Lazaro Gonzalez to defy a directive of the INS that he present Elian to the INS for that purpose. Again, the question on this appeal concerns the disposition of the asylum applications submitted by Lazaro Gonzalez in Elian's name; the pendency of that issue in this Court in no way affects whose care Elian will be in while he is in the United States. Lazaro's submission of an asylum application in Elian's name has no bearing on the responsibility of the Commissioner and the Attorney General under the governing regulation to place Elian in his father's care now that Juan Gonzalez is in the United States, no bearing on Juan Gonzalez' compelling claim to receive Elian into his care under that regulation, and no bearing on Lazaro Gonzalez' duty under federal law to present Elian to the INS as required by the INS, so that he can be transferred to his father.

For the foregoing reasons, the likelihood-of-success prong of the showing Lazaro Gonzalez must make in order to obtain the extraordinary relief of an injunction pending appeal can be satisfied only if he establishes a substantial likelihood that this Court will reverse the district court's judgment sustaining the Commissioner's and the Attorney General's decisions on the asylum application issue.

(b) The standards governing judicial review of the decision of the Commissioner, ratified by the Attorney General concerning the asylum applications are well established.

Under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court of Appeals can set aside

the Commissioner's decision only if it is not "facially legitimate and bona fide."⁴ Reliance on the *Kleindienst* standard is appropriate because both that case and this case involve agency decisions relating to aliens seeking admission to the United States.

However, even under the more exacting (but still highly deferential) standard of review that is generally applicable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, the INS decision at issue before the Eleventh Circuit should be upheld. As the district court observed regarding APA review, "courts hold agency findings and decisions unlawful only if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Gonzalez*, 2000 WL 289604, at *25 (quoting 5 U.S.C. § 706(2)(A)) (citation omitted). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Company v. Lorion*, 470 U.S. 729, 743-44 (1985).

The record this Court will review in considering the district court's entry of

⁴ Although the district court did not apply the *Kleindienst* standard to Count 2 because it found that *Kleindienst* applies only when a plaintiff "asserts a constitutional challenge to agency action," *Gonzalez*, 2000 WL 289604, at *31 n.33, the government respectfully points out that Eleventh Circuit case law is to the contrary. See, e.g., *Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986) (applying *Kleindienst* standard, in absence of constitutional challenge, to INS parole denial), *Sidney v. Howerton*, 777 F.2d 1490, 1491 (11th Cir. 1985) (same).

summary judgment on Count 2 depends on whether that court reviews the decision under the *Kleindienst* standard or the APA standard. If the Court applies the *Kleindienst* standard, it should review only the three letters from the INS to Juan Gonzalez, to Lazaro Gonzalez, and to Lazaro's attorneys; the Commissioner-approved INS memorandum, at pages one through twenty-three of the administrative record; the Attorney General's letter responding to the request by counsel that she review the Commissioner's decision, at pages twenty-four through twenty-eight; and the asylum applications filed under seal. See Defendant's Motion to Dismiss or Alternative Motion for Summary Judgement, Administrative Record and Exhibits. Again, all that is necessary to sustain an agency decision reviewed under the *Kleindienst* standard is "a facially legitimate and bona fide reason." 408 U.S. at 770.

If, on the other hand, the Court applies the APA standard, review of the 318-page record the government submitted with its dispositive motion, minus the declarations the government asked the district court to consider only in connection with the equitable bases of plaintiff's motion for preliminary injunctive relief,² is appropriate. A *de novo* review of the facts underlying the Commissioner's decision is not appropriate, although the Court may "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicles*,

² The government asked the district court not to consider any declarations it had submitted, except in connection with the equitable bases of appellant's motion for injunctive relief. See Defendants' (appellants') Concise Summary Of Position On Pending Motions And Review Of Administrative Record, at 1-3.

463 U.S. at 43 (citing *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974); *Cooperative Services, Inc. v. HUD*, 562 F.2d 1292, 1295 (D.C. Cir. 1977)).

To the extent the Commissioner's decision involves questions of statutory interpretation, "[c]onclusions of law rendered by summary judgment are subject to the same standard of review as any other question of law raised on appeal." *Lipscomb v. United States*, 906 F.2d 545, 548 (11th Cir. 1990) (citing *Erwin v. Westfall*, 785 F.2d 1551, 1552 (11th Cir. 1986), *aff'd*, 484 U.S. 292 (1988)). Because what is involved here is the interpretation of an asylum statute the INS administers, the applicable principles of statutory interpretation are described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). See also 8 U.S.C. § 1103(a) (stating that the Attorney General's determinations of all questions of law under the INA "shall be controlling").

Under *Chevron*, where Congress has not addressed the issue, a court must defer to the agency's interpretation if it is permissible or reasonable. *Lipscomb*, 906 F.2d at 545 (citing *Chevron*, 467 U.S. at 843-44). "A finding of reasonableness does not require a finding that the agency interpretation was the only possible construction, or that the agency made the same finding the court would have made." *Id.* (citing *Curse v. Director,*

Office of Workers' Compensation Programs, 843 F.2d 456, 460 (11th Cir. 1988) (quoting *Chevron*, 467 U.S. at 843 n.11)). Moreover, the Supreme Court observed in *Aguirre-*

Aguirre that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 119 S. Ct. at 1445 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

The Supreme Court's recognition of immigration law as occupying a unique status for judicial review dates back more than a hundred years. "Our cases have recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)) (collecting cases). "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Aguirre-Aguirre*, 119 S. Ct. at 1445; *see also Fiallo v. Bell*, 430 U.S. at 792 (Supreme Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens"); *Mathews v. Diaz*, 426 U.S. 67, 79-82 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("any policy toward aliens is vitally and intricately interwoven with

~~contemporaneous policies in regard to the conduct of foreign relations"). Thus, the~~

Commissioner's interpretations of the Immigration and Nationality Act are entitled to

more deference than what is accorded other agencies in their interpretations of laws not occupying a similar status.

Appellant's third and fourth claims in the complaint to the district court allege violations of INS asylum regulations at 8 C.F.R. §§ 208.9 and 208.14(b). The district court dismissed these Counts based on its analysis of Count 2 and its "determination that the decision of the Attorney General is controlling both on the issue of Plaintiff's capacity to file an application for asylum and on the question of who may speak for Plaintiff in the face of Plaintiff's incompetence," and conclusion that in light of Elian's lack of capacity to apply for asylum, "no asylum applications are pending." *Gonzalez*, 2000 WL 289604, at **21, 30. Judicial review of the district court's dismissal of Counts 3 and 4 is *de novo*, as is judicial review of the district court's conclusion that the Count 5, the mandamus count, fails as a matter of law.

(2) Lazaro Gonzalez Has Not Made The Required "Strong Showing" With Respect to His Appeal of The District Court's Dismissal of His Due Process Count

The district court dismissed Count 1 of the complaint for failure to state a claim. In dismissing this Count for failure to state a claim, the district court found that plaintiff lacked a "constitutionally protected liberty interest"; that he is an unadmitted alien, standing, as it were, "on the threshold of initial entry"; and that his status as an alien who

has been paroled into the United States makes no difference from the standpoint of his inability to assert constitutional rights with respect to his admission to the United States.

Gonzalez, 2000 WL 289604, at **21-22 (citations omitted). In this regard, the district court relied primarily on *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*) (affirmed on other grounds, 472 U.S. 846 (1985)), noting, among other things, that there the Eleventh Circuit had held that unadmitted aliens cannot challenge INS decisions on their "applications for admission, asylum, or parole on the basis of rights guaranteed by the United States Constitution." *Gonzalez*, 2000 WL 289604, at *22. In light of Elian's status as an unadmitted alien, the district court concluded, "no set of facts will support Plaintiff's claim for a denial of constitutional due process under Count 1, and this Count must be dismissed." *Id.*

In *Jean v. Nelson*, a class action brought on behalf of Haitian aliens being held in INS detention pending adjudication of their asylum claims, the Eleventh Circuit, sitting *en banc*, had occasion to examine whether unadmitted aliens have constitutional rights with respect to their applications for admission. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958) (although physically present within this country's borders, unadmitted and excludable alien not "within the United States"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953) (inadmissible aliens are "treated as if stopped at the border" and as being merely "on the threshold of initial entry").

This Court concluded that, "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Jean*, 727 F.2d at 967 (quoting *Nishimura Ekiu v. United States*, 142

U.S. 651, 660 (1892)) (collecting cases).⁹ The Eleventh Circuit's holding in this regard is settled law. Aliens "on the threshold of initial entry" have no more constitutional rights in connection with their applications for admission than would an alien physically located in another country. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (An alien on the threshold of entry "has no constitutional rights regarding his application [for admission], for the power to admit or exclude aliens is a sovereign prerogative."); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (Bill of Rights a futile authority for applicant for admission); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned")¹⁰; *id.* at 600 (denial of removal hearing "raises no constitutional conflict if limited to 'excludable' aliens who," again by virtue of their status, "are not within the protection of the Fifth Amendment"); *Gisbert v. U.S. Attorney*

⁹ This Court has made clear, however, that "aliens can raise constitutional challenges to deprivations of liberty or property outside the context of entry or admission, when the plenary authority of the political branches is not implicated." *Jean*, 727 F.2d at 972. See also *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987) ("outside the context of admission and exclusion procedures, excludable aliens do have due process rights.") (emphasis added).

¹⁰ The Supreme Court further stated,

[A]n alien who seeks admission to this country may not do so under any claim of right. . . . Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. . . . [I]t is not within the province of any court, unless expressly authorized by law to review the determination of the political branch of the government to exclude a given alien.

Knauff, 338 U.S. at 542.

General, 988 F.2d 1437, 1442 (5th Cir. 1993) (excludable aliens entitled only to those due process rights as are provided by law); *Lynch v. Cannarella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("entry fiction' that excludable aliens are to be treated as if detained at the border . . . determines the aliens' rights with regard to immigration and deportation proceedings").

As for the specific question of whether unadmitted aliens may assert a right to asylum based on the Fifth Amendment's Due Process Clause, the Eleventh Circuit was explicit. "[E]xcludable aliens . . . have no constitutional rights with respect to their applications for . . . asylum" 727 F.2d at 984. Rejecting an argument that the Refugee Act created a constitutionally protected "liberty" or "property" interest in asylum, it found that it is "clear that the Refugee Act does not create an entitlement to asylum" but only provides that asylum may be granted in the Attorney General's discretion. *Id.* Therefore, the Eleventh Circuit concluded, "[t]he grant of asylum does not . . . create an interest protected by the due process clause." *Id.* at 981-82.⁹ Other circuits also have found that the INA's asylum provisions do not create a constitutionally protected liberty or property interest. *See, e.g., Garcia v. INS*, 7 F.3d 1320, 1326 (7th Cir. 1993); *Ramirez-*

⁹ In affirming the *en banc* decision in *Jean*, the Supreme Court stated that the Eleventh Circuit "did not reach constitutional issues because the issues on appeal could have been resolved on statutory and regulatory grounds." *Jean*, 472 U.S. at 234-55. Nevertheless, the Eleventh Circuit later found that "our *en banc* holding in [*Jean*] regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds." *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 n.20 (11th Cir. (1995)).

Osorio v. INS, 745 F.2d 937, 942-43 (5th Cir. 1984).

Appellants base their first count on an assertion that Elian's parole entitles him to the constitutional protections afforded "all persons within the territorial jurisdiction of the United States." Complaint at ¶ 36. The Eleventh Circuit in *Jean* expressly rejected this contention, saying, "The Supreme Court has consistently rejected claims that the parole or detention of an excludable alien has an effect on his status under the law." 727 F.2d at 969 (citing *Leng May Ma*, 357 U.S. at 188; *Mezei*, 345 U.S. at 215; *Kaplan*, 267 U.S. 228, 230-31 (1925); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Nishimura Ekiu*, 142 U.S. at 661; *Ahrens v. Rojas*, 292 F.2d 406, 410-11 (5th Cir. 1961)). "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status." *Id.* (quoting *Leng May Ma*, 357 U.S. at 190).⁹ Clearly, Lazaro Gonzalez' motion for an injunction pending appeal prohibiting enforcement of the INS parole revocation and reparole of Elian into his father's care — as is expressly provided for in regulations governing the release of alien juveniles — lacks the required "strong showing" as to Count 1.

⁹ In any event, even if the Due Process Clause were applicable, the Attorney General has afforded more than adequate process and due diligence with respect to the application for asylum or admission. The Commissioner of the INS did not arbitrarily deny or extinguish any interest or ability to submit such applications. She gave effect to Juan Gonzalez' decision to withdraw those applications only after providing for two interviews of him in Cuba and after affording Lazaro Gonzalez an opportunity to be heard, and she personally met with Juan Gonzalez on April 7 and Lazaro Gonzalez and his family on April 12.

(3) **Lazaro Gonzalez Has Not Made The "Strong Showing Required for Injunctive Relief with Respect to Counts 2 Through 5"**

Nor has Lazaro made the required showing to obtain an injunction based on Counts 2 through 5. At issue in these counts is the question of whether the Commissioner and Attorney General reasonably construed Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, not to require a full adjudication of an asylum application filed on behalf of a six-year-old child by a distant relative where (1) the child's own father (whom the Commissioner has found to enjoy a close and loving relationship with his son (*see* Exhibit One at 4, 5-6, 7)) has decided not to file such an application, *and* (2) the Commissioner and the Attorney General have not found an objective basis for asylum in any event after reviewing the applications and other evidence submitted. *Id.* at 10-11. Elian has a right under the statute or regulations to apply for asylum.

Lazaro Gonzalez, of course, disputes the district court's reliance on *Chevron* deference, arguing that the language of 8 U.S.C. § 1158(a) is plain and affords Elian the right to apply for asylum. But Lazaro continues to miss the point. Section 1158(a)(1) provides that "any alien" in the United States may apply for asylum. But the question here is not whether Elian *may* apply for asylum: the INS has always acknowledged that he may. *See* Defendant's Motion to Dismiss, Administrative Record and Exhibits at 16

(agencies' decisions recognizing that "asylum statute clearly invests a child with the right to apply for asylum" and that "the INS has always acknowledged that he may apply for asylum"). Rather, the question is whether Elian *has applied* for asylum: the INS

concluded that because of his tender years he cannot do so for himself, and that the person

through whom Elían could apply — his father — expressly declined to do so. The INS apprised Lazaro Gonzalez of that conclusion before Lazaro filed his lawsuit. *See, e.g.*, Administrative Record and Exhibits at 4-5 (Jan. 5, 2000, INS letter to Lazaro Gonzalez, refusing to accept Lazaro's asylum applications for Elían because "Elían does not have the capacity to apply for asylum without the assistance of his parent," and Elían's father "has repeatedly informed us of his decision not to assert Elían's right to apply for asylum"); *id.* at 6 (Jan. 5, 2000, INS letter to Lazaro's attorneys) (same); *id.* at 15 (agency decision analyzing, "[i]s Elían truly seeking asylum?"). Lazaro's plain meaning arguments overlook this point. As the INS decision put it, "While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved." *Id.* at 16.

Finding that the capacity of a six-year-old to apply for asylum is a question of law, the district court upheld the INS conclusion that Elían lacked sufficient capacity. Section 1103(a)(1) of Title 8 supports this because there Congress directed that the Attorney General's determinations and rulings on all questions of law "shall be controlling." And Section 1158 of Title 8 supports this, for, as the district court aptly observed, to accept Lazaro's argument that all children have a right to apply for asylum independent of what their parents may want for them "requires the Attorney General to adjudicate asylum

applications from all children — no matter how young in age, no matter who claims to speak for them, and no matter what their mental condition." *Reno v. Gonzalez*, 86 F.

Supp. 2d at 1192. Lazaro's brief to the Eleventh Circuit challenges the Court's conclusion regarding the competency issue, insisting that "if a young child is medically qualified to speak . . . his words should at least be considered." Appellant's Opening Brief at 27. But as the Seventh Circuit observed in *Polovchak v. Meese*, 774 F.2d 731, 736 (7th Cir. 1985), where the INS had granted asylum to a twelve-year-old Soviet boy against his parents' wishes, Polovchak "was presumably near the lower end of the age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents." Polovchak was twelve. Elian is half that age.

Because the Commissioner, ratified by the Attorney General, permissibly concluded that Elian lacks the legal capacity to apply for asylum on his own, the question then is which of two adults -- his father, who has raised him for six years in a close and loving relationship and who is his sole surviving parent with full legal authority to act on his behalf -- or a distant relative in whose care Elian was only temporarily paroled, pending completion of immigration matters and reunion with his father. The decision of the Commissioner and the Attorney General that the parent properly speaks for the child in these circumstances is consistent with longstanding legal principles and practices in this country and is firmly grounded in the Constitution, as the Supreme Court recognized in Reno v. Flores. The sacred bond between parent and child is also a universally shared principle in the international community. Respecting that bond also furthers the family-reunification principles of the immigration laws and international agreements,

including those governing refugees. And, finally, adherence to that rule of law in this case is of central importance to the United States in the world community, in order to ensure that other nations to which U.S. children travel will return U.S. children to this country promptly under comparable circumstances. *See the 1980 Hague Convention on Civil Aspects of International Child Abduction.*

To the extent that Lazaro's motion for injunctive relief and Eleventh Circuit brief go beyond questions of law to other aspects of the agency decision, he must make a strong showing that the decision is not facially legitimate and bona fide or at most that it is arbitrary and capricious. He claims the INS did not assess Elian's interests or whether those interests may diverge from his father's. Opening Brief at 25-34. But the agency's decision clearly reflects that it considered the question of whether Elian's interests diverge from his father's. *See* Administrative Record and Exhibits at 7 ("The INS must determine whether the father has an interest that conflicts with his ability to represent the immigration interests of the child. Specifically, the INS must consider whether the possibility of coercion precludes Elian's father from making his true intentions known and speaking on behalf of Elian and whether Elian's asylum application represents a divergence of interests between the father and child"). The INS reasoning on that issue satisfies both the *Kleindienst* and the APA standard.

Moreover, the Commissioner and the Attorney General did not rest their decisions solely on Juan Gonzalez's decision not to file an asylum claim on behalf of Elian. Before

giving effect to that decision, the Commissioner and the Attorney General specifically considered whether, notwithstanding Juan Gonzalez's decision not to file an asylum application on Elian's behalf, there nevertheless was an objective basis for such an asylum claim. After reviewing the applications and other information submitted by Lazaro Gonzalez, they concluded that there was not. *See* Administrative Record at 10-11. In taking that approach, the Commissioner relied on the practice in analogous situations where an accompanied minor arrives in the United States. *Id.* at 8-11.

In addition, through its investigation and two interviews of Juan Gonzalez, the INS developed a significant administrative record demonstrating that Juan Gonzalez had a long-standing, affectionate, parental relationship with Elian throughout the boy's life. *See* Defendant's Motion to Dismiss, Administrative Record and Exhibits at 48-55, 72-107, 118-99, 228-43. Juan Gonzalez has been an involved and caring father whether it came to parental participation in a child's education and activities (*Id.* at 72-107); his medical treatment and care — Juan Gonzalez was the listed parental point of contact in Elian's hospital records (*Id.*); or whether it involved the simpler and happier activities like teaching a boy to swim, ride a bike, do karate, or get a haircut (*Id.* at 51). Beyond the fact of his parents' divorce and the problems attendant on that for any family, Elian enjoyed a happily normal life in the nurturing bosom of his Cuban family. This record further supported the conclusions by the Commissioner and the Attorney General that Juan Gonzalez is a proper representative of Elian in immigration matters.

The implementation of Immigration and Nationality Act Section 208 by the Commissioner in these unusual circumstances is fully consistent with the statutory text and plainly satisfies both the Kleindienst and APA standards. As we have said, the fundamental question on this appeal is not whether Elian can apply for asylum, but whether he has done so. The Commissioner concluded that a juvenile of such tender years as Elian lacks the legal capacity to apply for asylum. The question then, in determining whether Elian has filed an application for asylum, is which of two adults speaks for Elian -- his father, or a far more distant relative. The decision of the Commissioner and the Attorney General that Elian's father speaks for him, and that therefore Elian should not be regarded as having filed an asylum application, was consistent with background principles governing the parent-child relationship -- principles that in this country are rooted in the Constitution as well as universally accepted norms. Section 208(b)(1) of the Immigration and Nationality Act, 8 U.S.C. 1158(b)(1), specifically provides that the Attorney General "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General." Here, the Commissioner, affirmed by the Attorney General, adopted the reasonable "requirement" that when an asylum application is sought to be submitted on behalf of a minor of tender years, who lacks the legal capacity to file an application on his own behalf, the application must be filed by the person who lawfully and properly speaks for the child and that, in the present circumstances, that person is Elian's father.

Furthermore, Section 208(d)(1) provides for the Attorney General to establish a procedure for the consideration of asylum applications that are filed under subsection (a). Even if Lazaro Gonzalez were correct that the applications he submitted on behalf of Elian should in some sense be deemed to have been "filed," the Commissioner and the Attorney General adopted a sensible and permissible procedure for "consideration" of those applications. As stated above, the Commissioner provided for two interviews of Juan Gonzalez in Cuba and one of Lazaro Gonzalez in Miami, and the Commissioner also considered the allegations made in the applications themselves as well as numerous declarations and other materials that were submitted. The Commissioner also drew from practices in analogous circumstances in fashioning her approach to considering the applications that had been submitted in Elian's behalf by someone other than his father. Those procedures, involving full and repeated consideration by the Commissioner and the Attorney General of the United States, were far more than ample as a basis for concluding that the applications Lazaro Gonzalez sought to file against the wishes of Elian's father would not be regarded as having been filed by Elian and did not in any event furnish an objective basis for asylum independent of his father's wishes. Section 208(d)(7) of the Immigration and Nationality Act provides that nothing in subsection (d) creates any procedural or substantive right that is legally enforceable against the United States or any of its officers. Section 208(d)(7) thereby bars judicial review of the adoption or implementation of procedures by the Attorney General for the consideration of asylum

applications in these circumstances. But to the extent judicial review is available, the Attorney General's approach plainly satisfies Kleindienst and the APA.

Finally, relying on *Johns v. INS*, 624 F.2d 522 (5th Cir. 1980), Lazaro seeks reversal of the district court's decision because the Court did not appoint a guardian ad litem. Opening Brief at 53-55. He has not made the required "strong showing" here either. *Johns* did not require the appointment of a guardian ad litem for Elian. The analysis of the guardian ad litem issue in *Johns* rested on application of the Fifth Amendment Due Process Clause, a constitutional protection, as the district court recognized in its analysis of Count 1, that does not apply here on account of Elian's status as an unadmitted alien. 86 F. Supp.2d at 1187. In any event, the district court recognized Lazaro as Elian's "next friend." 86 F. Supp. 2d at 1186. Whatever the precise differences were between a next friend and a guardian ad litem before Congress adopted Rule 17(c), the distinction has been eliminated.¹⁹ See Wright & Miller, *Federal Practice and Procedure* § 1572; see also Fed. R. Civ. P. 17(c) (infant may sue by next friend or by a guardian ad litem).

C. THE BALANCE OF EQUITIES WEIGHS HEAVILY AGAINST AN INJUNCTION

¹⁹ If Lazaro's complaint is that the district court did not appoint a guardian with expansive powers as an advisor, such an appointment would have exceeded Rule 17(c)'s authority, and would have circumvented legal restrictions on the proper use of the Court's review of the Attorney General's decisions in this area. See Defendants' Motion To Dismiss at 67-80; Defendants' Concise Summary Of Position On Pending Motions And Review Of Administrative Record at 1-3.

(1) **The Equities of Juan Gonzalez and Elian in Prompt Reunification Far Outweigh Those of Lazaro Gonzalez in Preventing Reunification**

In assessing the balance of equities in this case, it is essential to recognize that this is not a suit brought by Elian, who is a six-year-old child lacking the legal capacity to sue. Rather, it is, fundamentally, a suit arising out of a disagreement between two adults over who should speak for and have custody of Elian. Specifically, it is a suit by Lazaro Gonzalez — who has had Elian in his care since November only because the INS temporarily paroled Elian into his care under federal law during the pendency of immigration proceedings — that seeks to keep Elian with Lazaro Gonzalez in the United States against the express wishes of the boy's father and against the express determination of the Commissioner and the Attorney General (sustained by the district court) that Elian's father properly speaks for him in immigration matters. Although we recognize the affection for and attachment to Elian that Lazaro and his family feel, that affection and attachment do not constitute equities that can outweigh the constitutionally and historically protected interests of Juan Gonzalez in being reunited with his son and returning with him to their home among extended family and friends.

Furthermore, the interest in reuniting father and son, and the equities weighing heavily in favor of allowing the Attorney General to bring it about in accordance with her

considered judgment, almost Juan's alone. The respect for the special privileges and

responsibilities of parenthood under our constitutional heritage derive as well from the

recognition that children benefit from the special bond, nurturing, guidance, and learning

that they experience with their parents from the moment of birth. It is a fundamental premise of society that the entrusting of children to the care of their parents will result in the most fitting course of their development and decisions about their lives, even if others might disagree with a parent's choices. In this case, Elian's father and extended family in Cuba raised him for the first six years of his life. The relief Lazaro Gonzalez seeks would deprive Elian of the most basic opportunity to experience that relationship with his father and extended family once again. That is decidedly an equity weighing strongly in favor of immediate effectuation of the Attorney General's decision that Elian should be reunited with his father.

Finally, it is essential to the freedom and autonomy of both parent and child that society honor their shared relationship and sacred bond. The very foundation of society in turn rests on those basic relationships and a broadly shared affirmation of their importance. Respect for the bond between parent and child therefore is still another equity weighing against an injunction barring effectuation of the Attorney General's decision.

(2) Elian Will Be Harmed If Reunification Is Delayed

The district court, in fact, trenchantly noted that "Even this well-intended litigation has the capacity to bring about unintended harm." *Gonzalez*, 2000 WL 289604, at *30.

The district court's observations respecting the Attorney General's clearly articulated views on the matter of whether Elian should return home, [and] the reality that each

passing day is another day lost between Juan Gonzalez and his son" (*id.*) go to the heart of this question. Since November 22, 1999, over 140 days have been lost between Elian and Juan Gonzalez. It is time to staunch that loss.

Elian will suffer irreparable harm if the Court grants an injunction pending appeal. Dr. Paulina Kernberg, who together with Dr. Jerry M. Weiner and Dr. Lourdes Rigual-Lynch, interviewed Juan Gonzalez and his wife, as well as Lazaro Gonzalez (on April 9 and April 10, 2000, respectively), advised the INS Commissioner Meissner concerning the "impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez." See Exhibit Five, Declaration of Dr. Paulina Kernberg ; concurrences of Dr. Jerry M. Weiner, Exhibit Six, and Dr. Lourdes Rigual-Lynch, Exhibit Seven. It was Dr. Kernberg's opinion that "it is crucial for Elian to clear about who has authority for him, namely his father." She continued, "Not to return to his father as soon as possible may make him feel that he has lost not only one parent, but two parents." See Exhibit Three, page 2. She stated, "It is my opinion that the immediate, definitive, and unambiguous transfer of Elian into the custody of his father, Juan Gonzalez, preferably in a neutral setting, would make an essential contribution to Elian's mental and emotional well-being. This is especially so given that Elian is aware that his father has been in the United States for nearly one week . . . Any further delay in reuniting Elian with his father or any action that would create a sense of ambiguity or uncertainty as to who will be responsible for Elian's care and well-being could be expected to cause

increasing stress and psychological harm to Elian." *Id.* at page 3. She opines that "a transfer in a neutral setting would be preferable," but "the most important consideration at this time is Elian's immediate and unambiguous reunion with his father." *Id.*

Finally, as Judge Bailey of the Florida family court so eloquently observed in her opinion dismissing Lazaro Gonzalez' state court action, the equities must take into account the broader social context and intense media scrutiny in which this young child finds himself during every day that his return to his father is delayed. See In Re: Matter of Lazaro Gonzalez, at 18-21. It is time for that delay to end.

This is not an appeal by Elian, but an appeal by Lazaro Gonzalez, who insists on vindicating his own asserted rights through full appeals and collateral attacks. All parents would be greatly upset by the prospect of a distant relative asserting rights on behalf of their child despite the parent's contrary desires and the considered judgment of the officials responsible for administering those laws by which their decisions must be given legal effect. Ultimately, the purpose of the injunction Lazaro Gonzalez seeks is to prevent the defendants from reuniting Elian with his father. The expert medical opinions obtained by the government clearly confirm that a definitive and unambiguous transfer of Elian's custody to his father works to Elian's benefit, not to his irreparable harm. Those same experts have opined that any actions taken to delay the reunion between Juan Gonzalez and Elian, particularly now that Juan Gonzalez is in the United States and Elian is aware of that fact, will signal continued conflict among the adults in Elian's life, and

will complicate the child's psychological situation. See Exhibits Five, Six, and Seven.

3. Lazaro Gonzalez Has Failed to Show That Appellees Will Not Suffer Substantial Harm From The Issuance of The Injunction

Lazaro Gonzalez has failed to show that the issuance of an injunction will not substantially harm appellees' interests. To the contrary, an injunction would harm appellees' interests at multiple levels: it would substantially interfere with appellee's ability to honor Juan Gonzalez' legitimate demand that his son Elian be immediately returned to him, and Elian's interests in being reunited with his father. Concomitantly, it harms Elian's psychological condition. See discussion above. It substantially interferes with the Attorney General's ability to implement the immigration parole regulations that expressly require that the parole of an unaccompanied minor be to the minor's parent if that parent is in the United States. See 8 C.F.R. §§ 212.5, 236.3(b)(1) (1999); *Reno v. Flores*, 507 U.S. 292, 310 (1993). In addition, an injunction would harm the INS' interest in adhering to the family reunification policy that is reflected throughout the Immigration and Nationality Act and its regulations. See Government's Administrative Record and Exhibits at 284 (Declaration of Michael D. Cronin, Acting INS Associate Commissioner for Programs). Moreover, an injunction would harm the INS' interest in being able to give effect to immigration decisions made by parents on their children's behalf. *Id.* Last fiscal year, INS inspectors inspected a total of 345,000,000 nonimmigrant aliens at our points of entry. *Id.* at 283. A large percentage of these aliens were children, many them children of tender years like Elian. *Id.*

4. Lazaro Gonzalez Has Not Shown That The Injunction Will Serve The Public Interest

The United States would suffer substantial harm in its international standing in protecting parental rights in cases involving American children wrongfully removed from this country if the Attorney General were prevented from effecting her decision that Elian should be reunited with his father. *See Id.* at 286 (Declaration of Assistant Secretary of State for Consular Affairs Mary A. Ryan). It would disserve the public interest to undermine the principle that parents should decide what is best for their children. It would disserve the public interest to undermine the ability of immigration inspectors to look to parents or other responsible adults to make immigration decisions for minors. *Id.* at 283. And it would disserve the public interest to ignore accepted international practice in cases involving a sole surviving parent located in the United States, where we would expect a foreign country to return the child to the surviving American parent immediately. *Id.* at 287.

The admission of aliens is a sovereign power reserved to the political branches of the government. *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11 (1893); *Jean v. Nelson*, 727 F.2d at 964. The immigration laws, regulations, and policies of the United States all entail consequences that may extend beyond a particular alien to touch upon such vital government interests as international relations. *See INS v. Aguirre-Aguirre*, 119 S. Ct. at 1449 ("in the immigration context . . . officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS v. Abudu*,

485 U.S. 94, 110 (1988)). The interests of this Nation and of the international community thus are firmly aligned with those of Juan Gonzalez and Elian in being reunited with one another.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for an injunction pending appeal or in the alternative for a stay of administrative action pending appeal, because appellant has not demonstrated a substantial likelihood of success on the narrow asylum issue that is presented on appeal and the balance of equities weighs heavily against that extraordinary relief.

If the Court nevertheless concludes that some assurance that Elian will not leave the country while the appeal is pending is necessary, the appellees consent to the entry by this Court of an injunction requiring the appellees to issue a departure control order barring the departure of Elian Gonzalez from the United States pending the issuance of a decision by this Court on the instant appeal, conditioned upon the Court also entering an order directing Lazaro Gonzalez to present Elian Gonzalez to the Immigration and Naturalization Service (INS), as directed by the INS, for transfer of care to Juan Gonzalez. The departure control order shall become effective upon the presentment of Elian Gonzalez to the INS by Lazaro Gonzalez, as directed by the INS. The departure control order that would be applicable in that event is attached.

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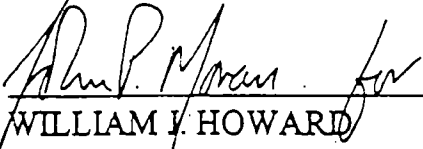
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CERTIFICATE OF SERVICE

I certify that on this 14TH day of April 2000, I served a copy of APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL OR ALTERNATIVELY FOR STAY OF ADMINISTRATIVE ACTION upon plaintiffs and intervenor-applicant by facsimile transmission and first-class mail to the following:

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