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Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- 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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- 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]

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I. BACKGROUND

Elian Gonzalez is a six-year-old Cuban national whose mother perished after setting out from Cuba in a small boat headed for the United States. *See* Exhibit A, "*How It Happened*." He was found floating on an inner tube in the Atlantic Ocean, taken to a hospital, and then given an Immigration and Naturalization Service ("INS") parole into the temporary care of his great uncle Lazaro Gonzalez.

The INS has handled this case in a cautious, deliberate, and humane manner from the outset. After a thorough investigation, it determined that only Juan Gonzalez could speak for Elian concerning his immigration status. Accordingly, it honored Juan's requests that Elian's application for admission and the asylum applications submitted in his behalf by Lazaro be withdrawn. *See* Exhibit B, Memorandum of the INS Office of General Counsel. Based on those careful determinations, the INS sought Lazaro's cooperation in bringing about Elian's transfer to his family in Cuba. *See* Exhibit C, Letter of Michael Pearson. Rather than cooperating with the INS, Lazaro sought intervention by a state family court which granted a Temporary Protective Order directing that the status quo be preserved, and that Elian could not be removed from its jurisdiction. *See* Exhibit D, Temporary Protective Order.

After the Attorney General determined both that the INS had correctly determined that Juan spoke for Elian and that the family court's order had no bearing on the federal immigration matter (*see* Exhibit E, Letter of the Attorney General), Lazaro filed suit in

the United States District Court for the Southern District of Florida seeking an order that the INS accept and adjudicate the asylum applications Lazaro submitted on Elian's behalf. After hearing argument on the case, the District Court for the Southern District of Florida dismissed the lawsuit and cautioned that "each passing day is another day lost between Juan Gonzalez and his son" *See Gonzalez v. Reno, et al.*, 86 F. Supp.2d 1167, 1194 (S.D. Fla. 2000).

When plaintiff appealed that decision to the United States Court of Appeals for the Eleventh Circuit, the government offered to forego exercising its authority to remove Elian from plaintiff's care on the condition he provide written assurance that Elian promptly would be surrendered once the appeals process was exhausted. Under the pertinent regulations, the INS normally seeks similar assurances from any person into whose care a juvenile alien is paroled. *See* 8 C.F.R. §§ 212.5(c); 236.3. However, Lazaro Gonzalez once again refused to cooperate with the government.

After a four-and-a-half month separation from his son, Juan Gonzalez traveled to the United States to reunite with Elian and return to Cuba. His arrival brought about the INS's decision to transfer Elian's parole from plaintiff to Juan Gonzalez. *See* Exhibit F, Letter of Michael Pearson. Seeking a smooth and peaceful transfer of Elian into Juan's care, the INS consulted two eminent psychiatrists and an eminent child psychologist, each of whom recommended that the reunion between father and son should occur sooner rather than later. *See* Exhibit G, Declaration of Dr. Paulina Kernberg;

concurrences of Dr. Jerry M. Weiner; Exhibit H, and Dr. Lourdes Rigual-Lynch, Exhibit

I. The INS's further efforts to reach an agreement with Lazaro for a prompt and orderly transfer of Elian into his father's care were rebuffed. Instead, Lazaro returned to the family court and sought an emergency hearing and order blocking the INS's efforts to bring about a reunion of father and son. Lazaro's efforts failed when the family court dismissed plaintiff's petition for temporary custody, finding that the suit was defective both because Lazaro lacked standing to sue and because the suit was federally preempted. *See* Exhibit J, *Gonzalez v. Gonzalez*, No. 00-00479-FC-28 (Apr. 13, 2000).

In dismissing Lazaro's suit, the Circuit Judge commented that Elian

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 the this case is, his days are filled with uncertainty.

* * *

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.

Id. at 21.

In an effort to bring a final and peaceful reunion between father and son, the Attorney General herself traveled to Miami for face-to-face negotiations. Lazaro Gonzalez still refused to transfer Elian into the care of his father. Accordingly, the INS ordered Lazaro Gonzalez to deliver Elian to its officials in Miami so that he could be brought to Washington, D.C. and reunited with his father. *See* Exhibit K, Letter of

Michael Pearson. Lazaro Gonzalez refused to comply with that order.

Now, having lost in both his home state and federal courts, Lazaro Gonzalez comes to Washington, D.C., searching for a forum which he hopes will authorize his continued refusal to reunite a son with his father. This Court too should refuse to sanction Lazaro's efforts to separate father from son. Not only should his motion for a temporary restraining order be denied because of simple notions of humanity, but it should be denied because Lazaro (1) lacks standing to sue on Elian's behalf; (2) his case is not justiciable; (3) the present action is barred by the doctrine of *res judicata*; and (4) the decisions of the INS in this matter comport with the obligations of the United States under international law.¹⁷

ARGUMENT

THIS COURT SHOULD DENY PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

A. STANDARD FOR ISSUANCE OF TEMPORARY RESTRAINING ORDERS

In the District of Columbia Circuit, when a party moves for a temporary restraining order, the standard to be applied is the same as if the party had moved for preliminary injunction. To demonstrate entitlement to a preliminary injunction, the

¹⁷ On April 13, 2000, the Eleventh Circuit Court of Appeals granted a temporary injunction pending appeal which precluded Elian's leaving the United States until further order of the Court. It also ordered the government to respond to Lazaro Gonzalez's motion for injunction pending appeal no later than 9:30am, April 14, 2000.

moving party must show: (1) a substantial likelihood of success on the merits; (2) that he would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction. *See, e.g., Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998); *City Fed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). In deciding whether to grant an injunction, the court must balance the moving party's showings in all four areas. *City Fed Financial Corps*, 58 F.3d at 747.

**B. PLAINTIFF HAS FAILED TO ESTABLISH A SUBSTANTIAL
LIKELIHOOD OF SUCCESS ON THE MERITS**

**1. PLAINTIFF LACKS STANDING TO RAISE ANY CLAIM ON
ELIAN'S BEHALF**

Generally, a litigant may only assert his or her own rights and cannot pursue a claim for relief based upon the legal rights or interests of a third party. *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Singleton v. Wulff*, 428 U.S. 106, 112-13 (1975). However, the courts have long permitted a "next friend" to proceed on behalf of a person who is unable to seek relief himself. *Donnelly v. Parker*, 482 F.2d 402, 406-07 (D.C. Cir. 1972); *Lonchar v. Zant*, 978 F.2d 637, 640 (11th Cir. 1993). A next friend does not himself become a party to the action in which he participates, but rather, merely presses forward with the cause action on behalf of the allegedly injured person, who remains the real party in interest. *Morgan v. Potter*, 157 U.S. 195, 198 (1895). Yet this

is not say that next friend standing is automatically granted or is without limits.

In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Supreme Court stressed that a next friend must first prove that the real party in interest cannot pursue his own cause due to some disability such as mental incompetence or lacking access to the courts. 495 U.S. at 163-65; *see also Lonchar*, 978 F.2d at 641. Second, the next friend must demonstrate some relationship or bring forth some other evidence that establishes the next friend is truly dedicated to the "best interests" of the person on whose behalf he seeks to litigate. *Whitmore*, 495 U.S. at 163-64; *Lonchar*, 978 F.2d at 641; *Morris v. United States*, 399 F. Supp. 720, 722 (E.D. Va. 1975). Ultimately, "[t]he burden is on the 'next friend' clearly to establish the propriety of [their] status, and thereby justify the jurisdiction of the court." *Whitmore*, 495 U.S. at 164.

Noting that the Supreme Court did not define the bounds of the relationship between the real party in interest and the putative next friend, the United States Court of Appeals for the Seventh Circuit cautioned that an action filed by a person claiming to be a next friend of the real party in interest should not be accepted on blind faith. *T. W. & M. W. v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997). "[A]ppointed or not, . . . [the putative next friend] can be challenged as not being a suitable representative, just as a guardian ad litem can be." *Id.*; *see also Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989).

Fed. R. Civ. Pro. 17(c) begins by with a primary proposition that whenever an

infant "has a representative, such as a general guardian" the representative may sue on the behalf of the infant. The United States Court of Appeals for the Eleventh Circuit has determined that in the context of Rule 17(c), the term "representative" includes a child's parents. *See Devine v. Indian River County School Board*, 121 F.3d 576, 581(11th Cir. 1997); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (same). The notion that parents are the natural choice to represent infants in court proceedings was stated by the Supreme Court more than one-hundred fifty years ago in *Bank of United States v. Ritchie*, 33 U.S. 128 (1834).²⁷

Rule 17(c) then goes on to provide a subordinate proposition that in the event a duly appointed representative is lacking, an infant may then "sue by a next friend" Fed. R. Civ. Pro 17(c); *Brophy*, 124 F.3d at 894.²⁸ Recognizing that a suit by a next friend occurs only in the absence of a qualified representative, the Seventh Circuit determined that a general representative should not be "bypassed by appointing [or allowing] a special representative to litigate on behalf of a ward." *Brophy*, 124 F.3d at

²⁷ While the *Ritchie* court did not find error in the lower court's appointment of non-parental guardian for an infant litigant, the Court did comment that such actions were "calculated to awaken attention . . . [when] the record shows . . . [the child has] parents living" 33 U.S. at 144.

²⁸ *See, e.g., United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986); *Developmental Disabilities Advocacy Center, Inc. v. Mellon*, 689 F.2d 281 (1st Cir. 1982); *Hafford v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982).

895. [‡] Similarly, the United States Court of Appeals for the Second Circuit has held that when an infant's representative "is unable, unwilling or refuses to act, or has interests which conflicts with that of the infant, a court may appoint a 'next friend' to ensure that the infant's rights are protected in a court of law." *Ad Hoc Committee of Concerned Teachers on Behalf of Minor and Under-Age Students Attending Greenburgh Eleven Union Free School Dist. v. Greenburgh No. 11 Union Free School District*, 873 F.2d 25, 30 (2d Cir. 1989). In short, a next friend may neither be appointed nor unilaterally act for a minor who is already adequately represented. See *Susan R.M. v. Northeast Independent School District*, 818 F.2d 455, 457 (5th Cir. 1987).

As Elian's surviving parent, Juan Gonzalez is the natural choice to serve as the boy's general representative. See *Ritchie*, 33 U.S. at 144. Under Fed. R. Civ. P. 17(c), Lazaro Gonzalez cannot act as Elian's next friend unless Juan Gonzalez is unable, unwilling or refuses to act, or has interests which conflicts with those of the Elian. Juan Gonzalez has made it very clear that he does not want Elian to seek any immigration benefits. Moreover, has even traveled to the United States so that he can be reunited with Elian. Through his travel to the United States and his efforts at reuniting with his son, Juan Gonzalez has demonstrated his willingness to represent Elian and take actions

[‡] The *Brophy* court also considered who would be best suited to represent an infant as a next friend. The Court stated that the "proper rule is that the next friend must be an appropriate alter ego for a plaintiff who is not able to litigation in his own right" *T. Brophy*, 124 F.3d at 897. The Court further opined that eligible next friends should be limited to the "plaintiff's parents, older siblings (if there are no parents), or a conservator or other guardian" *Id.*

on the child's behalf. Finally, there is no evidence that Juan Gonzalez's interests conflict with Elian's. Juan Gonzalez is adequately representing Elian's and, thus, Fed. R. Civ. P. 17(c) does not authorize Lazaro Gonzalez to act as Elian's next friend.⁸

Additionally, the Florida family court has determined that Lazaro Gonzalez lacked standing under Florida law to maintain his petition for temporary custody and other relief. *See*, Exhibit H, *Gonzalez v. Gonzalez*, No. 00-000479 FC 28 at 12-18. Based on that ruling, the Temporary Protective Order, which purported to authorize Lazaro Gonzalez to assert and protect whatever rights Elian may have under the immigration laws of the United States, has been terminated. *Id.* at 21-22. Contrary to his assertions before this Court, Lazaro Gonzalez has no legal authority to act as Elian's temporary legal custodian and, thus, he lacks standing to maintain the present action.

**2. PLAINTIFF'S REQUEST FOR A TEMPORARY
RESTRAINING ORDER IS NOT JUSTICIABLE**

Plaintiff asks this Court to issue a temporary restraining order precluding the government from "deporting and/or returning Elian Gonzalez and/or from taking any steps to participate in and/or aid in the deportation of Elian Gonzalez and further, requiring that deportation proceedings against Elian be enjoined" Motion at 2, 18.⁹

⁸ It should also be noted that the INS has revoked Elian's parole to Lazaro Gonzalez and, therefore, he is wholly without authority to speak for Elian before this Court.

⁹ The Immigration and Nationality Act has been amended so that immigration proceedings begun after April 1, 1997, are not *deportation* proceedings. *See* Sections 304(a)(3) & 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act

The government's current activities are not directed at returning Elian to Cuba, but directed at reuniting Elian with his father, while at the same time ensuring the conditions of his immigration parole comply with INS regulations. Once Juan Gonzalez has custody of Elian, the decision as to when, if ever, Elian leaves the United States will be his to make. Thus, plaintiff is wrongly attempting to enjoin the government from performing an action which is not its own but the father's.

In addition to Lazaro's suing the wrong party relating to any decision relating to Elian's return to Cuba, he sues to prohibit the transfer of parole to the father.. This is a discretionary decision, and one which is barred to this Court's review.

a. Plaintiff's Request for a Restraining Order Is Not Ripe

There are at present no removal, deportation, or exclusion proceedings pending or anticipated against Elian Gonzalez. Nevertheless, plaintiffs request an order from this Court enjoining the defendants from "deporting and/or returning Elian Gonzalez and/or taking any steps to participate in and/or aid in the deportation of Elian Gonzalez and/or continue with the deportation proceedings of Elian Gonzalez . . ." Plaintiff's [Proposed] Order at 1-2. Because the INS has not commenced a removal proceeding against Elian Gonzalez (and has no intention of doing so), plaintiff's request is not justiciable. It is not ripe.

of 1996 ("ARERE"), Pub. L. No. 104-208, 110 Stat. 3009-626 (Sept. 30, 1996). The proceedings by which aliens may be repatriated to their homelands are now referred to as removal proceedings. ARERE § 304(a)(3).

The Supreme Court has stated that the "basic rationale [of the ripeness doctrine] is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Furthermore, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). In assessing whether a claim is ripe "the court must 'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Pfizer Inc. v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999) (quoting *Texas*, 523 U.S. at 301). This case is neither fit for judicial decision nor is there a hardship to the parties if the court withholds consideration.

Simply because a case presents a legal issue does not make it fit for judicial decision. On the contrary, the Court of Appeals for the District of Columbia has concluded that "[e]ven where the issue presented is a purely legal one and presumptively fit for review . . . the Supreme Court has observed that such an issue may be deemed unfit for review, . . . for example, 'further administrative action is needed to clarify the agency's position.'" *Aulenback, Inc. v. Federal Highway Administration*, 103 F.3d 156, 167 (D.C. Cir. 1997) (citations omitted).

In this case further administrative action is necessary before Elian could be "deported" by the INS from the United States. Under the Immigration and Nationality Act (INA), the INS may only "deport" a person like Elian by commencing removal proceedings under INA § 240, 8 U.S.C. § 1229a. The INS commences removal proceedings through the issuance of a Notice To Appear under INA § 239, 8 U.S.C. § 1229. As a matter of law, the Notice To Appear must include specific information including, but not limited to, the legal authority for conducting the proceedings, the alleged violation of law, and notice that the person may be represented by counsel. 8 U.S.C. § 1229(a)(1)(A-G). In addition, a person charged as removable must appear before an immigration judge who determines inadmissibility and deportability. 8 U.S.C. § 1229(a)(1). Furthermore, a person may appeal an immigration judge's determination to the Board of Immigration Appeals which has appellate jurisdiction over such decisions. 8 C.F.R. § 3.1(b)(1). Decisions of the Board of Immigration Appeals (which are final administrative decisions) are reviewable in the courts of appeal. 8 U.S.C. § 1252.

The point is that there is an administrative process that the government must abide by when it wants to "deport" someone from the United States, and plaintiff is asking for an injunction regarding a process that has not yet begun and that the government does not intend to commence. Accordingly, this case falls squarely within the admonition in *Abbott Laboratories* that courts should refrain from "entangling themselves in abstract disagreements over administrative policies" at least until "an administrative decision has

formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148. Because the INS has not commenced proceedings against Elian Gonzalez this case "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.

Plaintiff also fails to meet the second part of the standard since there will be no hardship for plaintiffs if the court withholds decision. This case is limited to whether the government should be enjoined from "deporting" Elian from the United States. As stated at the outset, the government has no intention of placing Elian in removal proceedings.

On the other hand, once Juan Gonzalez has custody of Elian, he will be able to decide when, if ever, Elian is to leave the United States for Cuba. Since Elian's application for admission to the United States has been withdrawn, no further administrative action on the government's part would be necessary for Elian to return to Cuba in the company of his father. Hence, if Lazaro Gonzalez is here seeking relief from the wrong parties. His motion for a temporary restraining order should be denied for that reason alone.

b. Recent Amendments To The INA Preclude Judicial Review Of The Commissioner's Discretionary Decisions

By enacting IIRIRA § 306(b), Congress repealed the judicial review provisions outlined in former Section 106 of the INA, 8 U.S.C. § 1105a (1994). To fill the void left by this repeal, Congress also enacted Section 306(a) of IIRIRA which established a new judicial review procedure in the form of new INA § 242, 8 U.S.C. § 1252.

Section 242 begins simply enough by directing that "[j]udicial review of a final order of removal . . . is governed only by chapter 158 of title 28 to the United States Code." INA § 242(a)(1). Commonly known as the Hobbs Act, and titled "Orders of Federal Agencies; Review," Chapter 158 plainly states that jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . " final orders issued by federal authorities rests with the courts of appeal. 28 U.S.C. § 2342. This statute makes no provision for the review of administrative orders by federal district courts.

Additionally, INA § 242 provides that "[n]otwithstanding any other provision of law, *no court* shall have jurisdiction to review any . . . decision or action of the Attorney General the authority for which is specified under . . . [Title II of the INA] to be in the *discretion of the Attorney General . . .*" (emphasis added). INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

c. *Section 242(a)(2)(B)(ii) Of The INA Precludes Judicial Review Of The Commissioner's Decision To Transfer Elian's Parole To Juan Gonzalez*

When an arriving alien is suffering from a disability that renders it impractical to proceed with an inspection, the inspection is deferred for such a time and under such conditions as the district director may prescribe. 8 C.F.R. § 235.2(e). In addition, the deferral of an inspection is to be accomplished pursuant to the provisions of INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). 8 C.F.R. § 235.2(c). Section 212(d)(5)(A) in

turn permits the Attorney General to parole an alien into the United States for humanitarian reasons "*under such conditions as [s]he may prescribe . . . on a case by case basis . . .*" 8 U.S.C. § 1182(d)(5)(A) (emphasis added).

When the INS encountered Elian at the hospital, he was in no condition to undergo an immigration examination. 8 C.F.R. § 235.2(e). Consequently, Elian's inspection was deferred and he was paroled into the United States pursuant to Section 212(d)(5)(A). Because Elian is a juvenile (*see* 8 C.F.R. § 236.3(a)), his care-giver is determined by reference to 8 C.F.R. § 236.3(b)(1). Under this regulation, a juvenile alien who is paroled into the United States, will be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention. 8 C.F.R. § 236.3(b)(1)(i)-(iii).

When Elian arrived in the United States, his sole surviving parent, Juan Gonzalez, was in Cuba. As he had no legal guardian in America, Elian was released to his great-uncle, Lazaro Gonzalez. 8 C.F.R. § 236.3(b)(1)(iii). However, Elian's father, Juan Gonzalez, has entered the United States. This turn of events naturally led to a reevaluation of Elian's parole status. Applying the standards in 8 C.F.R. § 236.3(b)(1), the INS has revoked Elian's parole and ordered him delivered to its officials at a neutral site so that he can be placed into the care of his father.

INA § 212(d)(5)(A) clearly grants the Attorney General the "discretion" to parole aliens into the United States under conditions she "may prescribe" on a case by case

basis. Hence the INS Commissioner, as the Attorney General's designee, has the discretion to modify the conditions of Elian's parole by transferring him into Juan Gonzalez's care. Since INA § 212(d)(5)(A) appears in Title II of the INA, the discretionary decisions made with regard to the conditions of Elian's parole are protected from judicial review by Section 242(a)(2)(B)(ii). It follows that the Court lacks jurisdiction to review the INS's decision to parole Elian into the care of his own father.

**3. PLAINTIFF'S CAUSE OF ACTION IS BARRED BY THE
DOCTRINE OF RES JUDICATA**

This Court is precluded from hearing plaintiff's lawsuit, including his motion for a temporary restraining order, by the doctrine of *res judicata*. As long recognized by the Supreme Court, honoring the prior judgment of a competent court ensures

the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination [E]nforcement [of a prior decision] is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.

Southern Pacific Railroad v. United States, 168 U.S. 1, 49 (1897). The doctrine of *res judicata* provides that when judgment has been rendered in a case,

[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Cromwell v. County of Sacramento, 94 U.S. 351, 352 (1876). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the

parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

The inquiry as to whether a particular case is barred by the doctrine of *res judicata* turns on two factors. First, it must be determined whether the instant lawsuit is the same cause of action previously asserted before another tribunal. *Nevada v. United States*, 463 U.S. 110, 130 (1983). Second, this Court must decide whether the parties in the instant proceeding are identical to or in privity with the parties to the previous action. *Id.*

Under the first Restatement of Judgments § 61 (1942), two causes of action were deemed the same "if the evidence needed to sustain the second action would have sustained the first action." However, the Restatement (Second) of Judgments (1982) took a more pragmatic approach where causes of action were considered the same if they arose from the same "transaction." Restatement (Second) of Judgments § 24 (1982). Whether the two proceedings were products of the same "transaction" was to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* While the Supreme Court has applied the former "same evidence" test (see *United States v. The Haytian Republic*, 154 U.S. 118, 125 (1894)), it is not the only standard by which the "same cause of action" question has been measured. See *Nevada v. United States*, 463 U.S. at 131 n.12. For example, the Court has held that

[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince."

Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 320 (1927) (quoting *Chobanian v. Washburn Wire Company*, 33 R.I. 289, 302, 80 A. 394, 400 (Ann. Cas. 1913D, 730)).

Once a matter is raised and determined by a court of competent jurisdiction, "it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." See *Yamaha Corp. of America, v. United States*, 295 F.2d 245, 254-55 (D.C. Cir. 1992) (citing *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir.1990) (plaintiff may not raise new argument in second proceeding even though it was never made in first proceeding; so long as argument could have been made, it is precluded); Restatement (Second) of Judgments § 27 at 253 (1982) (if previously litigated "issue was one of law, new arguments may not be presented to obtain a different determination of that issue"))).

"A fundamental requisite of [*res judicata* or claim] preclusion is an identity of the . . . [claim] decided in the earlier action and that sought to be precluded in a later action."

See *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1079 (D.C. Cir. 1987). Next, "it must be shown that the claim was (or could have been) raised in a prior proceeding." *Id.* (citing *Gould v. Mossinghoff*, 711 F.2d 396, 398-99 (D.C. Cir.1983)). These related issues are important because "[t]he principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so." *Clark-Cowlitz*, 826 F.2d at 1079 (quoting Restatement (Second) of Judgments at 6).

In the action he filed before the Southern District of Florida, plaintiff sought to challenge the INS Commissioner's determination that the Service did not have to accept and adjudicate an asylum application filed by a third party on behalf of an incompetent minor alien over the objections of the child's surviving parent. After rejecting plaintiff's constitutional challenges to the INS Commissioner's decision, Judge Moore held that plaintiff's statutory and regulatory claims failed because the INS Commissioner's interpretation of the immigration laws warranted *Chevron* deference. See *Gonzalez*, 86 F. Supp.2d at 1193. In essence, plaintiff's claim before the Southern District of Florida was that the INS Commissioner's decision was wrong as a matter of law. In that action, plaintiff's position was that the Commissioner's decision violates domestic law. The only manner in which plaintiff's action before this Court differs from the lawsuit he presented to the Florida court, is that he now contends the Commissioner's decision violates international law.

Plaintiff's current action is, for *res judicata* purposes, not materially different from his prior action in the Southern District of Florida. In both lawsuits he claims that the INS Commissioner's decision was incorrect as a matter of law. Moreover, plaintiff could have challenged the Commissioner's decision based on international law while before the Southern District of Florida, but, for some unexplained reason, he failed to do so. It follows that plaintiff has presented this Court with the "same cause of action" he filed before the Florida court and, thus, the first prong of the *res judicata* inquiry has been satisfied. *See Nevada v. United States*, 463 U.S. at 130.

As for the second prong of the *res judicata* inquiry, Lazaro has brought this action against the Attorney General, the INS Commissioner, the Miami INS District Director, the Department of Justice, and the INS. The parties to the instant case are identical to the parties in the action dismissed by the Southern District of Florida. Plaintiff has filed the same cause of action against the same parties before successive tribunals. Lazaro's motion for a temporary restraining order should be denied because his entire suit is defective and barred by the *res judicata* doctrine.

**4. THE COMMISSIONER'S DECISIONS ARE IN KEEPING
WITH THE OBLIGATIONS OF THE UNITED STATES
UNDER INTERNATIONAL LAW**

Even if the Court had jurisdiction over Lazaro's suit, it would have to deny his motion for temporary restraining order. This is so because the INS's actions in attempting to reunite Elian with his father comply with the international obligations of

the United States. In his motion for a temporary restraining order, plaintiff argues that the United States' "obligations arising under international agreements" provide a basis for the requested injunctive relief. TRO Motion at 2. He claims that the United States will violate its international obligations by "deporting" Elian to Cuba because Cuba has a record of serious human rights violations, as documented by State Department Reports. *Id.* Plaintiffs ask this Court for an order enjoining Elian's deportation until such time that the State Department amends its country reports and/or certifies to Congress and/or provides an advisory opinion to the INS that Cuba is in compliance with the Universal Declaration of Human Rights, that the government of Cuba is no longer engaging in human rights violations and that Elian may return to Cuba "with the assurance that his human rights will be respected." *Id.* at 3.

As a preliminary matter, it is noted that Lazaro's international law claims are unpersuasive because there is no likelihood that Elian will be deported or removed to Cuba. As discussed above, the INS had not placed Elian in removal proceedings and has not indicated any intention to do so. Moreover, since Elian's application for admission to the United States has been withdrawn, he is free to leave the United States without undergoing any form of removal proceedings. *See* INA § 235(a)(4), 8 U.S.C. § 1225(a)(4). Under these circumstances, there can be no violation of international law. Furthermore, as demonstrated below, Lazaro is simply incorrect in arguing that the United States' international agreements preclude it from deporting Elian to Cuba, even if

it had any intention of doing so.

Plaintiff asserts rights under the Protocol Relating to the Status of Refugees (Protocol), *entered into force for the United States*, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), *entered into force for the United States*, Nov. 20, 1994, S. Treaty Doc. No. 100-20 (1988); and the Universal Declaration of Human Rights. The relevant provisions of these treaties cannot form the basis for a claim because they are not self-executing.

Treaties are agreements between sovereign nations and do not generally create privately enforceable rights. *Head Money Cases*, 112 U.S. 580 (1884). Privately enforceable rights arise *only if* the underlying treaty is self-executing. *Committee of U.S. Citizens v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). Self-executing treaties are those international agreements which "require no legislation to make them operative" and therefore "have the force and effect of legislative enactment." *British Caledonian Airways Limited v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (citation omitted). Treaties that are not self-executing do not give rise to privately enforceable rights. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *see also Head Money Cases*, 112 U.S. 580, 598-99. When a treaty is not self-executing, its provisions cannot be enforced in the courts of the United States except "pursuant to legislation to carry [those terms] into effect." *British Caledonian*, 665 F.2d at 1160.

Courts have found that the pertinent provisions of the Protocol are not self-executing. *Haitian Refugee Center v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992); *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982). Indeed, the treaty itself demonstrates that they are not self-executing. It states that "the signatories were to communicate to the United Nations the laws and regulations which they adopt to ensure the application of the present Protocol." *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1406 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987). This provision in the treaty makes clear that implementing action by signatory states was necessary before the treaty could become effective in those states.

Likewise, the Torture Convention is not a self-executing treaty. *See* S. Treaty Doc. No. 100-20 (1988) (reservations and declarations of the United States Senate in ratifying the Torture Convention: "The Senate's advise and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."); *see also* 136 Cong. Rec. S17486-01, 1990 WL 168442 (daily ed. Oct. 27, 1990). This is a clear manifestation of the Senate's intent in ratifying the Convention, and this Court should defer to the Senate's express announcement. *See Restatement (Third) of Foreign Relations Law*, § 111(h) (1987). As such this Court has no jurisdiction to consider an individual's claim for protection under the treaty and no individual is provided with a right of action. *Khourassany v. INS*, ___ F.3d ___, 2000 WL 347167 (9th Cir. April 5, 2000); *Diakite v.*

INS, 179 F.3d 553, 554 (7th Cir. 1999); see *Head Money Cases*, 112 U.S. at 598-99.

Because the Protocol and Torture Convention are not self-executing, they do not confer any rights upon persons beyond those granted by the implementing domestic legislation. The United States has implemented its obligation under the Protocol by providing aliens with an opportunity to apply for withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). That provision prohibits the removal of an alien to a country where the alien's life or freedom would be threatened. An application for asylum is also deemed to be an application for withholding of removal and for relief under the Torture Convention. 8 C.F.R. § 208.13 (1999).

In this case, the INS Commissioner has already made a determination that Elian is not competent to demonstrate an "intention to apply for asylum," and therefore not competent to submit an application for withholding of removal or for relief under the Torture Convention. *Gonzalez v. Reno*, 86 F. Supp.2d 1167, 1189 (S.D. Fla. 2000). The INS has concluded that "under universally accepted legal norms," Elian's father should speak for Elian. *Id.* Before reaching her decision, the Commissioner considered several factors including the fact that the INS had conducted two in-person interviews with the father and found no evidence of abuse. *Id.* at 1989. The INS does not rule out the possibility of a case in which it would accept an asylum application of a young child against the wishes of a parent. See

Exhibit K, Letter of the Attorney General at 3. The Attorney General indicated that the INS would provide for a review of "objective circumstances relating to possible torture or persecution in the child's home country" if the child is too young to express a view on this matter. *Id.* In fact, as the Attorney General stated in her decision, the INS reviewed the asylum application filed on Elian's behalf and all other relevant available information and "found no credible information indicating that the [Elian] would be at risk of torture or persecution if returned to his father." *Id.*

The Attorney General's decision has been upheld by a district court in Miami which determined that her conclusion is "controlling, conclusive, not manifestly contrary to law, and not an abuse [of] other congressionally delegated discretion." *Id.* at 1188. Plaintiff, in essence, seeks to circumvent the adverse district court decision in Miami by raising Elian's persecution claim in this Court. As argued earlier, Lazaro should have raised this claim in the Miami district court and on appeal to the Eleventh Circuit, which appeal currently is pending.

Similar to the Protocol, the only enforceable rights that an alien has with regard to the Torture Convention are those afforded under this nation's domestic law. In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, 112 Stat. 2681-822 (appearing as a note to 8 U.S.C. § 1231), authorizing the promulgation of regulations implementing the Torture

Convention and expressly limiting the jurisdiction of any court to review decisions on claims for protection under those rules. *See* FARRA § 2242. Specifically, in FARRA § 2242(d), Congress provided that federal courts could review claims under the Torture Convention only as permitted by INA § 242, 8 U.S.C. § 1252, IIRIRA's permanent provision governing the jurisdiction of federal courts over cases arising under the immigration laws. Under FARRA's limited grant of jurisdiction, the Court may not consider any claim regarding Elian's application for relief under the Torture Convention. Instead, a torture claim must be considered administratively through the filing of an asylum application. *See* 8 C.F.R. § 208.13. As discussed above, the Attorney General already has made a determination that Elian is not competent to demonstrate an "intention to apply for asylum." *Gonzalez*, 86 F. Supp.2d at 189. Accordingly, the Attorney General has already concluded that Elian is not competent to submit an application for relief under the torture convention. Petitioners may not collaterally attack that determination in these proceedings.

Finally, petitioners arguments based on the Declaration Of Human Rights are without merit. Petitioners argue that the return of Elian to Cuba would violate the United States' "obligations" under the Declaration of Human Rights, G.A. Res. 217(III) (A) (Dec. 10, 1948). Motion. at 12. The Declaration of Human Rights, however, is not even a treaty but rather is a "non-binding resolution" adopted by the

United Nations General Assembly in 1948, *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 816 n. 17 (D.C. Cir. 1987), and therefore cannot support the petitioners' argument.

C. PLAINTIFF HAS NOT SHOWN HE WILL SUFFER IRREPARABLE DAMAGE

Lazaro Gonzalez cannot meet the burden of proving that Elian will suffer irreparable damage if the Court denies his request for a temporary restraining order. The District Court for the Southern District of Florida noted that "Even this well-intended litigation has the capacity to bring about unintended harm. *Gonzalez*, 86 F. Supp.2d at 1194. The Miami 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.

The Court should deny Lazaro Gonzalez' request for a temporary restraining order because Elian will suffer irreparable harm if the Court grants it. 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), opined to 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 Exhibits G, H, and I. It was Dr. Kernberg's opinion that it was important for Elian to be clear about who has authority for him. 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 G at 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 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.*

This is not an action filed by Elian, but rather, a lawsuit filed by Lazaro, who insists on vindicating his own asserted rights through collateral attacks. All parents would be greatly upset by the prospect of a distant relative asserting rights on behalf of their child despite that the parents made known their contrary desires. Ultimately, the

purpose of the temporary restraining order is to prevent the defendants from reuniting Elian with his father. The expert medical opinions obtained by the defendants clearly indicate 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 opine that any actions taken to delay the reunion between Juan Gonzalez and Elian, particularly because 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 G, H, and I.*

Additionally, it must be kept in mind that Lazaro Gonzalez is ultimately seeking to have the INS accept and adjudicate an asylum application he file on Elian's behalf. Motion at 18. If this Court were to deny Lazaro Gonzalez the order he seeks, Elian would suffer no harm because in the event Lazaro Gonzalez's ultimately prevails either on appeal or before this Court, there is little possibility, if any, that Elian's eligibility for political asylum will change. Stated another way, when it comes to the asylum application filed on Elian's behalf, time is not of the essence and, thus, an order precluding the government from simply transferring Elian's parole to his father will no way harm Elian.

D. THE GOVERNMENT WILL SUFFER SUBSTANTIAL HARM FROM THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER

Lazaro Gonzalez has not shown that the issuance of a temporary restraining order will not the government's interests. To the contrary, a temporary restraining order would

harm the government's interests at multiple levels: it would substantially interfere with government'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's interest in adhering to the family reunification policy that is reflected throughout the Immigration and Nationality Act and its regulations. *See* Exhibit L, Declaration of Michael D. Cronin. Moreover, a temporary restraining order would harm the INS's 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.* A large percentage of these aliens were children, many them children of tender years like Elian. *Id.*

E. A TEMPORARY RESTRAINING ORDER WILL NOT SERVE THE PUBLIC INTEREST

If this Court were to issue a temporary restraining order, the government would suffer harm from the standpoint of its international standing in protecting parental rights in cases involving American children wrongfully removed from this country. *See* Exhibit M, Declaration of Assistant Secretary of State for Consular Affairs Mary A.

Ryan. A restraining order would disserve the public interest by undermining the principle that parents should decide what is best for their children. It would disserve the public interest by undermining the ability of immigration inspectors to look to parents or other responsible adults to make immigration decisions for minors. 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 the foreign country to return the child to the surviving American parent immediately. *Id.*

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 957, 964 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). 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)).

CONCLUSION

Based on the foregoing reasons, Lazaro Gonzalez's motion for a temporary restraining order should be denied.

Respectfully Submitted,

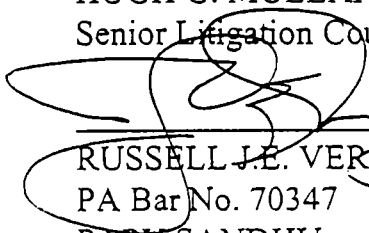
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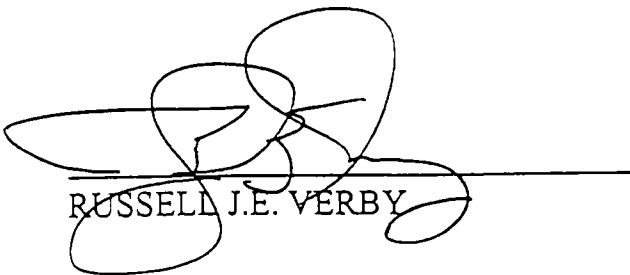
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SUBJECT: Gonzalez v. Reno

CONTENTS: (1) Application and Affidavit for Search Warrant;
(2) Affidavit of S/A Mary A. Rodriguez; (3)
Application of United States Immigration and
Naturalization Service for Search Warrant Pursuant
to Federal Rule of Criminal Procedure 41(b) and
Memorandum in Support Thereof; (4) Search Warrant;
and (5) Motion to Seal and Order Granting Motion
to Seal

PAGES: Thirty-two (32), including cover page

AO 106 (Rev. 7/87) Affidavit for Search Warrant

United States District Court

SOUTHERN DISTRICT OF FLORIDA

In the Matter of the Search of

(Name, address or brief description of person, property or premises to be searched)

THE RESIDENCE OF LAZARO GONZALEZ, LOCATED AT
2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE COUNTY,
FLORIDA

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

CASE NUMBER:

being duly sworn depose and
s o y

Mary A. Rodriguez

I am a(n) Senior Special Agent, U.S. Immigration and Naturalization Service

Official Title

and have reason to believe

that ☐ on the person of or ☒ on the property or premises known as (name, description and/or location)

THE RESIDENCE OF LAZARO GONZALEZ, LOCATED AT 2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE COUNTY,
FLORIDA,

in the SOUTHERN District of FLORIDA

there is now concealed a certain person or property, namely (describe the person or property to be seized)

THE PERSON OF ELIAN GONZALEZ, DATE OF BIRTH DECEMBER 6, 1993, A NATIVE AND CITIZEN OF CUBA.

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)

BEING UNLAWFULLY RESTRAINED AND THE SUBJECT OF AN INS ADMINISTRATIVE WARRANT OF ARREST.

concerning a violation of Title United States code,
Section(s)

The facts to support a finding of Probable Cause are as follows:

SEE ATTACHED AFFIDAVIT

Continued on the attached sheet and made a part hereof.

☒ Yes☐ No

Mary A. Rodriguez
Signature of Affiant

Sworn to before me, and subscribed in my presence

21 APR 2000
Date

U.S. MAGISTRATE JUDGE
Name and Title of Judicial Officer

at

Miami, Florida
City and State

[Signature]
Signature of Judicial Officer

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Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. affidavit	RE: Mary A. Rodriguez [partial] (1 page)	00/00/0000	b(7)(C)

COLLECTION:

Clinton Presidential Records
Counsel Office
General Files
OA/Box Number: 20840

FOLDER TITLE:

Elian Gonzalez General [2]

2012-0371-F
db4246

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- 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]

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]

C. Closed in accordance with restrictions contained in donor's deed of gift.

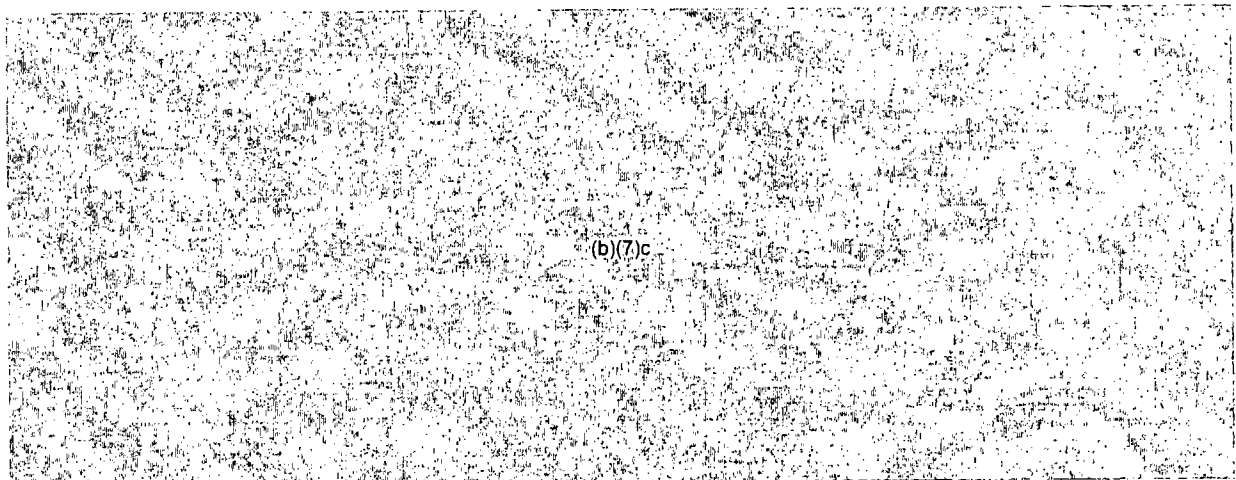
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Mary A. Rodriguez,, who after being duly sworn, deposes and says:

1. I am Mary A. Rodriguez, Senior Special Agent, United States Immigration and Naturalization Service (INS). (b)(7)c [001]



(b)(7)c As a senior special agent, my duties include the apprehension of aliens who are in the United States illegally; enforcement of the immigration laws; and conducting investigations into suspected violations of the criminal statutes within the Immigration and Nationality Act (INA). I am authorized by Title 8, United States Code, section 1357 to interrogate any alien or person believed to be an alien as to his/her right to be or to remain in the United States or to arrest any alien in the United States if there is any reason to believe that the alien so arrested is in the United States in violation of any law or regulation made in pursuance of

law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States if I have reason to believe that the alien so arrested is in the United States in violation of any law or regulation and is likely to abscond before a warrant can be obtained for his/her arrest.

2. On November 25, 1999, two fishermen encountered a young boy on an inner tube floating several miles off the coast of Fort Lauderdale, Florida. They rescued the boy, Elian Gonzalez, who was then five years old. The fishermen contacted the United States Coast Guard, who rendezvoused with their vessel and Elian was taken aboard the Coast Guard cutter. The Coast Guard took Elian to shore, where he was then taken to Hollywood Memorial Hospital to be treated for dehydration and exposure.

3. INS immigration inspector Edward Agundez and United States Border Patrol Agent Verne Eastwood responded to the hospital. Elian Gonzalez is a native and citizen of Cuba, who is subject to the Immigration and Nationality Act. He had departed Cuba on a boat with his mother, Elisabeth Brotons, and step-father, Lazaro Munero, on November 22, 1999, along with ten other persons. During the voyage, they encountered heavy seas. The vessel capsized. Elian's mother and step-father perished, along with eight others. Elian and two other people survived.

4. Mr. Agundez met with Lazaro Gonzalez, who was at the hospital and advised that he was Elian's great-uncle. Lazaro

Gonzalez identified a child in a photograph presented to him as Elian, and Lazaro presented his own photograph showing Elian with his natural parents. Due to Elian's continuing medical treatment, Inspector Agundez deferred Elian's immigration inspection for a period of 30 days, pursuant to 8 C.F.R. § 235.2(e). He was temporarily paroled into the custody of Lazaro Gonzalez pursuant to section 212(d)(5) of the INA, 8 U.S.C. § 1182(d)(5), and ordered to report for deferred inspection on December 23, 1999, at 9:00 a.m. Exhibit A.

5. Elian's natural father, Juan Miguel Gonzalez, contacted the Cuban Foreign Ministry and requested the return of his son Elian. Officials of the INS and the State Department interviewed Juan Miguel Gonzalez on December 13 and 31, 1999, in Cuba, to evaluate his claim that he was Elian's father and wanted his son returned. On January 5, 2000, INS Commissioner Doris Meissner determined that Juan Miguel Gonzalez was Elian's biological father and has legal custody of Elian under Cuban law. Exhibit B. Accordingly, Juan Miguel Gonzalez had the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Juan Miguel Gonzalez advised the INS that he did not want Elian to seek political asylum in the United States, and requested Elian's immediate return to Cuba.

6. Attorneys representing Lazaro Gonzalez asked the

Attorney General to review Commissioner's Meissner's January 5, 2000 decision. On January 12, 2000, the Attorney General upheld the Commissioner's decision that Juan Miguel Gonzalez, as Elian's father, has sole authority to speak for his son in immigration matters. Exhibit C.

7. On January 19, 2000, Lazaro Gonzalez filed a complaint in the United States District Court, Southern District of Florida, challenging the INS's decision not to consider an application for political asylum submitted on behalf of Elian. Gonzalez v. Reno, et al., Case No. 00-0206-CIV-MOORE. On March 21, 2000, the Honorable K. Michael Moore, United States District Judge, issued an Order granting the United States' motion to dismiss or, in the alternative, for summary judgment. Lazaro Gonzalez filed a notice of appeal on the same day.

8. On April 6, 2000, Juan Miguel Gonzalez arrived in the United States. He is currently residing in Bethesda, Maryland, and earnestly wants to be reunited with his son Elian.

9. On April 12, 2000, the INS, acting through Executive Associate Commissioner Michael Pearson, issued an Order to Lazaro Gonzalez to bring Elian to the Opa Locka Airport in Miami-Dade County, Florida, on April 13, 2000, at 2:00 p.m., for the purpose of transferring custody of Elian to the INS. Exhibit D. At the appointed time and place on April 13, Lazaro Gonzalez failed to appear to transfer custody of Elian.

10. On January 7, 2000, Lazaro Gonzalez filed a petition in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, Family Division, seeking temporary custody of Elian Gonzalez. Gonzalez v. Gonzalez, Case No. 00-0049-FC-28. On January 10, 2000, the Court granted, on an emergency ex parte basis, a Temporary Protective Order granting Lazaro temporary custody pending service of process upon Juan Miguel Gonzalez and a full hearing. On April 13, 2000, a successor judge issued a Final Order dismissing the petition for lack of subject matter jurisdiction due to federal preemption, and lack of standing.

11. On April 14, 2000, Michael Pearson, INS Executive Associate Commissioner for Field Operations, sent a letter to Lazaro Gonzalez to make clear that Elian's parole into his care was revoked at 2:00 p.m., Thursday, April 13, 2000, when Lazaro failed to comply with the INS's instruction that he present Elian at the Opa Locka Airport. Exhibit E. On April 21, 2000, James T. Spearman, Jr., INS Deputy Assistant District Director for Investigations, issued a Warrant of Arrest for Elian Gonzalez. Exhibit F.

12. Once the INS revoked Elian's parole, his remaining in the United States is a violation of law. Moreover, Lazaro Gonzalez has refused to return physical custody of Elian to the INS, as ordered by the INS. In his letter of April 13, 2000,

Executive Associate Commissioner Pearson advised:

Absent an order from the Eleventh Circuit enjoining Elian's transfer to his father, you have no legal basis to continue to exercise control over Elian. Moreover, you are holding Elian without the consent of his father and without the consent of the Immigration and Naturalization Service, Elian's current legal custodian under the immigration laws.

Exhibit E. When the state court dismissed Lazaro Gonzalez's petition, it terminated the Temporary Protective Order which had granted Lazaro temporary custody of Elian. Therefore, Lazaro Gonzalez has no claim of a right to custody based on the now dismissed state court proceeding. In the absence of legal authority from the INS to retain custody of Elian, or the consent of Elian's father, Juan Miguel Gonzalez to retain custody, Lazaro Gonzalez is unlawfully restraining Elian Gonzalez.

13. On April 19, 2000, the United States Court of Appeals for the Eleventh Circuit issued an Order granting Elian Gonzalez's motion for injunction pending appeal. The Court's Order expressly did not decide "where or in whose custody Plaintiff should remain while this appeal is pending. This Order only prevents Plaintiff's removal from this country." See Order at 15 n. 16.

14. Since he was paroled into his great-uncle's custody, Elian Gonzalez has resided at Lazaro Gonzalez's home located at 2319 N.W. 2nd Street, Miami, Florida. The home is a one-story,

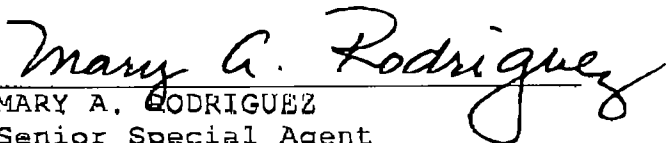
two-bedroom, family residence located in Miami-Dade County, Florida, within the city limits of the City of Miami. The home is located on Northwest 2nd Street, bounded by Northwest 23rd Avenue on the East and Northwest 24th Avenue on the West. The persons inhabiting the residence include Lazaro Gonzalez, his wife Angela Maria, adult daughter Marisleysis Gonzalez, and Elian. In a declaration filed in the District Court proceedings, Marisleysis Gonzalez stated that she and Elian shared the same room in the house. The INS has maintained daily surveillance of the residence at 2319 N.W. 2nd Street, Miami, Florida. I have reviewed the latest surveillance reports and they indicate Elian Gonzalez is still residing at 2319 N.W. 2nd Street, Miami, Florida.

15. Based on this information, I have probable cause to believe that Elian Gonzalez is being unlawfully restrained. Further, I have probable cause to believe he is located at the Lazaro Gonzalez family residence at 2319 N.W. 2nd Street, Miami, Miami-Dade County, Florida. This affidavit requests that a search warrant be issued, authorizing United States Immigration and Naturalization Service officers to enter the residence of Lazaro Gonzalez, located at 2319 N.W. 2nd Street, Miami, Florida, to seize the person of Elian Gonzalez.

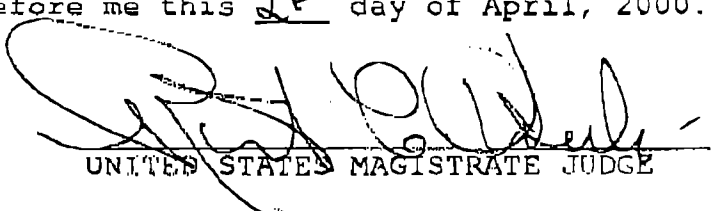
16. The undersigned also requests that the search warrant permit execution during night time hours. During the last two

weeks, large crowds, up to several thousand people, have gathered outside 2319 N.W. 2nd Street to protest the United States Government's actions to reunite Elian with his father. Large numbers of individuals have indicated to the media covering the event that they intend to form a "human chain" to prevent the INS from entering the home of Lazaro Gonzalez. The numbers of individuals outside the home dwindles during the night time hours. In order to meet the least amount of resistance from any crowd gathered outside the home, ensure the safety of Elian Gonzalez, and protect the officers executing the warrant, the INS may plan to execute the search warrant during night time hours.

FURTHER AFFIANT SAYETH NAUGHT.


MARY A. RODRIGUEZ
Senior Special Agent
United States Immigration and
Naturalization Service
Miami, Florida

Sworn to and subscribed before me this 21st day of April, 2000.


UNITED STATES MAGISTRATE JUDGE

Dec-13-99 01:32:00 From-US DEPT OF JUSTICE

+3055365220

T-621 P-03

F-583

U.S. Department of Justice
Immigration and Naturalization ServiceORDER TO APPEAR
DEFERRED INSPECTIONYou, ELIAN GONZALEZ

have not established conclusively that you are admissible to the United States; therefore, YOU ARE ORDERED TO APPEAR IN PERSON AT THE BELOW INDICATED ADDRESS ON THE DATE AND TIME CITED. A final determination will be made then concerning whether and under what conditions you will be admitted to this country for the purpose you have indicated. FAILURE TO APPEAR AS ABOVE ORDERED MAY RESULT IN YOUR BEING TAKEN INTO CUSTODY BY AN OFFICER OF THIS SERVICE. ☐ Your passport has been retained. It will be returned to you in person when you report to the address indicated below.

Reporting Address:

U.S. IMMIGRATION AND NATURALIZATION SERVICE
7820 E. SCARLE CUD
M. 9M. FL 33138
Att: DEFERRED IUSP.

Reporting Date & Time

~~DEC 23~~, 1999
DEC
0900 am.

Specific Reason(s) for Deferral of Inspection:

- ☒ Documentary Deficiency: ☐ Passport ☐ Visa ☐ FORM I-151/I-551
☐ Non-bona fide Nonimmigrant (See details below)
☐ For M/S Band Posting (See details below)

DETAILS:

Applicant Speaks SPANISH
(Language)

Above sub, a minor was rescued by two fishermen on 11/25/99 3 miles out to sea from the Port Everglades Port of Entry. minor Subject was taken to the Port Everglades Coast Guard Station & pickup by EHS unit. Taken to Hollywood ch. hospital on Johnson St. Subject minor had no docs on I.D. on him. was released to the custody of his uncle & aunt m. + Mrs. Gonzalez both ARC holders. Any other information required contact Agent Eastwood, 954-444-2536 Special Agent with the Border Patrol, on Border Patrol agent Lopez 954-768-3450-Buena. They were both on site when minor was brought to USCG Station/PEU. Deferred AS per ADD ORDER.

305-541-9039

Port Everglades, FL 11/25/99
Deferring Port Date

Signature of recommending officer

Supervisory Officer

GOVERNMENT
EXHIBIT

A

(NOTE: Instructions on Reverse)

000025

FORM I-544 (REV. 4-1-83) Y

Dec-15-99 01:32am From-US DEPT OF JUSTICE

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T-621 P 04/31 F-553

043849814 02

Immigration and
Naturalization ServiceI-94
Arrival RecordDeferred
INS?
PEU # 3
11/25/99

Family Name <u>GONZALEZ</u>		Birth (Date/Month/Year) <u>1944</u>	
First (Given) Name <u>FLIAN</u>		Sex (Male or Female) <u>MALE</u>	
Country of Citizenship <u>CUBA</u>		Arrival and Flight Number <u>SEA</u>	
Passport Number <u>CUBA</u>		City Where You Boarded <u>SEA</u>	
Country Where You Live <u>Cuba</u>		Date Issued (Date/Month/Year) <u>1944</u>	
City Where You Were Issued <u>Cuba</u>		Date of Entry (Date/Month/Year) <u>1944</u>	
Address While in the United States (Number and Street) <u>2319 NW 2ND ST</u>			
City and State <u>Miami FL</u>			

000026

JAN-05-2000 11:20

INS GENERAL COUNSEL

202 514 8044 P.02/03

**U.S. Department of Justice**
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JAN - 5 2000

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

Dear Mr. Gonzalez,

We appreciate your cooperation during our consideration of immigration matters relating to Elian Gonzalez and your meeting with us in Miami on December 20th. After careful consideration and consultation with her legal advisors, the INS Commissioner has made several determinations in this case, of which I am now prepared to inform you.

The INS has been in direct contact with Juan Miguel Gonzalez-Quintana. Mr. Gonzalez-Quintana has provided reliable documentation that he is Elian's biological father and that he now has legal custody of the child under Cuban law. As such, he has the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Therefore, we have determined that Mr. Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters. Further, we took steps to ensure that Mr. Gonzalez-Quintana could express his true wishes at our interviews with him, and after carefully reviewing the results of the interviews, we are convinced that he did so.

Roger Bernstein and several of his associates, attorneys in Miami, have submitted several Forms G-28, Notice of Entry and Appearance as Attorney, for Elian. Some of these Forms G-28 were signed by you on behalf of Elian. On others, Elian himself has printed his first name. After careful consideration, we have determined that we cannot recognize any of the Forms G-28 as authorizing these attorneys to represent Elian in immigration matters. Although the INS has placed Elian in your physical care, such placement does not confer upon you the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child's custodial parent. Further, we do not believe that Elian, who recently turned six years old, has the legal capacity on his own to authorize representation. Finally, Mr. Gonzalez-Quintana has expressly declined to authorize Mr. Bernstein or his associates to represent Elian. Therefore, the INS cannot recognize them as Elian's representatives.



000003

JAN-05-2000 11:21

INS GENERAL COUNSEL

202 514 8044 P.03/03

Mr. Lazaro Gonzalez
Page 2

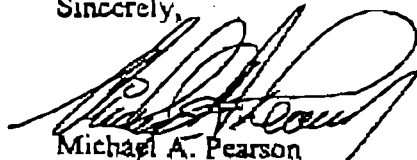
In our direct conversations with Mr. Gonzalez-Quintana, he has repeatedly informed us of his decision not to assert Elian's right to apply for asylum. Mr. Bernstein and his associates have prepared and submitted asylum applications on Elian's behalf, one of which was signed by Elian. After careful consideration, we have determined that Elian does not have the capacity to apply for asylum without the assistance of his parent. Further, neither the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. Gonzalez-Quintana's decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications as having been submitted on Elian's behalf.

Mr. Gonzalez-Quintana has also repeatedly requested that Elian be returned immediately to his custody in Cuba. We consider this to be a request to withdraw Elian's application for admission to the United States, made by Elian's custodial parent with authority to speak for Elian in immigration matters. Therefore, we have granted Mr. Gonzalez-Quintana's request to withdraw Elian's application for admission to the United States.

Upon his arrival, Elian was temporarily paroled into the United States. Arrangements should now be made within the next nine days for Elian's reunion with his father. It is our hope that you will be able to make arrangements with your nephew to ensure that Elian is returned to him and his immediate family as soon as possible. The INS is prepared to provide whatever assistance would be appropriate. We are also aware that neutral third parties have offered to facilitate Elian's return to Cuba and we are ready to work with them as arrangements are sought.

We appreciate your family's immediate willingness to care for and comfort Elian after the tragic loss of his mother and stepfather and his ordeal on the high seas. Please be assured that we would be happy to facilitate continuing contact between Elian, his father, and your family. If Elian and his immediate family wished to apply for tourist visas at some point in the future, the Consular Section at the U.S. Interests Section in Havana would, of course, consider them very favorably.

Sincerely,



Michael A. Pearson
Executive Associate Commissioner
for Field Operations

000004

TOTAL 4 03



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 191st 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 views about



Letter to Spencer Wig, Esq., et al.

Page 2

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, the father's very close relationship

Letter to Spencer Big, Esq., et al.

Page 3

with Elian, 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: Who speaks for the child? If Elian is not competent to "indicate[] a fear of persecution or intention to apply for

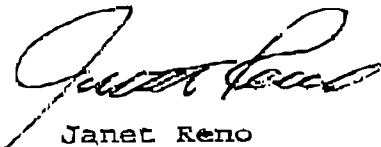
Letter to Spencer Eig, Esq., et al.

Page 4

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,


Janet Reno

APR-13-2000 00:00

OFC OF THE COMMISSIONER

202 514 4623 P.02/03



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. Lazzaro 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 Mariscysis, 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,

GOVERNMENT
EXHIBIT

D

APR-13-2000 00:00

OFC OF THE COMMISSIONER

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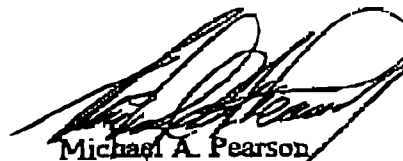
Mr. Lazaro Gonzalez
Page 2

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.

TOTAL P.03

HFK-14-2000 1H:17

OFF OF THE COMMISSIONER

202 514 4623 P.02/03



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

April 14, 2000

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

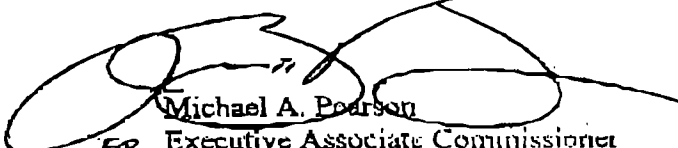
Re: Elian Gonzalez

Dear Mr. Gonzalez:

We are aware that certain of your attorneys and spokesmen have stated publicly that you believe Elian Gonzalez is still legally paroled into your care. I am writing to make clear that Elian's parole into your care was revoked at 2:00 p.m. on Thursday, April 13, 2000, when you failed to comply with the INS's instruction to present Elian at the Opa-Locka Airport to be reunited with his father. The revocation was pursuant to 8 U.S.C. §§ 1103, 1182(d)(5), 1225 (Supp. 1998); 8 C.F.R. §§ 103.1, 212.5, 235.2, 236.3 (1999). Absent an order from the Eleventh Circuit enjoining Elian's transfer to his father, you have no legal basis to continue to exercise control over Elian. Moreover, you are holding Elian without the consent of his father and without the consent of the Immigration and Naturalization Service, Elian's current legal custodian under the immigration laws.

Should you have any questions, please contact District Director Robert Wallis at 305-762-3630.

Sincerely,


Michael A. Pearson
FOR Executive Associate Commissioner
for Field Operations



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

U.S. Department of Justice
Immigration and Naturalization Service

Warrant for Arrest of AlienFile No. A77 013 761Date: April 21, 2000

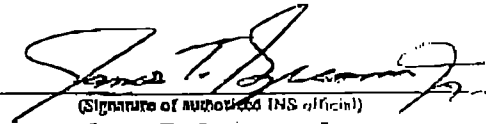
To any officer of the Immigration and Naturalization Service delegated authority pursuant to section 287 of the Immigration and Nationality Act:

From evidence submitted to me, it appears that:

GONZALEZ, Elian
(Full name of alien)

an alien who entered the United States at or near Port Everglades, Florida on
(Port)
November 25, 1999 is within the country in violation of the immigration laws and is
(Date)
therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act.

By the virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.



(Signature of authorized INS official)

James T. Spearman, Jr.

(Print name of official)

Deputy Assistant District Director Investigations

(Title)

Certificate of Service

Served by me at _____ on _____ at _____
I certify that following such service, the alien was advised concerning his or her right to counsel and was furnished a copy of this warrant.

(Signature of officer serving warrant)

(Title of officer serving warrant)

**GOVERNMENT
EXHIBIT**F

Form I-200 (Rev. 4-1-97) N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-_____

IN THE MATTER OF THE SEARCH)
OF RESIDENCE OF LAZARO GONZALEZ,)
LOCATED AT 2319 N.W. 2ND STREET,)
MIAMI, MIAMI-DADE COUNTY, FLORIDA)
_____)

APPLICATION OF UNITED STATES
IMMIGRATION AND NATURALIZATION SERVICE
FOR SEARCH WARRANT PURSUANT TO FEDERAL RULE OF
CRIMINAL PROCEDURE 41(b) AND MEMORANDUM IN SUPPORT THEREOF

The United States Immigration and Naturalization Service (INS), by and through its undersigned counsel, files its Application for Search Warrant Pursuant to Federal Rule of Criminal Procedure Rule 41(b) and Memorandum of Law in Support Thereof, and states:

The INS seeks a search warrant in order to seize the person of Elian Gonzalez, date of birth of December 6, 1993, who is a native and citizen of Cuba. On November 25, 1999, Elian was paroled into the temporary custody of Lazaro Gonzalez, pursuant to section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5).

On April 12, 2000, Michael Pearson, Executive Associate Commissioner, Immigration and Naturalization Service, and Robert Wallis, Miami INS District Director, revoked Elian's parole. The Eleventh Circuit has described parole as "an act of extraordinary

sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." Jean v. Nelson, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985). By revoking parole, Commissioner Pearson and District Director Wallis ended Elian's temporary admission into the United States.

The revocation of parole also terminated any legal basis for Lazaro Gonzalez to retain custody of Elian. On April 12, 2000, Lazaro Gonzalez was directed by the INS to turn over custody of Elian on April 13, 2000, at 2:00 p.m., at Opa Locka Airport, Miami, Florida. He failed to do so. Lazaro Gonzalez's present custody of Elian has no legal basis because it is in contravention of the INS's order and without the consent of Elian's natural father, Juan Miguel Gonzalez.

Federal Rule of Criminal Procedure 41(b) provides that a warrant "may be issued under this rule to search for and seize any . . . (4) person for whose arrest there is probable cause, or who is unlawfully restrained." Lazaro Gonzalez's retention of the custody of Elian is unlawful because it is contrary to the INS order of April 12, 2000, and without the consent of Juan Miguel Gonzalez. The instant situation is analogous to the retention of custody by a parent when a court has ordered custody

transferred to another individual. See United States v. Al-Ahmad, 996 F.Supp. 1055 (D. Colo. 1998) (Probable cause existed to establish a violation of 18 U.S.C. § 1204 where the father refused to comply with a court order changing custody to the maternal grandmother).

Inasmuch as Elian has been residing at the residence of a third-party, Lazaro Gonzalez, the INS, in an abundance of caution, requests a search warrant in order to enter that residence in order to seize the person of Elian Gonzalez and reunite him with his father, Juan Miguel Gonzalez. Federal Rule of Criminal Procedure 41 was amended in 1979 to allow a warrant to be issued to search for and seize a person who is unlawfully restrained. Wright, Federal Practice and Procedure: Criminal 2d § 664.1. The Advisory Committee Note to the 1979 amendment states in part:

This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search for a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that

the person sought is at the place to be searched.

The Advisory Committee recognized that "[i]t may be that very often exigent circumstances, especially the need to act very promptly to protect the life or well-being of the kidnap victim, would justify an immediate warrantless search for the person restrained. But this is not inevitably the case. Moreover, as noted above, there should be available a process whereby law enforcement agents may acquire in advance a judicial determination that they have a cause to intrude upon the privacy of those at the place where the victim is thought to be located." Id. at 613-14 n.3. While the INS does not necessarily need a search warrant in order to seize Elian Gonzalez, an unlawfully restrained individual, it believes there is probable cause to support the issuance of a search warrant and seeks such a warrant.

On April 21, 2000, James T. Spearman, Jr., INS Deputy Assistant District Director for Investigations, issued an Administrative Arrest Warrant for Elian. In Steagald v. United States, 451 U.S. 204 (1981), the Supreme Court held that an arrest warrant does not authorize the police to enter the home of a third person in order to effect the arrest. Instead, the police must obtain, through the "detached scrutiny of a judicial officer," a warrant before it can intrude into the privacy of a person's home. Id. at 213-14. While a judicially issued arrest

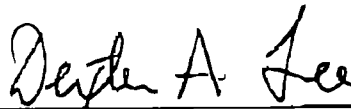
warrant is sufficient to justify an entry into the person's home to effect his arrest, Payton v. New York, 445 U.S. 573, 602-03 (1980), the Administrative Arrest Warrant is issued for Elian Gonzalez, who is residing in the home of a third-party. Accordingly, a search warrant is required before the INS may enter that residence in order to execute the Administrative Arrest Warrant by seizing the person of Elian Gonzalez.¹

The INS has probable cause to believe that Elian Gonzalez is residing at the residence of Lazaro Gonzalez, his great-uncle, which is located at 2319 N.W. 2nd Street, Miami, Miami-Dade County, Florida. Accordingly, it requests a search warrant be issued to search those premises.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:



DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139

¹ A search warrant is also required under the Fourth Amendment because the Administrative Arrest Warrant was not issued by a judicial officer.

AO 93 (Rev. 8/95) Search Warrant

United States District Court

SOUTHERN DISTRICT OF FLORIDA

In the Matter of the Search of

(Name, address or brief description of person or property to be searched)

RESIDENCE OF LAZARO GONZALEZ, LOCATED AT
2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE
COUNTY, FLORIDA

SEARCH WARRANT

CASE NUMBER:

TO: S/A Mary A. Rodriguez, U.S. Immig. & Natl. Service and any Authorized Officer of the United States

Affidavit(s) having been made before me by S/A Mary A. Rodriguez who has reason to
Affiantbelieve that ☐ on the person of or ☒ on the premises known as (name, description and/or location)THE RESIDENCE OF LAZARO GONZALEZ, LOCATED AT 2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE COUNTY,
FLORIDAin the SOUTHERN District of FLORIDA there is now
concealed a certain person or property, namely (describe the person or property)

THE PERSON OF ELIAN GONZALEZ, DATE OF BIRTH DECEMBER 6, 1993, A NATIVE AND CITIZEN OF CUBA.

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property
so described is now concealed on the person or premises above-described and establish grounds for the issuance of this
warrant.YOU ARE HEREBY COMMANDED to search on or before 5-1-0

Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and
making the search (in the daytime ~~5:00 A.M. to 10:00 P.M.~~) (at any time in the day or night as I find reasonable cause
has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and
receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly
return this warrant to U. S. MAGISTRATE JUDGE HUBE as required by law.

U.S. Judge or Magistrate Judge

21 APR 2000 12:00 P.M.
Date and Time Issued

at

Miami, Florida
City and StateU.S. MAGISTRATE JUDGE
Name and Title of Judicial Officer

Signature of Judicial Officer

This form was electronically produced by Elite Federal Forms, Inc.

AO 93 (Rev. 8/95) Search Warrant

RETURN

DATE WARRANT RECEIVED

DATE AND TIME WARRANT EXECUTED

COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH

INVENTORY MADE IN THE PRESENCE OF

INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT

CERTIFICATION

I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.

Subscribed, sworn to, and returned before me this date.

U.S. Magistrate Judge

Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-_____

IN THE MATTER OF THE SEARCH)
OF RESIDENCE OF LAZARO GONZALEZ,)
LOCATED AT 2319 N.W. 2ND STREET,)
MIAMI, MIAMI-DADE COUNTY, FLORIDA)
_____))
_____)

UNITED STATES IMMIGRATION AND NATURALIZATION
SERVICE'S MOTION TO SEAL APPLICATION FOR SEARCH WARRANT,
AFFIDAVIT IN SUPPORT OF APPLICATION, MEMORANDUM
IN SUPPORT OF APPLICATION, AND SEARCH WARRANT, PENDING
EXECUTION OF SEARCH WARRANT AND FILING OF THE RETURN

The United States Immigration and Naturalization Service (INS), by and through its undersigned counsel, files its Motion to Seal Application for Search Warrant, Affidavit in Support of Application, Memorandum in Support of Application, and Search Warrant, Pending Execution of Search Warrant and Filing of the Return, and states;

The INS requests an Order sealing the Application for Search Warrant, Affidavit in Support of the Application, the Memorandum in Support of the Application, and the Search Warrant, pending the execution of the search warrant and filing of the return. The request is based on the need to preserve the security of the operation. Knowledge that a search warrant had been issued would compromise the execution of the warrant since resistance, in the form of even larger crowds gathering outside the home of Lazaro Gonzalez, would likely increase. This could jeopardize the

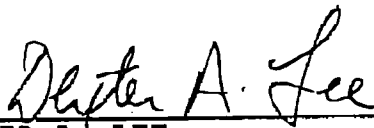
safety of Elian Gonzalez, the officers executing the warrant, and the general public.

Accordingly, the INS requests that the Application for Search Warrant, Affidavit in Support thereof, Memorandum in Support of Application, and Search Warrant, be sealed until the search warrant is executed and the return is filed.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:

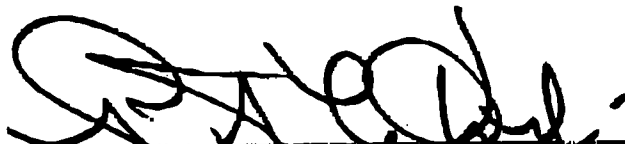

DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139

DATED: April 21, 2000

ORDER GRANTING MOTION TO SEAL

For the reasons set forth above, the Immigration and Naturalization Service's Motion to Seal is hereby GRANTED.

DONE AND ORDERED at Miami, Florida, this 21st day of April, 2000.


UNITED STATES MAGISTRATE JUDGE

U.S. DEPARTMENT OF JUSTICE

OFFICE OF PUBLIC AFFAIRS

IMPORTANT INFORMATION

ATTENTION: _____

DATE: _____

OF: _____

SUBJ: _____

FAX #: 456-6279

PAGES: _____

FROM: Public Affairs

PHONE: (202) 514-2007

FAX: (202) 514-5331

NOTE: If you are not the intended receiver written above, please do not read the contents of this facsimile, for it may contain confidential information. Please call immediately and inform the sender. We are sorry for the inconvenience.

Please call (202) 514-2008 if there is a problem with the transmission.

AO 93 (Rev. 8/95) Search Warrant

United States District Court

SOUTHERN DISTRICT OF FLORIDA

In the Matter of the Search of

(Name, address or brief description of person or property to be searched)

RESIDENCE OF LAZARO GONZALEZ, LOCATED AT
2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE
COUNTY, FLORIDA

SEARCH WARRANT

CASE NUMBER:

TO: S/A Mary A. Rodriguez, U.S. Immig. & Nat. Service and any Authorized Officer of the United States

Affidavit(s) having been made before me by S/A Mary A. Rodriguez who has reason to
Affiant

believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

THE RESIDENCE OF LAZARO GONZALEZ, LOCATED AT 2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE COUNTY,
FLORIDA

in the SOUTHERN District of FLORIDA there is now
concealed a certain person or property, namely (describe the person or property)

THE PERSON OF ELIAN GONZALEZ, DATE OF BIRTH DECEMBER 6, 1993, A NATIVE AND CITIZEN OF CUBA.

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property
so described is now concealed on the person or premises above-described and establish grounds for the issuance of this
warrant.

YOU ARE HEREBY COMMANDED to search on or before 5-1-0
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and
making the search (in the daytime 6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause
has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and
receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly
return this warrant to U. S. MAGISTRATE JUDGE HUBE as required by law.

U.S. Judge or Magistrate Judge

21 APR 2001 2:20 P.M.
Date and Time Issued

at Miami, Florida
City and State

U. S. MAGISTRATE JUDGE
Name and Title of Judicial Officer

[Signature]
Signature of Judicial Officer

AO 93 (Rev. 8/95) Search Warrant

RETURN

DATE WARRANT RECEIVED

DATE AND TIME WARRANT EXECUTED

COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH

INVENTORY MADE IN THE PRESENCE OF

INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT

CERTIFICATION

I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.

Subscribed, sworn to, and returned before me this date.

U.S. Magistrate Judge

Date

AO 106 (Rev. 7/87) Affidavit for Search Warrant

United States District Court

SOUTHERN DISTRICT OF FLORIDA

In the Matter of the Search of

(Name, address or brief description of person, property or premises to be searched)

APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANTTHE RESIDENCE OF LAZARO GONZALEZ, LOCATED AT
2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE COUNTY,
FLORIDA

CASE NUMBER:

I, Mary A. Rodriguez being duly sworn depose and
s a y :I am a(n) Senior Special Agent, U.S. Immigration and Naturalization Service and have reason to believe

official title

that ☐ on the person of or ☒ on the property or premises known as (name, description and/or location)THE RESIDENCE OF LAZARO GONZALEZ, LOCATED AT 2319 N.W. 2ND STREET, MIAMI, MIAMI-DADE COUNTY,
FLORIDA,in the SOUTHERN District of FLORIDA

there is now concealed a certain person or property, namely (describe the person or property to be seized)

THE PERSON OF ELIAN GONZALEZ, DATE OF BIRTH DECEMBER 6, 1993, A NATIVE AND CITIZEN OF CUBA.

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)

BEING UNLAWFULLY RESTRAINED AND THE SUBJECT OF AN INS ADMINISTRATIVE WARRANT OF ARREST.

concerning a violation of Title United States code,
Section(s) _____

The facts to support a finding of Probable Cause are as follows:

SEE ATTACHED AFFIDAVIT

Continued on the attached sheet and made a part hereof.

☒ Yes ☐ NoMary A. Rodriguez
Signature of Affiant

Sworn to before me, and subscribed in my presence

91 APR 2000
DateU.S. MAGISTRATE JUDGE
Name and Title of Judicial Officerat Miami, Florida
City and State
[Signature]
Signature of Judicial Officer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-_____

IN THE MATTER OF THE SEARCH)
OF RESIDENCE OF LAZARO GONZALEZ,)
LOCATED AT 2319 N.W. 2ND STREET,)
MIAMI, MIAMI-DADE COUNTY, FLORIDA)
)
)

APPLICATION OF UNITED STATES
IMMIGRATION AND NATURALIZATION SERVICE
FOR SEARCH WARRANT PURSUANT TO FEDERAL RULE OF
CRIMINAL PROCEDURE 41(b) AND MEMORANDUM IN SUPPORT THEREOF

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On April 12, 2000, Michael Pearson, Executive Associate Commissioner, Immigration and Naturalization Service, and Robert Wallis, Miami INS District Director, revoked Elian's parole. The Eleventh Circuit has described parole as "an act of extraordinary

sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." Jean v. Nelson, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985). By revoking parole, Commissioner Pearson and District Director Wallis ended Elian's temporary admission into the United States.

The revocation of parole also terminated any legal basis for Lazaro Gonzalez to retain custody of Elian. On April 12, 2000, Lazaro Gonzalez was directed by the INS to turn over custody of Elian on April 13, 2000, at 2:00 p.m., at Opa Locka Airport, Miami, Florida. He failed to do so. Lazaro Gonzalez's present custody of Elian has no legal basis because it is in contravention of the INS's order and without the consent of Elian's natural father, Juan Miguel Gonzalez.

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transferred to another individual. See United States v. Al-Ahmad, 996 F.Supp. 1055 (D. Colo. 1998) (Probable cause existed to establish a violation of 18 U.S.C. § 1204 where the father refused to comply with a court order changing custody to the maternal grandmother).

Inasmuch as Elian has been residing at the residence of a third-party, Lazaro Gonzalez, the INS, in an abundance of caution, requests a search warrant in order to enter that residence in order to seize the person of Elian Gonzalez and reunite him with his father, Juan Miguel Gonzalez. Federal Rule of Criminal Procedure 41 was amended in 1979 to allow a warrant to be issued to search for and seize a person who is unlawfully restrained. Wright, *Federal Practice and Procedure: Criminal* 2d § 664.1. The Advisory Committee Note to the 1979 amendment states in part:

This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search for a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that

the person sought is at the place to be searched.

The Advisory Committee recognized that "[i]t may be that very often exigent circumstances, especially the need to act very promptly to protect the life or well-being of the kidnap victim, would justify an immediate warrantless search for the person restrained. But this is not inevitably the case. Moreover, as noted above, there should be available a process whereby law enforcement agents may acquire in advance a judicial determination that they have a cause to intrude upon the privacy of those at the place where the victim is thought to be located." Id. at 613-14 n.3. While the INS does not necessarily need a search warrant in order to seize Elian Gonzalez, an unlawfully restrained individual, it believes there is probable cause to support the issuance of a search warrant and seeks such a warrant.

On April 21, 2000, James T. Spearman, Jr., INS Deputy Assistant District Director for Investigations, issued an Administrative Arrest Warrant for Elian. In Steagald v. United States, 451 U.S. 204 (1981), the Supreme Court held that an arrest warrant does not authorize the police to enter the home of a third person in order to effect the arrest. Instead, the police must obtain, through the "detached scrutiny of a judicial officer," a warrant before it can intrude into the privacy of a person's home. Id. at 213-14. While a judicially issued arrest

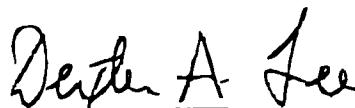
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The INS has probable cause to believe that Elian Gonzalez is residing at the residence of Lazaro Gonzalez, his great-uncle, which is located at 2319 N.W. 2nd Street, Miami, Miami-Dade County, Florida. Accordingly, it requests a search warrant be issued to search those premises.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:



DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139

¹ A search warrant is also required under the Fourth Amendment because the Administrative Arrest Warrant was not issued by a judicial officer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00- _____

IN THE MATTER OF THE SEARCH)
OF RESIDENCE OF LAZARO GONZALEZ,)
LOCATED AT 2319 N.W. 2ND STREET,)
MIAMI, MIAMI-DADE COUNTY, FLORIDA)
_____)

UNITED STATES IMMIGRATION AND NATURALIZATION
SERVICE'S MOTION TO SEAL APPLICATION FOR SEARCH WARRANT,
AFFIDAVIT IN SUPPORT OF APPLICATION, MEMORANDUM
IN SUPPORT OF APPLICATION, AND SEARCH WARRANT, PENDING
EXECUTION OF SEARCH WARRANT AND FILING OF THE RETURN

The United States Immigration and Naturalization Service (INS), by and through its undersigned counsel, files its Motion to Seal Application for Search Warrant, Affidavit in Support of Application, Memorandum in Support of Application, and Search Warrant, Pending Execution of Search Warrant and Filing of the Return, and states:

The INS requests an Order sealing the Application for Search Warrant, Affidavit in Support of the Application, the Memorandum in Support of the Application, and the Search Warrant, pending the execution of the search warrant and filing of the return. The request is based on the need to preserve the security of the operation. Knowledge that a search warrant had been issued would compromise the execution of the warrant since resistance, in the form of even larger crowds gathering outside the home of Lazaro Gonzalez, would likely increase. This could jeopardize the

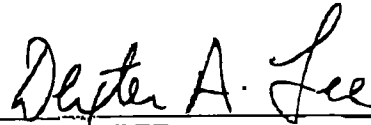
safety of Elian Gonzalez, the officers executing the warrant, and the general public.

Accordingly, the INS requests that the Application for Search Warrant, Affidavit in Support thereof, Memorandum in Support of Application, and Search Warrant, be sealed until the search warrant is executed and the return is filed.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:



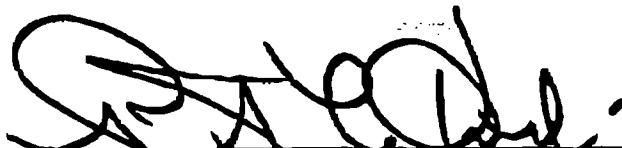
DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139

DATED: April 21, 2000

ORDER GRANTING MOTION TO SEAL

For the reasons set forth above, the Immigration and Naturalization Service's Motion to Seal is hereby GRANTED.

DONE AND ORDERED at Miami, Florida, this 21st day of April, 2000.


UNITED STATES MAGISTRATE JUDGE

(REDACTED) AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Mary A. Rodriguez,, who after being duly sworn, deposes and says:

1. I am Mary A. Rodriguez, Senior Special Agent, United States Immigration and Naturalization Service (INS).

As a senior special agent, my duties include the apprehension of aliens who are in the United States illegally; enforcement of the immigration laws; and conducting investigations into suspected violations of the criminal statutes within the Immigration and Nationality Act (INA). I am authorized by Title 8, United States Code, section 1357 to interrogate any alien or person believed to be an alien as to his/her right to be or to remain in the United States or to arrest any alien in the United States if there is any reason to believe that the alien so arrested is in the United States in violation of any law or regulation made in pursuance of

law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States if I have reason to believe that the alien so arrested is in the United States in violation of any law or regulation and is likely to abscond before a warrant can be obtained for his/her arrest.

2. On November 25, 1999, two fishermen encountered a young boy on an inner tube floating several miles off the coast of Fort Lauderdale, Florida. They rescued the boy, Elian Gonzalez, who was then five years old. The fishermen contacted the United States Coast Guard, who rendezvoused with their vessel and Elian was taken aboard the Coast Guard cutter. The Coast Guard took Elian to shore, where he was then taken to Hollywood Memorial Hospital to be treated for dehydration and exposure.

3. INS immigration inspector Edward Agundez and United States Border Patrol Agent Verne Eastwood responded to the hospital. Elian Gonzalez is a native and citizen of Cuba, who is subject to the Immigration and Nationality Act. He had departed Cuba on a boat with his mother, Elisabeth Brotons, and step-father, Lazaro Munero, on November 22, 1999, along with ten other persons. During the voyage, they encountered heavy seas. The vessel capsized. Elian's mother and step-father perished, along with eight others. Elian and two other people survived.

4. Mr. Agundez met with Lazaro Gonzalez, who was at the hospital and advised that he was Elian's great-uncle. Lazaro

Gonzalez identified a child in a photograph presented to him as Elian, and Lazaro presented his own photograph showing Elian with his natural parents. Due to Elian's continuing medical treatment, Inspector Agundez deferred Elian's immigration inspection for a period of 30 days, pursuant to 8 C.F.R. § 235.2(e). He was temporarily paroled into the custody of Lazaro Gonzalez pursuant to section 212(d)(5) of the INA, 8 U.S.C. § 1182(d)(5), and ordered to report for deferred inspection on December 23, 1999, at 9:00 a.m. Exhibit A.

5. Elian's natural father, Juan Miguel Gonzalez, contacted the Cuban Foreign Ministry and requested the return of his son Elian. Officials of the INS and the State Department interviewed Juan Miguel Gonzalez on December 13 and 31, 1999, in Cuba, to evaluate his claim that he was Elian's father and wanted his son returned. On January 5, 2000, INS Commissioner Doris Meissner determined that Juan Miguel Gonzalez was Elian's biological father and has legal custody of Elian under Cuban law. Exhibit B. Accordingly, Juan Miguel Gonzalez had the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Juan Miguel Gonzalez advised the INS that he did not want Elian to seek political asylum in the United States, and requested Elian's immediate return to Cuba.

6. Attorneys representing Lazaro Gonzalez asked the

Attorney General to review Commissioner's Meissner's January 5, 2000 decision. On January 12, 2000, the Attorney General upheld the Commissioner's decision that Juan Miguel Gonzalez, as Elian's father, has sole authority to speak for his son in immigration matters. Exhibit C.

7. On January 19, 2000, Lazaro Gonzalez filed a complaint in the United States District Court, Southern District of Florida, challenging the INS's decision not to consider an application for political asylum submitted on behalf of Elian. Gonzalez v. Reno, et al., Case No. 00-0206-CIV-MOORE. On March 21, 2000, the Honorable K. Michael Moore, United States District Judge, issued an Order granting the United States' motion to dismiss or, in the alternative, for summary judgment. Lazaro Gonzalez filed a notice of appeal on the same day.

8. On April 6, 2000, Juan Miguel Gonzalez arrived in the United States. He is currently residing in Bethesda, Maryland, and earnestly wants to be reunited with his son Elian.

9. On April 12, 2000, the INS, acting through Executive Associate Commissioner Michael Pearson, issued an Order to Lazaro Gonzalez to bring Elian to the Opa Locka Airport in Miami-Dade County, Florida, on April 13, 2000, at 2:00 p.m., for the purpose of transferring custody of Elian to the INS. Exhibit D. At the appointed time and place on April 13, Lazaro Gonzalez failed to appear to transfer custody of Elian.

10. On January 7, 2000, Lazaro Gonzalez filed a petition in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, Family Division, seeking temporary custody of Elian Gonzalez. Gonzalez v. Gonzalez, Case No. 00-0049-FC-28. On January 10, 2000, the Court granted, on an emergency ex parte basis, a Temporary Protective Order granting Lazaro temporary custody pending service of process upon Juan Miguel Gonzalez and a full hearing. On April 13, 2000, a successor judge issued a Final Order dismissing the petition for lack of subject matter jurisdiction due to federal preemption, and lack of standing.

11. On April 14, 2000, Michael Pearson, INS Executive Associate Commissioner for Field Operations, sent a letter to Lazaro Gonzalez to make clear that Elian's parole into his care was revoked at 2:00 p.m., Thursday, April 13, 2000, when Lazaro failed to comply with the INS's instruction that he present Elian at the Opa Locka Airport. Exhibit E. On April 21, 2000, James T. Spearman, Jr., INS Deputy Assistant District Director for Investigations, issued a Warrant of Arrest for Elian Gonzalez. Exhibit F.

12. Once the INS revoked Elian's parole, his remaining in the United States is a violation of law. Moreover, Lazaro Gonzalez has refused to return physical custody of Elian to the INS, as ordered by the INS. In his letter of April 13, 2000,

Executive Associate Commissioner Pearson advised:

Absent an order from the Eleventh Circuit enjoining Elian's transfer to his father, you have no legal basis to continue to exercise control over Elian. Moreover, you are holding Elian without the consent of his father and without the consent of the Immigration and Naturalization Service, Elian's current legal custodian under the immigration laws.

Exhibit E. When the state court dismissed Lazaro Gonzalez's petition, it terminated the Temporary Protective Order which had granted Lazaro temporary custody of Elian. Therefore, Lazaro Gonzalez has no claim of a right to custody based on the now dismissed state court proceeding. In the absence of legal authority from the INS to retain custody of Elian, or the consent of Elian's father, Juan Miguel Gonzalez to retain custody, Lazaro Gonzalez is unlawfully restraining Elian Gonzalez.

13. On April 19, 2000, the United States Court of Appeals for the Eleventh Circuit issued an Order granting Elian Gonzalez's motion for injunction pending appeal. The Court's Order expressly did not decide "where or in whose custody Plaintiff should remain while this appeal is pending. This Order only prevents Plaintiff's removal from this country." See Order at 15 n. 16.

14. Since he was paroled into his great-uncle's custody, Elian Gonzalez has resided at Lazaro Gonzalez's home located at 2319 N.W. 2nd Street, Miami, Florida. The home is a one-story,

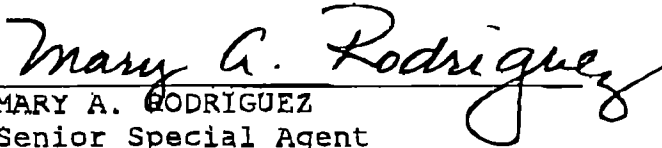
two-bedroom, family residence located in Miami-Dade County, Florida, within the city limits of the City of Miami. The home is located on Northwest 2nd Street, bounded by Northwest 23rd Avenue on the East and Northwest 24th Avenue on the West. The persons inhabiting the residence include Lazaro Gonzalez, his wife Angela Maria, adult daughter Marisleysis Gonzalez, and Elian. In a declaration filed in the District Court proceedings, Marisleysis Gonzalez stated that she and Elian shared the same room in the house. The INS has maintained daily surveillance of the residence at 2319 N.W. 2nd Street, Miami, Florida. I have reviewed the latest surveillance reports and they indicate Elian Gonzalez is still residing at 2319 N.W. 2nd Street, Miami, Florida.

15. Based on this information, I have probable cause to believe that Elian Gonzalez is being unlawfully restrained. Further, I have probable cause to believe he is located at the Lazaro Gonzalez family residence at 2319 N.W. 2nd Street, Miami, Miami-Dade County, Florida. This affidavit requests that a search warrant be issued, authorizing United States Immigration and Naturalization Service officers to enter the residence of Lazaro Gonzalez, located at 2319 N.W. 2nd Street, Miami, Florida, to seize the person of Elian Gonzalez.

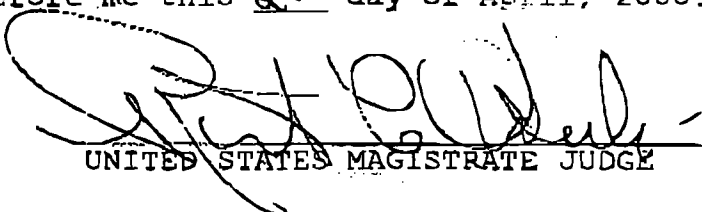
16. The undersigned also requests that the search warrant permit execution during night time hours. During the last two

weeks, large crowds, up to several thousand people, have gathered outside 2319 N.W. 2nd Street to protest the United States Government's actions to reunite Elian with his father. Large numbers of individuals have indicated to the media covering the event that they intend to form a "human chain" to prevent the INS from entering the home of Lazaro Gonzalez. The numbers of individuals outside the home dwindle during the night time hours. In order to meet the least amount of resistance from any crowd gathered outside the home, ensure the safety of Elian Gonzalez, and protect the officers executing the warrant, the INS may plan to execute the search warrant during night time hours.

FURTHER AFFIANT SAYETH NAUGHT.


MARY A. RODRIGUEZ
Senior Special Agent
United States Immigration and
Naturalization Service
Miami, Florida

Sworn to and subscribed before me this 2nd day of April, 2000.


UNITED STATES MAGISTRATE JUDGE

Dec-13-99 01:32pm From:US DEPT OF JUSTICE

+3055365220

T-621 P 03

F-563

U.S. Department of Justice
Immigration and Naturalization Service**ORDER TO APPEAR
DEFERRED INSPECTION**You, ELIAN GONZALEZ

have not established conclusively that you are admissible to the United States; therefore, YOU ARE ORDERED TO APPEAR IN PERSON AT THE BELOW INDICATED ADDRESS ON THE DATE AND TIME CITED. A final determination will be made then concerning whether and under what conditions you will be admitted to this country for the purpose you have indicated. FAILURE TO APPEAR AS ABOVE ORDERED MAY RESULT IN YOUR BEING TAKEN INTO CUSTODY BY AN OFFICER OF THIS SERVICE. ☐ Your passport has been retained. It will be returned to you in person when you report to the address indicated below.

Reporting Address:

U.S. IMMIGRATION AND NATURALIZATION SERVICE
7880 E. SCAGGS BLVD
P.M., FL 33108
ATTN: DEFERRED INSP.

Reporting Date & Time

~~DEC 23~~, 1999
DEC
0900 am.

Specific Reason(s) for Deferral of Inspection:

- ☒ Documentary Deficiency: ☐ Passport ☐ Visa ☐ FORM I-151/I-551
☐ Non-bona fide Nonimmigrant (See details below)
☐ For M/S Bond Posting (See details below)

DETAILS:

Applicant Speaks SPANISH

(Language)

Above subject minor was rescued by two fisherman on 11/25/99 3 miles out to sea from the Port Everglades Port of Entry. minor subject was taken to the Port Everglades Coast Guard Station & pickup by EHS unit. Taken to Hoxleywood children's Hospital on Johnson St. Subject minor had no docs on ID on him. was released to the custody of his uncle & aunt m. + Mrs. Gonzalez both ARC holders. Any other information required contact agent Eastwood, 954-444-2536 Special Agent with the Border Patrol, on Border Patrol agent Lopez 954-768-3450-Bepm. They were both onsite when minor was brought to USCG Station/PEU. Deferred AS per ADA NADER.

305-541-9039

Port Everglades, FL 11/25/99
Deferring Port Date

Signature of recommending officer

Supervisory Officer

GOVERNMENT
EXHIBIT
A

(NOTE: Instructions on Reverse)

Dec-13-99 01:32pm From:US DEPT OF JUSTICE

*3055365223

T-021 F 04/21 F-553

043849814 02

Immigration and
Naturalization Service
I-94
Arrival RecordDeferred
INS?
PEU # 3
11/25/99

Family Name <u>GONZALEZ</u>		Birth Date (MM/DD/YYYY) <u>94</u>
First (Given) Name <u>ELIAN</u>		Sex (M/F) <u>MALE</u>
Country of Citizenship <u>CUBA</u>		Port of Entry <u>SEA</u>
Country Where You Were Born <u>Cuba</u>	City Where You Boarded <u>SEA</u>	
Date (MM/DD/YYYY) You Arrived <u>11/25/99</u>		
Address While in the United States (Number and Street) <u>2319 NW 2nd St</u>		
City and State <u>MIAMI FL</u>		

000026

JAN-05-2000 11:20

INS GENERAL COUNSEL

202 514 8044 P.02/03



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JAN - 5 2000

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

Dear Mr. Gonzalez,

We appreciate your cooperation during our consideration of immigration matters relating to Elian Gonzalez and your meeting with us in Miami on December 20th. After careful consideration and consultation with her legal advisors, the INS Commissioner has made several determinations in this case, of which I am now prepared to inform you.

The INS has been in direct contact with Juan Miguel Gonzalez-Quintana. Mr. Gonzalez-Quintana has provided reliable documentation that he is Elian's biological father and that he now has legal custody of the child under Cuban law. As such, he has the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Therefore, we have determined that Mr. Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters. Further, we took steps to ensure that Mr. Gonzalez-Quintana could express his true wishes at our interviews with him, and after carefully reviewing the results of the interviews, we are convinced that he did so.

Roger Bernstein and several of his associates, attorneys in Miami, have submitted several Forms G-28, Notice of Entry and Appearance as Attorney, for Elian. Some of these Forms G-28 were signed by you on behalf of Elian. On others, Elian himself has printed his first name. After careful consideration, we have determined that we cannot recognize any of the Forms G-28 as authorizing these attorneys to represent Elian in immigration matters. Although the INS has placed Elian in your physical care, such placement does not confer upon you the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child's custodial parent. Further, we do not believe that Elian, who recently turned six years old, has the legal capacity on his own to authorize representation. Finally, Mr. Gonzalez-Quintana has expressly declined to authorize Mr. Bernstein or his associates to represent Elian. Therefore, the INS cannot recognize them as Elian's representatives.

GOVERNMENT
EXHIBIT
B

000003

JAN-05-2020 11:21

INS GENERAL COUNSEL

202 514 8044 P.03/03

Mr. Lazaro Gonzalez

Page 2

In our direct conversations with Mr. Gonzalez-Quintana, he has repeatedly informed us of his decision not to assert Elian's right to apply for asylum. Mr. Bernstein and his associates have prepared and submitted asylum applications on Elian's behalf, one of which was signed by Elian. After careful consideration, we have determined that Elian does not have the capacity to apply for asylum without the assistance of his parent. Further, neither the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. Gonzalez-Quintana's decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications as having been submitted on Elian's behalf.

Mr. Gonzalez-Quintana has also repeatedly requested that Elian be returned immediately to his custody in Cuba. We consider this to be a request to withdraw Elian's application for admission to the United States, made by Elian's custodial parent with authority to speak for Elian in immigration matters. Therefore, we have granted Mr. Gonzalez-Quintana's request to withdraw Elian's application for admission to the United States.

Upon his arrival, Elian was temporarily paroled into the United States. Arrangements should now be made within the next nine days for Elian's reunion with his father. It is our hope that you will be able to make arrangements with your nephew to ensure that Elian is returned to him and his immediate family as soon as possible. The INS is prepared to provide whatever assistance would be appropriate. We are also aware that neutral third parties have offered to facilitate Elian's return to Cuba and we are ready to work with them as arrangements are sought.

We appreciate your family's immediate willingness to care for and comfort Elian after the tragic loss of his mother and stepfather and his ordeal on the high seas. Please be assured that we would be happy to facilitate continuing contact between Elian, his father, and your family. If Elian and his immediate family wished to apply for tourist visas at some point in the future, the Consular Section at the U.S. Interests Section in Havana would, of course, consider them very favorably.

Sincerely,



Michael A. Pearson
Executive Associate Commissioner
for Field Operations

000004



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
2375 NE 191st 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 views about



Letter to Spencer Eig, Esq., et al.

Page 2

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, the father's very close relationship

Letter to Spencer Eig, Esq., et al.

Page 2

with Elian, 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: Who speaks for the child? If Elian is not competent to indicate[] a fear of persecution or intention to apply for

Letter to Spencer Big, Esq., et al.

Page 4

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,



Janet Reno

APR-13-2000 00:00

OFFICE OF THE COMMISSIONER

202 514 4523 P.02/03



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 Marisleysis, 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,

GOVERNMENT
EXHIBIT

D

APR-13-2000 00:00

OFF OF THE COMMISSIONER

202 514 4623

P.03/03

Mr. Lazaro Gonzalez

Page 2

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.

APR 14 2000 15:17

OFFICE OF THE COMMISSIONER

202 514 4623 P.02/03

**U.S. Department of Justice
Immigration and Naturalization Service**

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

April 14, 2000

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

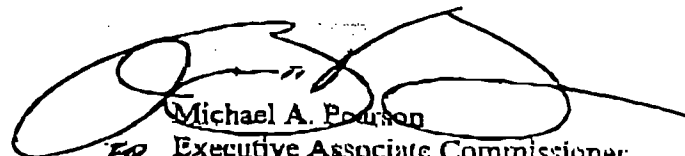
Re: Elian Gonzalez

Dear Mr. Gonzalez:

We are aware that certain of your attorneys and spokesmen have stated publicly that you believe Elian Gonzalez is still legally paroled into your care. I am writing to make clear that Elian's parole into your care was revoked at 2:00 p.m. on Thursday, April 13, 2000, when you failed to comply with the INS's instruction to present Elian at the Opa-Locka Airport to be reunited with his father. The revocation was pursuant to 8 U.S.C. §§ 1103, 1182(d)(5), 1225 (Supp. 1998); 8 C.F.R. §§ 103.1, 212.5, 235.2, 236.3 (1999). Absent an order from the Eleventh Circuit enjoining Elian's transfer to his father, you have no legal basis to continue to exercise control over Elian. Moreover, you are holding Elian without the consent of his father and without the consent of the Immigration and Naturalization Service, Elian's current legal custodian under the immigration laws.

Should you have any questions, please contact District Director Robert Wallis at 305-762-3680.

Sincerely,



Michael A. Poirson
Executive Associate Commissioner
for Field Operations



HR-14-2000 18:17

OFC OF THE COMMISSIONER

202 514 4623 P.03/03

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

Department of Justice
Immigration and Naturalization Service

Warrant for Arrest of AlienFile No. A77 013 761Date: April 21, 2000

To any officer of the Immigration and Naturalization Service delegated authority pursuant to section 287 of the Immigration and Nationality Act:

From evidence submitted to me, it appears that:

CONCEALMENT Elian

(Full name of alien)

an alien who entered the United States at or near Port Everglades, Florida on November 25, 1999 is within the country in violation of the immigration laws and is therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act.

By the virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.



(Signature of authorized INS official)

James T. Spearman, Jr.

(Print name of official)

Deputy Assistant District Director Investigations

(Title)

Certificate of Service

Served by me at _____ on _____ at _____
I certify that following such service, the alien was advised concerning his or her right to counsel and was furnished a copy of this warrant.

(Signature of officer serving warrant)

(Title of officer serving warrant)

**GOVERNMENT
EXHIBIT**F

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.

Meeting w/

10-12

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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 Lazaro 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 SCT. 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 Marti 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 *balseiros* 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, Jagiella 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 Rev., 571 So.2d 527, 528 (Fla. 3rd DCA

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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

CASE NO. 00-00479-FC-28

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.

CASE NO. 00-00479-FC-28

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

CASE NO. 00-00479-FC-28

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

CASE NO. 00-00479-FC-28

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

D

J

Office of the Deputy Attorney General
U. S. Department of Justice

The Deputy Attorney General

Washington, D. C. 20530

FACSIMILE TRANSMISSION COVER SHEET

DATE: 3/24/00

TO: Beth Nolan
White House Counsel
456-2632 (phone)
456-6279 (fax)

FROM: Eric H. Holder, Jr.

OFFICE

PHONE #: 202-514-2101

FACSIMILE

PHONE #: 202-514-0467

COVER PLUS 6 PAGE(s)

REMARKS:

Please deliver to Beth ASAP.

UNITED STATES ATTORNEYS OFFICE
THOMAS E. SCOTT
UNITED STATES ATTORNEY
FACSIMILE COVER SHEET

No. of pages: _____

Date: _____

To: _____

Eric Holder

Phone #: _____

514-2101

Fax #: _____

From: _____

Phone #: _____

Fax #: _____

IF NOT PROPERLY RECEIVED, CALL THE SENDING INDIVIDUAL

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_____ URGENT (Please respond by: _____)
_____ STANDARD (Please respond within 1-3 working days)
_____ FYI ONLY (No response needed)

ADDITIONAL COMMENTS:

UNITED STATES ATTORNEYS
85 N.E. 4th STREET
MIAMI, FL 33132
MAIN: (305) 551-4000
MAIN FAX: (305) 530-7057

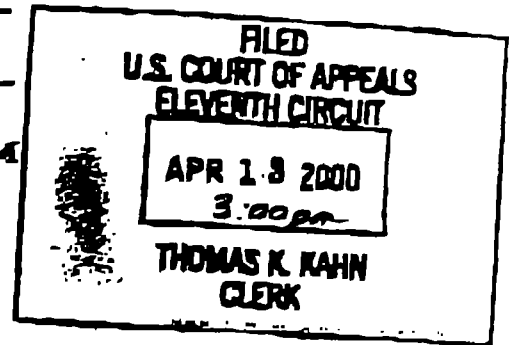
UNITED STATES ATTORNEYS-FT.L
300 E. BROWARD BLVD - 7th FLOOR
FT. LAUDERDALE, FL 33304
MAIN: (954) 356-7333
MAIN FAX: (954) 356-7336

UNITED STATES ATTORNEYS-WPB
100 AUSTRALIAN AVENUE - SUITE 400
WEST PALM BEACH, FL 33401
MAIN: (561) 870-8711
MAIN FAX: (561) 720-8777

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

No. 00-11424-D

D. C. Docket No. 00-206-CV-KNDM



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

Plaintiffs,

**JANET RENO, Attorney General of the United States;
DORIS MEISSNER, Commissioner, United States
Immigration and Naturalization Service;
ROBERT WALLIS, District Director,
United States Immigration and Naturalization Service;
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE; and UNITED
STATES DEPARTMENT OF JUSTICE,**

Defendants.

**Appeal from the United States District Court
for the Southern District of Florida**

ORDER

Plaintiff-Appellant, Elian Gonzalez, by and through his next friend, Lazaro Gonzalez, has filed a motion for an injunction to preclude Plaintiff's physical removal from the jurisdiction of the United States during the pendency of this appeal. In ordinary cases, a motion for injunction pending appeal will not be granted except after consideration by a panel of three judges of this Court. Fed. R. App. P. 8(a)(2)(D). But where time may be short, a single judge of this Court may grant a temporary injunction, preserving the status quo until a panel of three judges can more fully consider the motion for injunction pending appeal. See Fed. R. App. P. 8(a)(2)(D); see also Fed. R. App. P. 27(c); 11th Cir. Local R. 27-1(d)(7).

Consideration of Plaintiff's motion for injunction pending appeal requires examining four factors: (1) whether Plaintiff is likely to succeed on the merits of his appeal; (2) whether Plaintiff

will suffer irreparable injury if the injunction is not granted; (3) whether the injunction, if granted, would substantially harm other parties; and (4) whether the injunction, if granted, would harm the public interest. In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1492 (11th Cir. 1992). Plaintiff, however, need not necessarily show that he probably will succeed on the merits of his appeal; "Instead, [Plaintiff] need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); see also United States v. Hamilton, 963 F.2d 322, 323 (11th Cir. 1992); Garcia-Mir v. Mesa, 781 F.2d 1450, 1453 (11th Cir. 1986).

I understand that Plaintiff is subject to being placed under the physical control, custody, and care of the Immigration and Naturalization Service at any time after 2 o'clock this afternoon. Because of the possibility that Plaintiff might be removed from this country before the motion for injunction

pending appeal can be determined by a panel of three judges, I have decided to act alone but only until a panel can act. I have considered each of the four elements, particularly irreparable injury and likelihood of success. For now, at least—in the light of Plaintiff's motion and Plaintiff's brief on appeal, already filed with this Court—it seems that Plaintiff probably has demonstrated that he is entitled to an injunction prohibiting his removal from the United States during the pendency of this appeal.

THEREFORE,

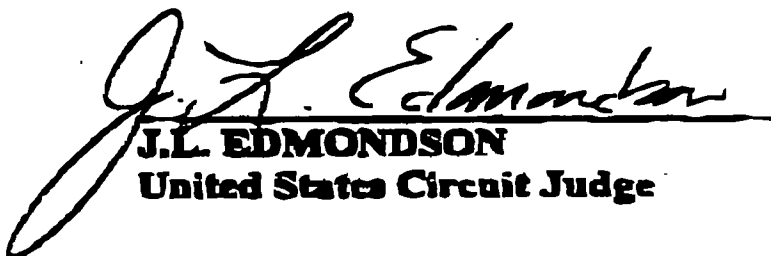
- (1) Plaintiff, Elian Gonzalez, is ENJOINED from leaving the United States;**
- (2) Any and all persons acting for, on behalf of, or in concert with Plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting the removal of Plaintiff from the United States; and**
- (3) All officers and agents of the United States (including, but not limited to, officers and agents of the United States**

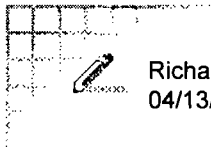
**Department of Justice) are ENJOINED to take such
lawful and reasonable precautions and actions as are
necessary to prevent the removal of Plaintiff from the
United States,**

until further Order of this Court.

**This temporary Order is entered without the Court's having
received a response from Defendants-Appellees. Defendants shall
have until 9:30 a.m. Friday, 14 April, to file a response to Plaintiff's
motion.**

IT IS SO ORDERED.


J.L. EDMONDSON
United States Circuit Judge



Richard L. Siewert
04/13/2000 10:56:22 AM

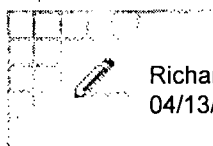
Record Type: Record

To: Maria Echaveste/WHO/EOP@EOP, Bruce R. Lindsey/WHO/EOP@EOP, Beth Nolan/WHO/EOP@EOP, James E. Kennedy/WHO/EOP@EOP
cc: Emily Karcher/WHO/EOP@EOP, Leslie Bernstein/WHO/EOP@EOP, Jennifer M. Palmieri/WHO/EOP@EOP
Subject: with nolan and echaveste edits

We hope and expect that the relatives in Miami will comply with the lawful order of the United States Department of Justice. I urge the relatives to consider the well-being of Elian as we try to reunite him with his father, Juan Miguel.

I appreciate the patience and restraint that Attorney General Janet Reno and her entire Department have shown throughout their effort to resolve this matter in a peaceful and orderly way. Her personal effort to meet with the relatives in Miami demonstrates that she has spared no effort to reunite father and son in the least traumatic way possible. In the spirit of that effort, I hope the relatives in Miami accept her offer to accompany Elian to his reunion with his father.

Let's step back for a minute and remember what is really important here. For the last four months, this six-year-old boy has been separated from the father who raised him from the day he was born. There's a simple principle at stake here; children should be raised by their parents. I think the American public understands and appreciates that we simply are trying to reunite a loving father with his son, to enforce the law, and to do the right thing.



Richard L. Siewert
04/13/2000 10:37:33 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Q & A on Elian

We hope and expect that the relatives in Miami will comply with the lawful order of the United States Department of Justice. I urge the relatives to consider the well-being of Elian as we try to reunite him with his father, Juan Miguel.

I appreciate the patience and restraint that Attorney General Janet Reno and her entire Department have throughout their effort to resolve this matter in a peaceful and orderly way. Her personal effort to meet with the relatives in Miami demonstrates that she has spared no effort to reunite father and son in the least traumatic way possible. I hope the relatives in Miami ^{accept} consider her offer to accompany Elian to his reunion with his father. ~~so that can be as calm as possible~~

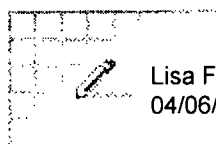
In the spirit of that effort, ✓

Let's step back for a minute and remember what is really important here. For the last four months, this six-year-old boy has been separated from the father who raised him from the day he was born. There's a simple principle at stake here; children should be raised by their parents. I think the American public understands and appreciates that we simply are trying to reunite a loving father with his son, to enforce the law, and to do the right thing.

Message Sent To:

Beth Nolan/WHO/EOP@EOP
Leslie Bernstein/WHO/EOP@EOP
James E. Kennedy/WHO/EOP@EOP
Jennifer M. Palmieri/WHO/EOP@EOP
Jason H. Schechter/WHO/EOP@EOP

10/11
10/11/00
10/11/00
10/11/00
10/11/00



Lisa Ferdinando
04/06/2000 09:41:34 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Father of Elian makes remarks, April 6, 2000

**FATHER OF ELIAN GONZALEZ MAKES REMARKS UPON HIS ARRIVAL
IN THE U.S.**

APRIL 6, 2000

**SPEAKERS: JUAN MIGUEL GONZALEZ, FATHER OF ELIAN GONZALEZ
GONZALEZ (THROUGH TRANSLATOR):**

Good morning.

Message to the American people: I've arrived in Washington where I hope to hug very soon, and for the first time in four months, my son, Elian Gonzalez Broton (ph).

With me is my wife and 6-month-old son. They are the true family that Elian has, and we love him very much.

Exactly 166 days, I have been cruelly separated from my child. Never has he needed his father and his family more, his school more, than during the anguishing period, which went from November 21.

I witnessed the disappearance of his mother, and he survived miraculously a shipwreck. Wasn't that enough for a 5-year-old child? In addition, the temporary custody of some distant relatives who had never seen him before and who had only one meeting with him.

I made an appeal to the U.S. authorities to have my son returned to me, but it was not until January 5 that in compliance with international law the INS recognized the unquestionable principle of parental rights and declared that, as is common practice in such cases, the child should be returned to the father.

However, that decision has not been forced but rather subjected to endless confusing legal procedures.

Finally, last March 21, a U.S. federal court ruled in favor of what should have never been questioned.

It's been an agonizing experience to see my son submitted to cruel psychological pressures aimed at influencing his personality already weakened by the terrible trauma.

Worst still, Elian's been paraded and exhibited in public rallies and by the media with a clear intent to obtain political advantage from this tragedy.

Politicians, journalists, lawyers, publicity agents and others unrelated to the family have been harassing my son. An 8-hour television interview, done without my consent, have shown their cruelty to him and the damaged caused.

My telephone calls to my son from Cuba are often jeopardized and when we do communicate I can hear the adults disturbing the child.

I don't know who are the doctors and psychologists caring for my son, nor the treatment and medications he has been taking. Although on four different occasions I have submitted regular requests for information, I have not received a response.

In the last few days my family and I have been alarmed to see the pressure exacerbated in Miami and dangerous displays on television that make us fear for the safety of my son.

I am truly impatient to have him returned to me as soon as possible and go back to Cuba

together immediately.

However, I have been told that I should still wait for two other months before I can take Elian back to his small home town, Cardenas, where he was growing up well-loved and cared for.

In the face of this new and unfair delay, I have asked the U.S. government to allow me to come here with a small group of Elian's classmates and teachers, as well as psychologists, pediatricians and nurses who would help me care for him and assist those other children who have been following every step of the situation--also leader from our country, who has been like a brother giving me advice and support through our long days of pain and uncertainty.

Anyone understands that in the process where my son Elian recover from his trauma, I can be guided only for my fatherly love.

I will also need the counseling of specialists and a propitious environment with his classmates and teachers, to help him back to his old routine of family life, schooling and playing with his friends.

Despite everything I have been through since last November 22, I am confident the U.S. authorities will not allow that my son and my family continue to be hurt, and I beg them to understand the reason why I'm asking to be accompanied by those children and professionals.

I can't forget that what my family's anguish and suffering reached an unimaginable limits, all of the Cuban people and authorities were there for us.

At this moment I also want to express my deepest gratitude to the American people who have been overwhelmingly and increasingly in favor that my son being returned to me.

Thank you.

END

Message Sent To: _____

Anna Richter/OPD/EOP@EOP
Anne W. Bovaird/WHO/EOP@EOP
Anne M. Edwards/WHO/EOP@EOP
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Kimberly S. Anderson/OA/EOP@EOP
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Laura D. Schwartz/WHO/EOP@EOP
Laura J. Lewis/WHO/EOP@EOP
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Melissa M. Murray/WHO/EOP@EOP
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Matthew T. Schneider/WHO/EOP@EOP
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Rebecca L. Walldorff/WHO/EOP@EOP
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Rebecca J. Salay/WHO/EOP@EOP
Scott Hynes/WHO/EOP@EOP
Stephen N. Boyd/WHO/EOP@EOP
Steven J. Naplan/NSC/EOP@EOP
Sarah E. Gegenheimer/WHO/EOP@EOP
Steve Ricchetti/WHO/EOP@EOP
Sean P. O'Shea/WHO/EOP@EOP
Thomas D. Janenda/WHO/EOP@EOP
Thurgood Marshall Jr/WHO/EOP@EOP
Victoria L. Valentine/WHO/EOP@EOP
Daniel R. Wilson/OMB/EOP@EOP

NATIONAL SECURITY COUNCIL

Beth -

Here are some materials that show that an analysis of what is in Elian's best interests was very much a part of the INS/DOJ analysis -- even though that is not the standard that they articulate.

Also, Wendy Patthen confirms that in state court, the court would have to determine that Juan (the Dad) is unfit and terminate his parental rights before it would

→

reach any analysis of the best interests of the child.

Mary

INTERVIEW WITH JUAN MIGUEL GONZALEZ QUINTANA

On December 13, 1999, at approximately 7:30 a.m., the writer Silma L. Dimmel, Officer in Charge for the U.S. Immigration and Naturalization Service (INS) at the Havana sub office accompanied by Jeffrey DeLaurentis, U.S. Interests Section in Havana arrived at Calle Cossio #170, Cardenas, Cuba, the residence of Mr. Gonzalez Quintana to conduct an INS interview. At the residence, Mr. Gonzalez Quintana was surrounded by his parents, the parents of Mrs. Elisabeth Brotons, his present "wife" although not legally married, their son, and other family members.

I introduced myself and the Political Officer and expressed our sincerest condolences for the tragic death of Ms. Elisabeth Brotons. Mr. Gonzalez Quintana was asked if we could meet in private in order to talk freely and without interruptions. Mr. Gonzalez Quintana led us to another area of the residence where he had set a table with 6 chairs in anticipation of our visit.

Again, we expressed our deepest sympathies over the tragedy on behalf of the U.S. Government, as well as our concern for the well-being of Elian Gonzalez. I also stressed that the INS, on behalf of the U.S. Government, would like to resolve the matter pertaining to Elian as quickly as possible.

Mr. Gonzalez Quintana proceeded with reading his handwritten statement which said that he preferred not to have the interview, and that he had given his mother full power of attorney in order for her to represent him. The statement indicated, however, that he was willing to proceed with the interview, but wished that his parents be present during the entire interview. Under the circumstances, and due to the fact that this would be the only opportunity INS would have to interview him on behalf of the U.S. Government, I agreed to this. However, it was made clear to Mr. Gonzalez Quintana that the questions would be asked directly to him but that any comments from the parents would be allowed later. All parties agreed.

Mr. Gonzalez Quintana continued to read his handwritten note in which he mentioned the inclusion of a variety of documents that will be identified as attachments to this statement. Once he concluded, we began the interview. The questions presented to Mr. Gonzalez Quintana had been prepared by the INS' General Counsel office in Washington, D.C. Mr. Gonzalez Quintana was also given an attachment of five questions prepared by the General Counsel's office, translated into the Spanish language, for him to answer by circling the response without any oral presentation. He completed this immediately and without any hesitations.

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Questions:

1) Are you Juan Miguel Gonzalez Quintana? Can you present me with any identification documents?

Yes. He presented carnet de identidad #6MOOO300566.

2) Who has accompanied you to this interview?

My parents, Maria Mariela Quitana Garrido and Juan Gonzalez Hernandez.

3) Are you the biological father of Elian Gonzalez Broton?

Yes.

4) Do you have Elian's birth certificate?

Yes, also I'm submitting my birth certificate and his mother's birth certificate.

5) Is there any formal custody arrangement concerning Elian? If so, do you have any documents describing the custody arrangement? If not, did you and Ms. Brotons have an informal arrangement for Elian's custody? If so, please describe.

When we got divorced the laws in Cuba grant custody of a child to the mother. However, the boy practically lived with me since he attended school closer to my residence because she lived outside the city limits. She even decided not to register him at the school to which he was supposed to attend in order for him to stay here and my mother to take care of him while both of us worked. She (Ms. Brotons) sometimes argued with me because he spent more time with me in this residence than with her. He would sleep and eat here and spent most of his time here. He even slept with me and my present "wife" in the same bed while visiting because he's very close to me.

6) Under United States law, there are different ways to proceed with the case of an individual in Elian's circumstances. First, the individual may ask to voluntarily leave the United States and return to Cuba. Second, he may ask to remain in the United States in his current status, which will entitle him to become a permanent resident after a year. Finally, he may apply for asylum to become a legal resident of the United States. Asylum may be granted if the individual has a reasonable fear of

000049

persecution upon his return to Cuba. As his father, which option would you choose for Elian?

Return immediately to Cuba. I was listening to the news and about the laws in the United States. Elian, at the age of six, cannot make a decision on his own. In the first place, he wasn't found on land, he was found at sea. I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family. I am not allowing him to stay in the United States. As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

7) Elian arrived in the United States on November 25. Were you aware that Elian was being taken to the United States? If so, at what point did you become aware? Did you agree to this?

No, I did not know that he was being taken to the United States. Neither he nor his mother lacked anything here. She worked in Varadero in the Hotel Paraiso as a steward and I provided for his sustenance. She did not need to go to the United States and there was no idea that she was thinking in that manner. As a matter of fact, neither her parents nor I had any idea what she had been planning and if so, would not have allowed her to go and take Elian.

For your information, on the prior Wednesday before her departure, I went to pick him up at the place where she lived; a room because she didn't live with her mother. He slept that night in this house and I took him to school on the following Thursday morning. Again, that day my brother went to pick him up at the school and he slept here that night because he (Elian) and my brother, Jose Antonio Gonzalez, had been making a kite to fly it on the next day after school. They had been working on that kite for days and Elian was very excited. When my brother returned on Friday to the school to pick up Elian, he was informed by the teacher that his mother had picked him up on Friday morning and that he didn't return to the school in the afternoon of that same day.

It seems that she (Ms. Brotons) had been planning this for some time without anybody's knowledge. My brother went to her house on Saturday and Sunday and didn't find Elian there. On Monday, my cousin, who is also Elian's Godmother, went to pick up Elian at school and again, the teacher informed her that he wasn't taken to the school on that day. She, cousin/Godmother, immediately came to the house to tell my father. I was working and they went to Ms. Brotons' house looking for Elian. On the way there, my father was stopped at a store by someone who told him that Ms. Brotons and Elian had left the country. They decided not to tell me until I returned from work in order not to worry me. My mother informed me of what had happened after my return from work.

We still didn't know where Elian was - until November 25, when people watched the news and told me that they saw a boy on television that looked like him. I asked my father to call his relatives in the United States to inquire about Elian's welfare.

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FOLDER TITLE:

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2012-0371-F
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Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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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]

(b)(6)

[002]

Elian is a very bright boy. On the day he was found, I received a telephone call from the doctor in the United States, who provided care for Elian. It was Elian who had given the doctor his full name, date and place of birth, my name and my telephone number in Cuba where he (doctor) could reach me. The doctor needed to know of Elian's past medical record because he had told the doctor he had had surgery before.

8) Can you describe your relationship with Elian? How did that change since your relationship with Ms. Brotons ended?

In between relationships, Ms. Brotons and I spent 15 years together. We wanted a child very badly and she had a few miscarriages. When Elian was born he was a miracle to us. We got divorced in 1991, and got together again because we wanted to have a child together. Elian was born in 1993, and we were very happy. As a matter of fact, Elian's name is the construction of parts of our names: "Eli", for the beginning of her name Elisabeth and "an" for the latter part of my name, Juan. Elian is my life. He is my first son. Wherever I went, he went with me. I taught him how to swim, do karate, he has a parrot here, dogs, a bicycle and all kinds of toys. As a matter of fact, I haven't been to the barber because he isn't here since we always went together.

I always had a good relationship with Ms. Brotons. She would even bring Elian here and go to buy birthday gifts for my father. Even her present boyfriend would come here and talk to me and eat here. My parents also liked him a lot. I liked him also because he never mistreated my son whom he loved very much and I appreciated that from him. Ms. Brotons also had a good relationship with my present "wife".

9) A law firm has submitted documents to the INS in which they claim to represent Elian. This law firm has told the INS that Elian should be permitted to remain in the United States. Are you aware of this law firm? Have you ever spoken to any of these attorneys? Do you want this law firm to represent Elian's immigration interests?

No. I do not want any law firm to represent Elian.

I have heard such on television. I do not want to bring politics into this or for anyone to use Elian for political purposes. Can you believe that there should be a trial against me whereas I cannot claim my child?

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I will not accept any telephone calls from any law firm. No one has talked to me. For your information, the day after Elian was rescued, I immediately went to the Civil Registry office to obtain the necessary documents in order to reclaim my son. Please notice the dates on the birth, divorce and marriage certificate which indicate November 26, after Elian was found.

10) How often did you see Elian?

All of the time. He basically lived here, we did everything together and as already mentioned, he spent more time with me and my parents than with his own mother.

NOTE: At this point, Mr. Gonzalez Quintana excused himself and returned with an album of photographs of Elian when he was a baby and toddler with Mr. Gonzalez Quintana, his cousin and many other pictures of Elian. He also showed us pictures of Elian with his new baby stepbrother and his father as well as pictures of Elian with his grandparents and great grandmother.

11) How much time did you spend with him?

As stated, as much time as possible since we are very good friends and I miss him very much. We did everything together. I used to take him to the place where I work to use the swimming pool and we played together. He slept with me, that's how close we are.

12) Did Elian sleep at your home since your relationship to Ms. Brotons ended? If so, how often?

Yes, all of the time.

13) Did you participate in Elian's school or other activities in any way? If so, please describe your participation?

Yes, always. I attended meetings and school activities. Imagine, it was I who noticed Elian's bleeding problem and at my insistence, the doctor was contacted; that's how close we are.

14) Please describe any financial or other support that you may have provided for Elian's upbringing.

I work at the Parque Josone which is a tourist center where they have all kinds of facilities. I have been working there for over 11 years. The law requires that I pay 60 pesos (equivalent of 3 USD) a month. Instead I gave Ms. Brotons \$5.00 (USD) a month.

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and bought food and clothes. I even brought food to her often although I knew she didn't need it. Each time I bought something for Elian, I bought two; one for here and one for Ms. Brotons' residence.

15) Do you have any documents demonstrating your involvement in Elian's life?

Yes. I am submitting all sorts of documents which prove of my involvement in his life. I am also submitting affidavits of people which relate to my support to Elian.

16) Did you enter into marriage with Elisabeth Brotons, Elian's mother? If so, when?

Yes. I am providing the marriage certificate.

17) Did you register this marriage? If so, do you have a marriage certificate?

Yes, I am including such. Elian was born in 1993, after we were already divorced, but since we wanted to have a child together we got together again and then he was born.

18) Were you married to Ms. Brotons at the time of her death, on or about November 24th?

No.

19) If divorced, do you have a divorce decree?

Yes. I am including such.

20) Until his legal status in the United States can be determined, the Immigration and Naturalization Service has released Elian into the custody of Lazaro and Angela Gonzalez, who we understand to be family members. Can you tell us how you and Elian are related to them? Have you been in contact with them? Do you want them to represent Elian's immigration interests?

Lazaro Gonzalez is my uncle, my father's brother. He and his wife left Cuba for the United States legally over 10 years ago. They lived with us in this house and with family since I was a young child. Last August, 1998, they visited Cuba for 15 days and that's when they met Elian. They took a liking to Elian because he's such a nice boy, well behaved and well mannered; since he's such a lovable boy, they immediately liked him. Elian is very well educated.

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When this whole thing started I talked to them and initially, they said that Elian should be returned immediately to me. Then all of the sudden, things changed. We had an argument over the phone because they even offered me money to leave Elian there. I do not want Elian to stay there, I want him back here in Cuba. It appears that Lazaro is under pressure. I tried to convince him rationally to let Elian return, but he says he is unable to back off because of the circumstances of what could happen.

Mr. Gonzalez Quintana's father, Juan Gonzalez Hernandez, added that his brother Lazaro told him that under the present circumstances it is impossible for him to back off because he would look bad in front of the Cuban people in Miami.

Mr. Gonzalez Quintana proceeded to say that the relatives in the United States have no rights over Elian and that they are to return him to Cuba as soon as possible.

21) You may apply for a visa to the United States to see Elian now. Visas are generally granted in situations like this. Do you wish to apply for a visa?

No, I am not interested. I want Elian to be returned as soon as possible. I do not want to speak to other people anymore. I am tired of being hounded by the press. At this moment I cannot work under these circumstances, it's impossible; I am worried for Elian.

At this point, Mr. Gonzalez Quintana's mother added that she has not returned to her job because of being distraught. She misses her grandson and wants him back immediately. The grandfather also expressed the same feelings.

Interview concluded at this point.

SUMMATION

It was this officer's observation that the residence where Elian lived, until the time he was removed by his mother, is very well kept, clean and that Elian has a very loving set of grandparents and father.

Mr. Gonzalez Quintana appeared very concerned for Elian's return to him as soon as possible without further delays because he misses his "buddy". Mr. Gonzalez Quintana provided for the well being of Elian and his grandparents took good care of Elian after school and during visits to the residence. Mr. Gonzalez Quintana lives with his present common-law wife, baby son, his parents and his brother. Elian's grandparents on his mother's side were also present at Mr. Gonzalez Quintana residence, but were precluded from being present at the interview.

Mr. Gonzalez Quintana was very much involved in Elian's sustenance and care. He taught Elian how to swim, do karate and did many activities together, to the point that Mr. Gonzalez Quintana has not visited the barber shop since Elian's gone because they got their haircuts together.

Elian was taken care of by his paternal grandmother more so than by his mother since she resided in a very small room and not with her mother. This is one reason why Elian spent so much time with his father, grandparents, stepmother and stepbrother.

Mr. Gonzalez Quintana, his parents and maternal grandparents expressed their request that Elian return to Cuba immediately. His paternal grandparents are greatly distraught that the emptiness that Elian's not being in Cuba has left in the family. The honesty, concern and truthfulness on the part of Mr. Gonzalez Quintana was palpable as well as his caring and wanting his son be returned to Cuba. Elian's paternal grandparents also appear to be confused and distraught. The family was hurt by the death of Ms. Broton and ~~was~~ it was obvious that Elian is deeply missed by the family.

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ELIAN GONZALEZ

Background

On November 25, 1999, the Coast Guard intercepted two fishermen who had rescued (then) five-year-old Elian Gonzalez from the Atlantic Ocean off the coast of Florida. His mother had perished during the ill-fated voyage from Cuba to the United States. The Coast Guard transported Elian to the hospital, where the Border Patrol (a part of INS) gave him a temporary “parole” into the care of his great-uncle, Lazaro Gonzalez. Elian’s father, Juan Gonzalez, who had begun gathering birth certificates and other papers the day after Elian was found, soon requested his son’s return through the Cuban government. Elian’s Miami relatives, however, refused to return him, alleged that his father was under duress in Cuba, and filed an asylum claim in his behalf.

On January 5, INS, after interviewing Elian’s relatives in Miami and his father twice in Cuba, determined that Juan was Elian’s father, that he had a close and loving relationship with the boy, and that he was expressing his true wish that Elian be returned to him (regardless of allegations that he actually wanted to come to the United States himself). Applying the basic principle that parents speak and make decisions for their children, INS accepted Juan’s request that the asylum application not be considered, rejected it on that ground, ruled that Elian should be reunited with his father, and called upon the family to effectuate the transfer cooperatively. The Miami relatives appealed to the Attorney General, who upheld the INS’s decision on January 12.

Just prior to the Attorney General’s January 12 decision, the Miami relatives obtained an order from a Miami-Dade family court purporting to give Lazaro temporary interim custody of Elian, and the authority to file immigration applications for him. A controversy erupted upon discovery that the Miami family’s publicist Armando Gutierrez had worked on the family court judge’s judicial election campaign. The judge, Rosa Rodriguez, later recused herself from the case. The Attorney General’s January 12 decision stated that “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,” and that the “Florida court’s order has no force or effect insofar as INS’s administration of the immigration laws is concerned.”

The Miami relatives filed a complaint in the U.S. District Court in Miami, seeking to force the INS to adjudicate the asylum application filed by Lazaro, and to enjoin Elian’s return to his father. The district court dismissed the complaint on March 21, upholding the Attorney General’s decision that the asylum application was not properly before the INS in view of Juan’s objection to it. The court observed that “each passing day is another day lost between Juan Gonzalez and his son.” The Miami relatives have appealed the decision, but have not sought an injunction pending appeal. The Department is thus free to carry out its decision under the immigration laws.

Because the Court of Appeals has set an expedited briefing schedule, with oral argument the week of May 8, the INS has been willing to entertain the Miami family’s request for continuing Elian’s present care arrangements through the appeal. In return, the Department has asked for

assurances that the child will be turned over cooperatively if the Miami relatives' appeal is unsuccessful. The family has not been willing to give these assurances, and the INS has indicated that without them it will revoke Elian's parole. Tense negotiations took place during the week of March 27, and the parole revocation date was twice extended. It is now set for 9:00 a.m. on April 4, with further talks set for April 3.

On March 29, Fidel Castro announced that he would allow Juan Gonzalez, his common law wife and child in Cuba, and an entourage of relatives, schoolmates, teachers, and medical professionals to travel to the United States to retrieve Elian. [Discussions are in progress with Juan's attorney, Greg Craig, regarding arrangements for a possible trip by Juan and others to the United States. On camera, all that should be said on this score is that the Department has been in contact with Mr. Craig.]

Talking Points

- That parents speak and make decisions for their children is as basic as any principle of our law.
- Elian is not being deported or removed from the United States. His father is his sole surviving parent, and has asked that he return. In contemplation of law, Elian is returning voluntarily to Cuba, and is being prevented from doing so by his Miami relatives.
- This boy is not an orphan. He has a father who loves him. You can see that he is a bright, precocious, and well-adjusted child. The evidence, carefully gathered by the INS, indicates that Elian lived with his father for part of every week up until the time he left Cuba, and had an extremely close and loving relationship with him.
- The relatives' claim that Elian is "afraid" to return to his father is not relevant. And I would add that no one claimed he was afraid of his father at the beginning of his stay with the relatives.
- At the beginning of the case, the Miami relatives said that Juan was being held in Cuba and couldn't speak for himself. Now, when he says he's coming here, they claim he's a bad father, something they didn't say at the beginning.
- The INS is willing to hold up enforcement of its decision voluntarily for the duration of the appeal if the Miami relatives promise to turn the boy over as required by law if the appeal is unsuccessful. This is not an onerous requirement. INS is not asking the Miami relatives to do anything more than what is already required by federal law. People who take parole custody of minor children must agree upon request to produce the child when ordered to do so by INS.
- The federal judge who dismissed the Miami relatives' case said that "[e]ven this well-intentioned litigation has the capacity to bring about unintended harm." He also pointed out the "reality that each passing day is another day lost between Juan Gonzalez and his son."
- This case is a matter of federal immigration law. It does not belong in the state courts. An unaccompanied minor has arrived on our shores, and his sole surviving parent has asked that he

be returned. The father's wish should be carried out, as it is in hundreds of other cases.

- The Miami relatives would not get a "best interests of the child" determination even in the state court. That test is used when you have a parent against a parent. If it's a parent against anyone else, the parent wins, unless the parent is unfit. And that's a serious showing. Parental rights are among the most fundamental rights recognized in law.

- With regard to the bills in Congress, I do not believe the United States should be in the business of conferring U.S. citizenship or residency on people who do not want to be U.S. citizens or residents. These benefits are precious, and sought by many as the achievement of a lifetime. They should not be forced upon people who want only to go home and resume their lives. And they should not be used for political ends.