86-8010
86-8011

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

MOISES GARCIA-MIR, et al.,	RAFAEL FERNANDEZ-ROQUE, et al.,
Plaintiff-Appellees and Cross-Appellants,	Plaintiff-Appellees and Cross Appellants,
vs.	vs.
EDWIN MEESE, III, et al.,	EDWIN MEESE, III, et al.,
Defendant-Appellants and Cross-Appellees.	Defendant-Appellants and Cross-Apellees.

APPEAL NOS. 86-8010 AND 86-8011

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

HABEAS CORPUS PREFERENCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Judge Marvin H. Shoob, U.S. District Court, Northern District of Georgia

Dale M. Schwartz, Counsel of record for appellees

Myron N. Kramer, Counsel of record for appellees

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Kenneth A. Hindman, Counsel of record for appellees

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Madelyn E. Johnson, Attorney, Office of Immigration Litigation, Civil Division

Edwin Meese, III, Attorney General of the United States, Respondent

Norman A. Carlson, Director, Bureau of Prisons, Respondent

Jack A. Hanberry, Warden, Atlanta Federal Penitentiary, Respondent

Phillip N. Hawkes, Director, Office of Refugee Resettlement Program, Respondent

Dr. Otis R. Bowen, Secretary of Health and Human Services, Respondent

All Mariel Cubans who are members of the Plaintiff Class

STATEMENT REGARDING PREFERENCE

This case is entitled to a habeas corpus preference under Eleventh Circuit Local Rule Appendix One, (a) (3). Also, on January 21, 1986, as part of its ruling on the government's motion for stay, the Court ordered that this case be heard in expedited fashion.

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree with the government that oral argument is warranted in this appeal owing to the importance and complexity of the issues raised. Moreover, it is Appellees' understanding that in its January 21, 1986, Order the Court has already directed that this case be scheduled for oral argument.

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

TABLE OF CITATIONS AND AUTHORITIES

TABLE OF CITATIONS AND AUTHORITIES

STATUTES

REGULATIONS

TREATIES

MISCELLANEOUS AUTHORITY

STATEMENT OF THE ISSUES

1. Was the district court correct in finding that Mariel Cubans who were not mental incompetents in Cuba and who had not committed serious crimes in Cuba have a liberty interest in parole such that their detention, in the absence of fair hearings as ordered by the court, is illegal?

2. Did the district court err in failing to find that Mariel Cubans who have been continuously detained as mental incompetents or criminals since their arrival in the United States have a liberty interest in parole?

3. Did the district court err in finding that the customary international law of human rights does not apply to this case so as to render the Cubans' detention illegal?

4. Did the district court err in failing to find that the Cubans have a "core" liberty interest arising directly under the United States Constitution?

5. Was the district court correct in declining to decertify this case as a class action?

STATEMENT OF THE CASE

1. Course of Proceedings Below.

The description of the proceedings below contained in the government's brief is generally accurate. However, Plaintiffs take specific exception to the government's characterization of the class action issue. Brief for Appellants, p. 5. It is true that the government moved for class decertification (R.77 Motion for Decertification filed Sept. 23, 1985) [1] and that the district court declined to grant that motion. Beyond that, the government's contentions are inaccurate. The Court did not direct the district court to decertify this case as a class action in Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), and nothing in that opinion otherwise required the district court to do so.

2. Statement of the Facts.

Detailed accounts of the 1980 Cuban exodus from Mariel Harbor are found in other reported cases. See Pollgreen v. Morris, 496 F.Supp. 1042, 1047-48 (S.D. Fla. 1980); see also Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982) and 734 F.2d 576 (11th Cir. 1984). In addition, chronological

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[1] The record on appeal has not been prepared as of the date of this brief's preparation. However, the district court clerk's office stated that it believed that the "record tabs" which eventually will be affixed to the various pleadings and documents will correspond to the numbers used in the Stipulation of Record filed by the parties on February 4, 1986. Accordingly, Appellees will cite to the record using the Stipulation's numbers and include a brief description of the document as well in case there are any changes.

accounts of the Mariel situation are set forth in Plaintiff's Memorandum Regarding President Carter's Invitation To Cuban Refugees To Come To The United States (R.20) and in the November 1, 1980, Report of the Cuban-Haitian Task Force which was part of the government's reply to Plaintiff's Memorandum. (R.21, p. 99). Therefore, Plaintiffs will not simply repeat the background information contained in these documents and decisions.

However, Plaintiffs do wish to outline the events which led to the Mariel Cubans' departure from Cuba and the government's involvement in them. The United States first became involved when the 10,000 Cubans who had taken refuge in the Peruvian Embassy sent President Carter a message which read,

> We take this means to ask mercy for those who have taken refuge under inhuman conditions and who ask to emigrate as soon as possible to any country that will give them a visa, preferably to the United States. There are two thousand children among us ... We...ask you, Mr. Carter, on the basis of your concern with human rights to take cognizance of the desperate situation in which we find ourselves...

(R.20 - Exhibit 2 of Plaintiff's Sept. 11, 1981, Invitation Memorandum, hereinafter referred to as Invitation Exhibits).

At the same time Wayne Smith, head of the United States Interest Section in Cuba, cautioned that since over 100,000 Cubans would wish to leave Cuba for the United States if given the opportunity, resettlement might pose a problem. (R.20 - Invitation Exhibit 2).

President Carter nevertheless opted to assist the Cubans

by admitting as refugees 3500 of those waiting in the Peruvian Embassy pursuant to his emergency powers under 8 U.S.C. §§1101(a)(42) and 1157. (R.20 - Invitation Exhibits 5, 6). Our government's intent was that emigration to the United States would be accomplished by an airlift to Costa Rica, which was then in effect. Unfortunately, on April 20, 1980, the Cuban government stopped the airlift and announced that henceforth all departures to the United States could only be made by boat from Mariel Harbor. (R.20, Invitation Exhibit 1).

The State Department objected to the Mariel flotilla on April 23, 1980; Brief of Appellants, p. 8; although Plaintiffs suggest that the reason was our government's desire that the emigration continue via the airlift rather than by a boatlift. (R.20 - Invitation Exhibit 13).

On April 27, 1980, Vice President Mondale called upon Cuban Premier Castro to allow evacuation of the disaffected Cubans in an orderly, safe and humane manner. (R.20 - Invitation Exhibit 13). However, he also committed the United States to continuing with the international effort of evacuating the fleeing Cubans and directed our Coast Guard and Navy to assist those Cubans coming here by sea. (R.20 - Invitation Exhibit 13).

On May 2, 1980, the White House announced plans to accommodate the increasing number of Cuban refugees who were now arriving in Florida and stated that the Coast Guard was expanding its capability to provide rescue and assistance

missions between Cuba and Florida. (R.20 - Invitation Exhibit 13). It was in this context that President Carter issued his now famous "open heart and open arms" statement on May 5, 1980. See Fernandez-Roque v. Smith, 622 F.Supp. 887, 897-98 n. 16 (N.D.Ga. 1985), for the complete text of the President's remarks.

The response of the Cuban people to President Carter's speech was immediate and dramatic. Prior to May 6, 1980, the total number of Cubans who had arrived in this country was approximately 16,000. Following President Carter's statement, which was made widely known to the Cuban population as a whole via dissemination in the official newspaper, Granma, the numbers leaped to 16,000 - 20,000 per week. (R.21 -- Cuban/ Haitian Task Force Report, p. 86, attached to Sept. 18, 1981 Government Reply Brief; R.54 - Council for Inter American Security Report, p. 5, Exhibit 21 to Plaintiff's Nov. 30, 1984, Habeas Corpus Motion, hereinafter referred to as Habeas Corpus Exhibits). 2/

On May 14, 1980, President Carter announced the first of a series of specific steps aimed at stopping the Mariel boatlift in the form that it had developed. However, the steps were limited in scope to prescribing new boats from

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2/ Most, if not all, of the documents to which Plaintiffs will refer in this brief can be found as exhibits to R.20 - Invitation Memorandum, R.21 - Government Reply thereto, and R.54 -- Plaintiff's Nov. 30, 1984, Motion for Entry of Writ of Habeas Corpus.

leaving for Cuba to join the operation. The President did not elect to begin turning incoming boats around nor did he say that no more Cubans would be allowed into the country. In fact President Carter said just the opposite, i.e. that this country would continue to welcome those Cubans seeking freedom in accordance with the United States' laws. (R.54 - Habeas Corpus Exhibit 20). 3/ It took over a month for the new policy to show results in the form of a reduction in the number of Cuban immigrants. (R.54 - Habeas Corpus Exhibit 21, p. 86).

In the wake of the Mariel Cubans' arrival in the United States, the government announced its official policy vis-a-vis the Cubans' legal status in this country. The United States Coordinator for Refugee Affairs, Ambassador Victor H. Palmieri, announced on June 1, 1980, and again on June 20, 1980, that President Carter had decided to "seek special legislation regularizing the status of Cuban/Haitian entrants." (R.20 - Invitation Exhibit 15; R.54 - Habeas Corpus Exhibit 32). Until that legislation passes, Mariel Cubans who arrived here between April and October, 1980, have been given a special "Cuban/Haitian entrant status." This means that they were paroled to sponsors, never placed in exclusion proceedings and that their asylum applications were not processed.

3/ Habeas Corpus Exhibit 20 is the June, 1980, Department of State Bulletin in which Presidential, Vice Presidential, and other official statements are reproduced in the order of the date on which they were made.

The rationale behind the special procedures was that it was (and is) anticipated that eventually all of the Mariel Cubans would be converted to permanent resident status. 4/

3. Scope of Review.

Appellees agree with the government that Issues 1-4 of this appeal present questions of law for this Court's resolution. Accordingly, review should be de novo. See Turner v. Orr, 759 F.2d 817, 820-21 (11th Cir. 1985). However, Issue 5, which addresses the district court's refusal to decertify the class, should be reviewed under an abuse of discretion standard. See Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1571 n. 3 (11th Cir. 1983), mod. other grounds 740 F.2d 903 (11th Cir. 1984).

SUMMARY OF THE ARGUMENT

The Plaintiffs in this case are Cubans who came to this country in 1980's Freedom Flotilla. Presently they are incarcerated in the federal penitentiary in Atlanta, Georgia. However, they contend that their detention is unlawful because it results from a scheme under which Plaintiffs are not afforded due process. The Plaintiffs are entitled to due

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4/ The special Cuban/Haitian legislation has not passed Congress to date. INS initially took the position that the Mariel Cubans were ineligible for adjustment of status under the Cuban Refugee Adjustment Act of 1966, 8 U.S.C. §1255 note, but, in 1984, INS reversed its policy and apparently concedes that the Mariel Cubans are within the 1966 Act's purview. See 19 Clearinghouse Review, The Rights of Aliens and Immigrants: Recent Developments, pp. 1000-1001 (January, 1986).

process because they have a liberty interest in immigration parole which gives rise to the procedural protections they seek.

The liberty interest possessed by Plaintiffs was created by the actions and policies of the United States government during the Mariel boatlift. The specific source of the interest, though, differs for the Plaintiffs depending on which of two groups they fall into.

The "Second Group" of Plaintiffs consists of those Cubans who were released on parole at one time but have since had parole revoked and are currently jailed in Atlanta as a result. The district court properly found that the "Second Group" has a liberty interest by virtue of President Carter's invitation to them to come here coupled with the creation of a special entrant status for them. These Plaintiffs have legitimate expectations of freedom based on the governmental actions described. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). They are in the same situation as the alien in United States ex rel Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958), and should be afforded due process rights just as he was.

The "First Group" of Plaintiffs consists of those Cubans who have been detained since their arrival in this country because they were considered mental incompetents or criminals in Cuba prior to their departure. They, as well as the

members of the "Second Group", have a liberty interest in parole by virtue of executive policies in regard to the Freedom Flotilla, and because of their claim to asylum pursuant to the 1967 Protocol Relating to the Status of Refugees. See Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982).

The district court erred in ruling that international law does not apply to Plaintiffs' case so as to render their detention illegal. In order for the customary international law of human rights not to apply in this case, the President of the United States himself must have directed that this country would not be bound by its provisions. Acts and policies of subordinate cabinet members of the Executive Branch cannot preclude the application of international law. See Brief of Amicus Curiae on this point. Also, Plaintiffs continue to maintain that they have a core liberty interest in freedom that arises directly under the United States Constitution. But see Fernandez-Roque v. Smith, 734 F.2d 2d 576 (11th Cir. 1984).

Finally, the district court did not abuse its discretion in failing to decertify this case as a class action. Plaintiffs seek procedural due process protections and their entitlement to them is a matter of law which is common to the class. Procedural due process is an absolute right and individual Cubans' liklihood of ultimate success on the merits of their claims is not relevant to whether they are entitled to the procedures. See Carey v. Piphus, 435 U.S. 247, 98

S.Ct. 1042, 55 L.Ed.2d 252 (1978). The issues involved in this case are ones affecting all of the Mariel Cubans presently in prison in Atlanta or who will be sent here. The prerequisites of Fed. R. Civ. P. Rule 23 are satisfied and considerations of the individual Cubans' resources and judicial economy dictate that it is appropriate for this case to continue as a class action. See Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979); Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1292(a)(1).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE MARIEL CUBANS WHO WERE NOT MENTALLY INCOMPETENT OR CRIMINALS IN CUBA HAVE A LIBERTY INTEREST IN PAROLE SUCH THAT THEIR CONTINUED DETENTION IS UNLAWFUL ABSENT HEARINGS PROVIDED AS REQUIRED UNDER DUE PROCESS.

A. Creation Of A Protected Liberty Interest In General.

A person's entitlement to procedural due process is not an independent right but rather constitutes a condition precedent to deprivations of life, liberty or property. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1037 (5th Cir. Unit B 1982). Due process is implicated where one of these interests exists to which it can attach. See Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). 5/

The Plaintiffs who comprise the "Second Group" in the district court's opinion (i.e. those not considered criminals or mental incompetents in Cuba) have been locked up in the federal penitentiary in Atlanta for extended periods, some for

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5/ Such interests may arise directly under the United States Constitution. However, Plaintiffs' claims in this regard were rejected in Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984). Plaintiffs continue to assert that they are entitled to due process thereunder. See Section IV of Argument, infra.

almost five years. By virtue of President Jimmy Carter's invitation to disaffected Cubans to come to the United States and the consequent creation of a special Cuban/Haitian entrant status that distinguishes them from other aliens seeking admission to this country, Plaintiffs submit that they have a liberty interest sufficient to entitle them to due process protections in the decision whether to continue their incarceration. The district court found this to be the case in Fernandez-Roque v. Smith, 622 F.Supp. 887 (N.D. Ga. 1985), and its decision should be affirmed.

Governments create liberty interests by creation of "legitimate expectations", Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); or "justifiable expectations", Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983), in a given liberty. Such interests are most commonly created by standards governing and limiting what would otherwise be discretionary determinations. Olim, id. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981).

Despite the government's assertions, Brief of Appellants pp. 26 et seq, the declaration of substantive limits on government action is not the sole route to a liberty interest. Such interests may also be created by a presumption of releasability created by the state when the underlying issue is freedom or incarceration. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Although the

parolees in Morrissey had no "right" to continued freedom, and even though no stated criteria governed the parole revocation decision at issue, the Supreme Court nevertheless found a liberty interest in freedom by virtue of the grant of parole itself.

The Morrissey Court described criminal parole in language which addresses this case as well:

> We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to [all others.] The parolee has been released...based on an evaluation that he shows reasonable promise of being able to...function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

Id., 408 U.S. at 481-82; 33 L.Ed.2d 494-95. Thus, without reference to specified criteria, the Court found release on parole to create both valuable rights and a presumption of continued freedom sufficient to create liberty interests. 6/

6/ Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981), much relied upon by the government, does nothing to undercut this principle. Jago holds only that a state may reconsider a grant of "shock parole" up until the time an inmate is actually released. It does not address, let alone undercut, the Morrissey principle recognizing a presumption of freedom following release on parole.

Moreover, having recognized a liberty interest, it was also appropriate for the district court below to deduce appropriate substantive standards for due process hearings from the government's own actions and policies. Fernandez-Rogue v. Smith, supra 622 F.Supp. at 901. The United States Supreme Court did precisely this in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). There, the Supreme Court examined Georgia's Safety Responsibility Act and determined that because the scheme hinged on liability, that factor had to be considered in the hearings which the court ordered. Similarly, the district court properly extrapolated the purpose of the government's treatment of the Mariel Cubans from the invitation and creation of the special Cuban-Haitian Entrant Status, and incorporated that into its plan for hearings.

B. Liberty Interest For Mariel Cubans Created By Presidential Invitation And Special Entrant Status.

1. The Invitation.

According to the court in Parker v. Cook, 642 F.2d 865, 867 (5th Cir. Unit B 1981), 7/

> Since states rarely if ever explicitly label their creations as 'liberty interests', we must look to the substance of the state action to determine whether a liberty interest has been created. And

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7/ Decisions of the former Fifth Circuit are binding in the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 206 (11th Cir. 1981) (en banc).

> whether this substance is embodied in a constitution, statute, regulation, rule or practice is of no significance; once a state creates a liberty interest, '[n]o State shall...deprive any person of [the liberty interest] without due process of law...'.

Extensive documentation attached to Plaintiffs' September 11, 1981, Memorandum Regarding President Carter's Invitation To Cuban Refugees To Come To The United States (R.20) and to Plaintiff's November 30, 1984, Motion For Entry of Writ of Habeas Corpus (R.54) speaks for itself and demonstrates that this country extended an invitation to the Mariel Cubans and granted them a special immigration status. The combined effect of the government's actions was to create a liberty interest in parole for the Cubans. For simplicity, Plaintiffs will limit their record citations below to the 1984 brief and exhibits (R.54). However, they direct the Court's attention to the 1981 Memorandum and exhibits (R.20) for additional support and supplementation.

While the causes of the 1980 Cuban flight to freedom are many and complex, the triggering event was the April 4, 1980, removal of Cuban guards from the Peruvian Embassy and the announcement that all Cubans wishing to obtain Peruvian visas were free to leave Cuba. (R.54 - Exhibit 16, Palmieri Draft Testimony). Thereafter, 10,800 Cubans crowded into the embassy compound. Id.

> Recognizing 'that special circumstances exist[ed]', President Carter on April 14, 1980, determined that those persons in the Peruvian Embassy 'who otherwise qualify may be considered refugees even though they are within their country of nationality or habitual residence'. Further, declaring 'that an unforeseen

> emergency refugee situation exists', President Carter concluded that 'grave humanitarian needs' and the 'national interest' justified the admission of up to 3,500 of the refugees to this country and the appropriation of up to $4.25 million to aid in their resettlement pursuant to the Refugee Act of 1980. 45 Fed. Reg. 28079 (April 14, 1980).

Pollgreen v. Morris, 496 F.Supp. 1042, 1047 (S.D. Fla. 1980); see also R.54, Exhibits 17-19.

An airlift to Costa Rica was started but within three days Castro suspended the flights and announced that anyone wishing to leave Cuba could do so only through the harbor at Mariel. Immediately hundreds of small boats set out for Cuba making up what is now known as the "Freedom Flotilla." See United States v. Frade, 709 F.2d 1387, 1389 (11th Cir. 1983).

On April 23, 1980, the Department of State issued a statement indicating our country's deep sympathy for those seeking freedom from Castro's regime, while urging that the boatlift stop and that the airlift be reinstated. (R.54, Exhibit 20). On April 27, 1980, the President called on Castro to allow an orderly, safe and humane evacuation of the Cubans who wished to come here. He also ordered the Coast Guard and Navy to assist those at sea, asked the Cuban-American community to refrain from going to Mariel, and advised Cuba that if it wanted to expel its people the United States would contribute to this effort, but in an orderly, safe and humane evacuation process. (R.54, Exhibit 20). By this time 6,053 Cubans had already arrived in Florida. (R.54,

Exhibit 21, p. 5). [8/]

On May 1, 1980, the United States Navy was ordered to assist the Flotilla and on May 2 the White House issued a statement concerning its plan to handle the increasing number of Cuban refugees. It stated that it would add processing centers so as to handle daily flows of 2,500 - 3,000 refugees and that the Coast Guard had expanded its capability to assist the Flotilla. Additionally, resettlement assistance was being developed. (R.54, Exhibit 20).

On May 5, 1980, the most significant aspect involved in the extension of this country's invitation to the Mariel Cubans occurred, President Carter's "open heart and open arms" speech. (R.54, Exhibit 22). See Fernandez-Roque v. Smith, supra 622 F.Supp. at 897, f.n. 16. Shortly after the President's statement White House Press Secretary Jody Powell stated that,

> 'there is absolutely no possibility of some neat and tidy solution to this.' 'We are not going to turn the ships around at sea and send them back to Cuba.'

(R.54, Exhibit 23). Moreover,

> Verne Jerris, spokesman for INS, said that the government was not technically violating any law by permitting more than a certain number of Cubans into the country because the Cubans were applicants for asylum as opposed to refugees who are processed in a foreign country. Id.

[8/] R.54, Exhibit 21 is a special report prepared for the Council for Inter-American Security entitled The 1980 Mariel Exodus: An Assessment and Prospect. It and the Report of the Cuban-Haitian Task Force, attached to the Government's Reply to Plaintiff's Invitation Memorandum, R.21, provide in-depth factual background and analysis concerning the 1980 Mariel boatlift.

The "open heart and open arms speech" was reported in Granma, the official Cuban newspaper, (R.54, Exhibit 24), thus insuring wide dissemination to the Cuban people. Possibly because the content of President Carter's statement reiterated a previous welcome extended to the Cuban people by President Johnson following 1965's Camarioca boat exodus. (R.54, Exhibit 25 and Exhibit 21, p. 3), the numbers of Cubans joining the boatlift exploded. See R.54, Exhibit 21, p. 5 (weekly arrivals jump from 7600 to over 20,000).

The government views the idea that the United States extended an invitation to the Mariel Cubans as absurd and implausible. Brief of Appellants, pp. 37-38. How else though does one explain the escalation from 10,800 Cubans huddled in the Peruvian embassy to 125,000 fleeing across the ocean to Florida? Are Plaintiffs and this Court supposed to assume that 125,000 Cubans all decided to leave home at the same time without any reference to the United States government's actions? The government's invitation obviously precipitated the mass emigration.

This Court and the Southern District Court of Florida have already recognized that President Carter's "open heart and open arms" speech was "...broadly interpreted as [U.S.] governmental approval of the boatlift." United States v. Frade, supra at 1395; Pollgreen v. Morris, supra at 1047. Moreover, President Carter's May 5, 1980, statement was not an isolated "off-hand response" issued in a vacuum. It was one in a series of government actions and statements through

April, May and June of 1980 that plainly and clearly indicated to the Mariel Cubans that (1) they could come to this country and (2) they would be welcomed here. No rational interpretations of those events and statements can lead to the conclusion that the government was discouraging the Cuban emigration or that the Cubans were asked here only to be placed in detention. As much as the government hates to recognize it, it invited the Plaintiffs here to begin new lives and cannot now consign them to indefinite imprisonment with no consideration given to the justification or need for it.

Plaintiffs do not agree that "there was consistent government opposition to the flotilla." Brief of Appellants, p. 30. It is true that on May 14, 1980, President Carter issued a policy statement proposing an alternative to the Flotilla, specifically requesting that Castro allow prescreening by United States officials of all those who wished to leave Cuba, with an air-or sealift to be conducted by our government. (R.54, Exhibits 20 and 29). However, the May 14 policy did not rescind our government's welcome to Cuban immigrants. To the contrary, a decision was made to "take the following steps to welcome the Cuban refugees in a legal and orderly process." Id. Thus, the United States still welcomed Cubans, and would continue to accept their arrival from Cuba. It simply wanted to establish a more orderly and regular flow.

The Eleventh Circuit discussed the May 14 policy statement in United States v. Frade, supra at 1395-96. According to Frade the May 14 statement did not, nor was it calculated to,

renege on the previous invitation. The United States would continue to welcome legitimate Cuban refugees. Instead, the statement's purpose was to prevent loss of life at sea, and to prevent the transportation of Cuban criminals to the United States. Id. at 1396. (Also, see R.54, Exhibit 30).

Thus, although steps were undertaken to rechannel the influx of refugees back to the originally planned (and safer) airlift, it continued to be Presidential policy that "the ones who are already here will be assimilated into the American population. Their legal status has not yet been determined." (R.54, Exhibit 31). To sum up, President Carter invited the Cubans to the United States and thereby created in them a legitimate expectation of continued release on parole.

2. Cuban-Haitian Entrant Status.

Whether or not our government's invitation to the Mariel Cubans would be enough, standing alone, to create a liberty interest in parole is a question that does not have to be addressed because with the invitation the government also created a special status for the Mariel Cubans in the context of the immigration laws. 9/

On June 1 and June 20, 1980, Ambassador Palmieri, United States Coordinator for Refugee Affairs, announced the

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9/ Thus the government's assertion that it is being forced to afford due process solely because of Presidential pronouncements, see Brief of Appellants p. 34, is not well taken. Plaintiffs' liberty interest is also premised on the grant of a special immigration status which the government has never reconsidered or withdrawn.

Executive Branch's official policy regarding the status of the Cubans who arrived during the Mariel boatlift. According to the Ambassador's announcement, President Carter had,

> decided to seek special legislation regularizing the status of Cuban/Haitian entrants. This legislation will allow them to remain in the United States and will make them eligible for certain benefits but it will not provide the status or benefits accorded to those admitted as refugees or granted political asylum.

(R.54, Exhibit 32 - June 20 statement). Accordingly, Mariel Cubans who arrived in this country between April, 1980, and October, 1980, were given a special Cuban/Haitian entrant status, were paroled to sponsors, were not placed in exclusion hearings and did not have their asylum applications processed. (R.54, Exhibit 1 - Weglian Affidavit; Exhibits 33-37 - Telegrams Describing Procedures). 10/

The preceding discussion demonstrates that while President Carter would have preferred a more orderly exodus from Cuba and eventually took steps to stem the boatlift, his administration never attempted to withdraw or invalidate the invitation. That the Mariel Cubans who were not criminals or mental incompetents were invited here is bolstered by the fact that they were not merely paroled as "excludable aliens" but were given the unique Cuban/Haitian entrant status. As

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10/ Cubans who arrived between April and October, 1980, who were identified as mental incompetents or as having committed serious crimes in Cuba were not accorded Cuban/Haitian Entrant status nor were they covered by President Carter's invitation. For discussion of these Cubans' right to due process, see Section II, infra.

long as they exhibit "good behavior" they will not be placed in exclusion proceedings. Thus, Mariel Cuban parolees, by virtue of their special status, have a legitimate expectation that parole will be continued so long as they are not a threat to society. As the district court properly concluded,

> ...[I]t is nonsensical to suggest that the President invited plaintiffs to the United States to be treated no differently than unadmitted aliens who are caught attempting to steal past our borders. Nor can it be argued with any reason or logic that plaintiffs were invited to face indefinite confinement until Castro agreed to their return to Cuba...
>
> The Court, therefore, finds that a necessary component of the Presidential invitation was that the legal status of those Cubans invited would be greater than the status of ordinary excludable aliens, a result evident from the special Cuban/Haitian entrant status accorded this group...The invitation, then, can only reasonably be interpreted as according an interim status to those invited as a step to permanent residency status.

Fernandez-Roque v. Smith, supra 622 F.Supp. at 899-900.

C. Paktorovics v. Murff and Plaintiffs' Expectations of Parole.

Relying principally on Connecticut Board of Pardons v. Dumschat, supra, the government argues that none of the Mariel Cubans possesses a liberty interest in parole because "...nothing in the government's response to the flotilla placed any substantive restrictions on the Attorney General's exercise of his parole powers..." Brief of Appellants, p. 28. In Dumschat the fact that Connecticut's Parole Board had "unfettered discretion" to grant or deny commutations of prison sentences led the Supreme Court to find that Connecticut prisoners had no liberty interest in the decision of the state

concerning commutation. Id., 452 U.S. at 466, 69 L.Ed.2d at 166. However, the heart of Dumschat is captured in the following language:

> No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections...

Id. 452 U.S. at 465, 69 L.Ed.2d at 165. Thus the government's reliance upon Dumschat is wide of the mark. Plaintiffs do not depend upon any statistical showing of frequency of relief to others as the basis for their claim; nor is such individual clemency consideration at all relevant. This case starts and ends with the invitation and grant of special immigration status to all eligible Cubans, not as individual acts of grace, but as a sweeping policy decision.

Moreover, combination of the invitation with the creation of the special entrant status brings this case squarely within the holding of United States ex rel Paktorovics v. Murff, 260 F.2d 610, 614 (2d Cir. 1958). The Paktorovics court held that a Hungarian alien, one of thousands invited by President Eisenhower to flee Communist oppression by coming to this country, had due process rights in maintaining his parole here by virtue of that invitation. The situation faced by the Cubans is the same as that experienced by the Hungarians.

The primary basis by which the government seeks to distinguish Paktorovics from the Plaintiffs' situation is to focus on the pre-screening of the Hungarians which went on during that evacuation. Such a distinction is irrelevant.

"Screening" had nothing to do with the Second Circuit's holding and the basic facts of the Hungarian's plight are no different than the Cubans' situation. Plaintiffs urge this court to follow Paktorovics and apply its rule to their case.

The government suggests one other means by which it hopes to avoid a ruling that the Plaintiffs do indeed have a liberty interest in parole, namely that Plaintiffs failed to demonstrate individual reliance on President Carter's invitation for any one Cuban's journey to the United States. Simply stated, there is no such requirement for demonstrating the existence of a government-created liberty interest. 11/ While Plaintiffs must show that a legitimate expectation of entitlement exists in order to establish that a liberty interest has been created, Board of Regents v. Roth, supra, they have done that.

Plaintiffs are in essentially the same posture as the Nebraska prison inmates in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra. Having demonstrated that the mandatory nature of the Nebraska parole statutes created a legitimate expectation of parole in the inmates, and that therefore a liberty interest existed, the Greenholtz plaintiffs were not required to demonstrate that any one

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11/ Plaintiffs would also reiterate the point made above at page 18. After President Carter's "open heart and open arms" speech the number of persons joining the Freedom Flotilla skyrocketed. (R.54, Exhibit 21, p. 5). It is obvious they came because of the President's remarks and other government efforts at assisting the flotilla.

inmate had in fact expected parole because of the statutes or even that he knew the language or terms of the statutes. The Presidential invitation to the Cubans, with its attendant limitation on the discretion of the Attorney General as to the parole decisions he could make, creates a legitimate expectation of parole in the Plaintiffs. Consequently, just as in Greenholtz, a liberty interest was created.

D. What Process Is Due?

Once it is determined that a liberty interest has been created, the question becomes what process is due before that interest may be impaired. Hewitt v. Helms, 459 U.S. 460, 472, 103 S.Ct. 864, 74 L.Ed.2d 675, 688 (1983). The district court ruled that the procedures it had specified earlier in its ruling on the existence of a "core" liberty interest for the Cubans, Fernandez-Rogue v. Smith, 567 F.Supp. 1115, 1134-43 (N.D. Ga. 1983), rev'd other grounds 734 F.2d 576 (11th Cir. 1984), should also be imposed here where the right to due process derives from a federally-created liberty interest. Fernandez-Rogue v. Smith, supra 622 F.Supp. at 901.

The government criticizes use of a constitutional analysis to determine what procedures are required by due process. Brief of Appellants, pp. 46-47. However, while the source of a state-created liberty interest is obviously different from that of an interest arising directly under the Constitution, once the liberty interest is recognized to exist the requirements of procedural due process are determined by reference to federal constitutional law. See Cleveland Board of

Education v. Loudermill, 470 U.S. ___, 105 S.Ct. 1487, 84 L.Ed.2d 494, 503 (1985); Vitek v. Jones, 445 U.S. 480, 494-95, 100 S.Ct. 1254, 63 L.Ed.2d 552, 566 (1980); Shango v. Jurich, 681 F.2d 1091, 1097 (7th Cir. 1982). Consequently, the next step is to consider the factors set forth by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18, 33 (1976).

Under Mathews a court must consider three areas in deciding what process is due in any given situation, (1) the private interest affected by the official action, (2) the risk of erroneous deprivation of the protected interest through the procedures then being used, and (3) the government's interest, including the function involved and the burdens any hearings may involve. Id. Applying Mathews this circuit has recently ruled that a court's job is to determine what "fundamental fairness" is and what it calls for in any particular situation. See McCleskey v. Kemp, 753 F.2d 877, 892 (11th Cir. 1985) (en banc).

The district court did precisely what Mathews and McCleskey direct when it ordered the government to establish a hearing system at which it can be accurately gauged whether or not continued detention is appropriate for the individual involved. Relying principally on Morrissey v. Brewer, supra, which addressed revocation of parole for state prisoners in Iowa, the district court correctly held that due process requires at a minimum that Plaintiffs must be afforded (1) prior written notice of the factual allegations supporting continued

detention, (2) the right to compel the attendance of witnesses and to present documentary evidence at their hearing (unless overriding needs of prison discipline prohibit such presentation of evidence), (3) the right to confront and cross-examine adverse witnesses except where the hearing officer finds good cause for not allowing confrontation, (4) the right to a neutral and detached hearing body to be designated by the Attorney General, whose decision will rest solely on the evidence adduced at the hearing and (5) the right to a written statement of reasons for the decision. Fernandez-Roque v. Smith, supra 567 F.Supp. at 1134. In addition to the Morrissey elements, the district court also found that Plaintiffs are entitled to certain other procedural protections, i.e. a privilege against self-incrimination, the right to appointed counsel, and to have the burden of proof placed on the government to justify detention. Id., at 1137-1140 12/

In its 1983 opinion the district court provides a lengthy and well-reasoned discussion of the legal bases on which it issued the above directions plus specific rejoinder to various government objections. Rather than repeat those arguments here, Plaintiffs direct the Court's attention to that discussion. Id., at 1134-1140. In similar fashion, the district court's opinion also discusses fully and clearly what

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12/ See also Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) [where due process attaches one of the requirements of procedural due process for an alien is that there be complete and accurate translation of the proceedings].

process is due for revocation of parole. Id., at 1140-1143.

In addition to its primary concern that the relief fashioned by the district court is not required by due process, the government also makes an objection that before the district court ordered the adoption of the hearing procedures set forth above, it should have "...identified the existing procedures for revocation or denial of parole to determine whether and to what extent they were insufficient." Brief of Appellants, p. 46. This contention is without substance. The business of due process analysis is not to critique existing procedures; rather, it is to mandate needed protections for established property or liberty interests. 13/

E. Summary.

The Plaintiffs were invited to the United States in 1980. By virtue of that invitation, which included the creation of a special entrant status distinguishing them from all other excludable aliens, the Mariel Cubans have a legitimate expectation of parole and, consequently, a liberty interest in being free from detention. See United States ex rel

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13/ There are no "existing procedures" save the parole guidelines at 8 C.F.R. §212.5 (1985) which do not even afford Plaintiffs the bare minimum required by procedural due process, notice and an opportunity to be heard. See Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556, 569-80 (1972). Assuming that a liberty interest exists, thus triggering due process, the parole regulation on its face is deficient as a matter of due process.

Paktorovics v. Murff, supra. That being the case, the Plaintiffs must be afforded procedural due process before that liberty interest can be taken or otherwise impaired. Morrissey v. Brewer, supra; Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, supra. Under Morrissey, Vitek v. Jones, supra, and Mathews v. Eldridge, supra, the hearing procedures announced by the district court are necessary, and this Court should affirm them.

II. THE DISTRICT COURT ERRED BY FAILING TO FIND A LIBERTY INTEREST IN PAROLE FOR THOSE CUBANS WHO HAVE BEEN CONTINUOUSLY DETAINED SINCE THEIR ARRIVAL IN THE UNITED STATES.

For purposes of a liberty interest analysis the Plaintiffs can be divided into two groups. The preceding discussion addressed what was referred to in the district court's opinion as the "Second Group." The "First Group" consists of those members of the Plaintiff class who have been continuously detained since their arrival in this country because they had either committed a serious crime in Cuba or been classified as suffering from some form of mental impairment. Plaintiffs do not contend that President Carter invited criminals or mental incompetents to this country. Thus, these Cubans cannot find a liberty interest in the invitation which was discussed above. However, they also possess a liberty interest in parole by virtue of the Executive Branch's announced policies for detained Cubans and

the 1967 Protocol Relating to the Status of Refugees. 14/

All of the Mariel Cubans (this would include those in the "Second Group" as well) were guaranteed due process by executive pronouncement. When it became known that Cuban criminals had been placed by Fidel Castro on the boats leaving Mariel Harbor, the White House announced that as to those Cubans identified as having committed serious crimes, exclusion proceedings would be held "consistent with the constitutional requirements for due process of law". The White House further announced that:

> exclusion proceedings will also be started against those who have violated American law while waiting to be reprocessed or relocated. The Justice Department will investigate all serious violations of the law, and the Justice Department will bring prosecutions where justified. Those responsible for the disturbances at Fort Chaffee are confined and will be confined until fair decisions can be made on criminal prosecution or exclusion from this country or both. Similar measures will be taken in the event of any future disturbances. (emphasis added).

(R.54, Exhibit 13, June 7, 1980, White House Statement). This announcement, made at the highest executive level, imposed procedural due process limitations on decisions regarding detention in language which is plainly mandatory.

Additionally, the Plaintiffs have a liberty interest by

14/ Plaintiffs argued below that a liberty interest was created by the Attorney General's Status Review Plan. Owing to the termination of that Plan, Plaintiffs are no longer pressing this point.

virtue of an international agreement. Article 31 of the 1951 Convention relating to the Status of Refugees opened for signature July 28, 1951, entered into force April 21, 1954, 189 U.N.T.S. 137 and incorporated by reference in the 1967 Protocol Relating to the Status of Refugees ("Protocol"), signed January 31, 1967, entered into force October 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (entered into force for the United States, November 1, 1968) states:

> 1. The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The contracting states shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The contracting states shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

(R.54, Exhibit 14). Article 31 of the Protocol applies to Plaintiffs because they are still actively in the process of seeking asylum. 15/

15/ Plaintiffs' asylum claim applicable to the class was rejected in Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), pet. for cert. pending sub. nom. Marquez-Medina v. Meese, No. 85-5874 (filed Nov. 13, 1985). However, Plaintiffs believe their claim is proper and have petitioned the Supreme Court for certiorari. They concede that if certiorari is not granted, then this basis for a liberty interest disappears.

In mandatory terms, Article 31 of the Protocol forbids restriction of movement (detention) of asylum seekers who are present without authorization except to the extent "necessary". This is the equivalent of the language and structure of the Nebraska statute in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, supra ["shall release ... unless"], that mandates release unless adverse findings are made. A comparison to the criteria used to place a prisoner in administrative detention in Hewitt v. Helms, supra ("need for control"; "threat of a serious disturbance"; "serious threat to the individual or others"), or to the criteria which would prevent release on parole for a Nebraska inmate in Greenholtz ("substantial risk of not conforming to conditions of parole"; "release would depreciate the seriousness of the crime;" etc.), which in both cases were found to sufficiently define and circumscribe official discretion to create a liberty interest, reveals that the language of Article 31 is sufficiently clear to set conditions for detention and release. See Haitian Refugee Center v. Smith, supra.

As discussed above, once a liberty interest is found to exist, the extent of the procedural due process that must be provided is determined by federal constitutional law. See Vitek v. Jones, supra. Accordingly, the hearing procedures found necessary for the "Second Group" would also be required for the "First Group". See Discussion of "What Process Is Due," supra at p. 20.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS DOES NOT APPLY IN THIS CASE.

The district court acknowledged that Plaintiffs "... established that customary international law prohibits prolonged arbitrary detention." Fernandez-Roque v. Smith, 622 F.Supp. at 903. Furthermore the court said,

> Adopting Professor Henkin's view [Plaintiff's expert witness, see transcript at R.72], if the Court were applying customary international law here, the Court would hold that customary international law requires the type of periodic, individualized hearings [described at 567 F.Supp. 1131-1140]...

However, the district court found that international law did not apply in this case because the Attorney General's actions authorizing the Plaintiffs' detention constitute a "controlling executive act" precluding application of international law. Id., at 903.

Plaintiffs submit that for an act of the executive to be controlling it must be taken by the President himself acting pursuant to his constitutional authority or be expressly sanctioned by him. Concurrent with the filing of this brief, amicus curiae (American Civil Liberties Union and Lawyers Committee for International Human Rights) are also filing a brief which will examine the international law arguments in depth. Plaintiffs show the Court that they will rely on that brief for support on this issue and state that they adopt the arguments made in it.

IV. THE DISTRICT COURT ERRED IN FAILING TO FIND THAT PLAINTIFFS HAVE A CORE LIBERTY INTEREST IN THEIR

FREEDOM ARISING DIRECTLY UNDER THE CONSTITUTION.

This argument was rejected in Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984), based on the decision in Jean v. Nelson 727 F.2d 957 (11th Cir. 1984), (en banc) aff'd other grounds ___ U.S. ___, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). Plaintiffs believe that this ruling is in error, but instead of petitioning the Supreme Court for certiorari at that time, they elected to proceed with the remaining issues which were remanded. In order to preserve their claim under the Constitution Plaintiffs have reasserted it throughout the proceedings on remand. (R.52 - July 9, 1984 letter to court; R.54 - Nov. 30, 1984, Motion for Writ of Habeas Corpus, p. 5; R.89 - Transcript of Sept. 6, 1985, Proceedings, p. 9). They do so again at this time. However, absent instructions from the Court that it intends to reconsider its earlier ruling, Plaintiffs will not repeat those arguments but instead respectfully refer the Court back to the briefs filed in the context of the prior appeal.

V. THE DISTRICT COURT WAS CORRECT IN DECLINING TO DECERTIFY THIS CASE AS A CLASS ACTION.

Almost five years ago the district court certified this case as a class action. Fernandez-Roque v. Smith, 91 F.R.D. 117, mod. 91 F.R.D. 239 (N.D. Ga. 1981). Following last summer's decision in Garcia-Mir v. Smith, supra, the government moved to decertify the class in toto pursuant to its reading of footnote 11 in the Garcia-Mir opinion. Id. at

1478. The district court properly did not grant this relief.

Decisions whether to grant or deny class certification are subject to review only for abuse of discretion. Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1571-72, n. 3 (11th Cir. 1983), mod. other grounds 740 F.2d 903 (11th Cir. 1984). The district court plainly did not abuse its discretion because nothing in Garcia-Mir requires the district court to do what the government requested, and footnote 11 formed the only basis for its motion.

In relevant part the language in question from footnote 11 says,

> ...Decisions regarding parole, asylum, and withholding of deportation must be made only after considering the particular circumstances of each individual's case... We, therefore, find that further class-wide treatment on these issues is inappropriate. We also note that continuing to treat these issues on a class-wide basis will necessarily result in some individual class members at least temporarily, receiving relief that they are not entitled to under any circumstances...

Garcia-Mir v. Smith, supra at 1487-88, n. 11. The footnote is directed at the ultimate decisions on the merits in asylum (i.e. granting it) and parole (i.e. ordering release) cases. It arose in the context of Plaintiffs' attempt to present a class-wide asylum claim. However, it is totally inapposite to the issues on this appeal. 16/

16/ For this Court's information the class has been decertified as regards determinations of actual parole (meaning release from prison). See Fernandez-Roque v. Smith, 567 F.Supp. at 1144; 12/4/84 Order at R.55; 600 F.Supp. 1500 (N.D. Ga. 1985), rev'd other grounds 766 F.2d 1478 (11th Cir. 1985).

All of the issues on appeal implicate procedural due process. By virtue of prevailing in this appeal Plaintiffs would not gain actual release on parole. All that they would obtain are procedures whereby they could fairly present their claim as to why they should be free. Their right, or lack of right, to the procedures sought is not dependent in any way on the specific facts of any one Plaintiff's case. Everyone in the class is entitled to hearing procedures or everyone is not.

In a different context, concerning whether or not Social Security recipients were entitled to a certain type of hearing, the Supreme Court said,

> The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class. The ultimate question is whether a pre-recoupment hearing is to be held, and each claim has little monetary value. It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

Califano v. Yamasaki, 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176, 192 (1979). Similar legal and policy concerns dictate that this case continue as a class action. It is ridiculous to suggest that after almost five years of litigation the case should be decertified on the issues now before this Court so that the 1900-plus members of the class can go back, file individual lawsuits and start all over again.

The government misperceives the nature of procedural due

process. It is an "absolute" right in that its existence is not dependent upon the merits of a claimant's substantive assertions. Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252, 266 (1978). 17/ Thus, whether or not any "alien [has] been unjustifiably denied parole" is irrelevant, Brief of Appellants, p. 51. Cf. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) [class action seeking pre-termination hearings for welfare recipients even though that means some ineligible recipients will get a hearing and receive benefits wrongfully pending the hearing]; Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978) [class action allowed attacking pre-judgment attachment statute as violation of due process even though some class members will actually owe the money]; and In Re Class Action Application For Habeas Corpus, 612 F.Supp. 940 (W.D. Tex. 1985) [due process requires that counsel be appointed for all members of class of illegal aliens being indefinitely held as material witnesses even though all will not gain release simply because they have a lawyer]. The question here is whether the Plaintiffs are entitled to a hearing, not whether they are entitled to actual release.

The government's two other arguments are meritless. The contention that at some point in the future stare decisis

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17/ "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome..." Fuentes v. Shevin, supra 407 U.S. at 87, 32 L.Ed.2d at 574.

might result in the same relief being afforded to the class as a whole can be raised as opposition to every class action. The argument ignores the raison d'etre for Fed. R. Civ. P. Rule 23 and concerns of judicial economy. See Califano v. Yamasaki, supra; Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The other argument, that the interests of some class members are antagonistic to others, is also wrong. The arguments under issues II, III, and IV apply to the entire class and are being pursued zealously. That the scope of issue I does not extend to the entire class does not mean that those within and without it have antagonistic interests. Nor does it mean that class certification is inappropriate. See Fed. R. Civ. P. Rule 23(c)(4). Success on Issue I does not preclude any of the other arguments advanced. Therefore, the interests of some class members are not "at odds" with the others.

Finally, the government's contentions fly in the face of what the Garcia-Mir court itself did. In its decision, that court reviewed the separate legal issue of what standard of review exists for judicial review of immigration parole decisions on the same common, class-wide basis as had the district court.

There is no justification for decertifying this case at this late date. The district court did not abuse its discretion in refusing to do so.

VI. CONCLUSION

All that Plaintiffs seek are procedures through which they can demonstrate that their continued imprisonment is unjustified and that, accordingly, they should be released from the Atlanta penitentiary on parole. Therefore, Plaintiffs pray that this Court grant the following relief: (1) affirm that portion of the district court's order finding that a liberty interest has been created for all Mariel Cubans who were not mental incompetents or criminals in Cuba ("Second Group") and directing that the hearing procedures specified be implemented, (2) reverse the district court's ruling that the Plaintiffs, specifically the "First Group", do not have a protected liberty interest by virtue of executive policies and the 1967 Protocol Relating To The Status Of Refugees, (3) reverse the district court's ruling that international law does not apply in this case, (4) reverse the district court's implicit ruling that Plaintiffs do not have a core liberty interest arising directly under the Constitution and (5) affirm the district court's refusal to decertify this case as a class action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of Brief for Appellees and Cross-Appellants by sending via Federal Express a copy of same in a properly addressed envelope with adequate postage thereon addressed to:

Lauri Steven Filppu
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