

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

JOSE GUERRA-CASTRO

Petitioner,

V.

GARRETT, *et al.*

Respondents.

Civil Action No. 1:25-cv-22487-DPG

**PETITIONER'S REPLY TO RESPONDENTS'
OPPOSITION TO TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Petitioner Jose Guerra-Castro submits this Reply to the Respondents' opposition to a temporary restraining order (ECF Doc 38). Of note, on September 2, 2025, this Court entered an order that Petitioner not be removed from the United States pending further order. (Doc 37).

Petitioner is currently held at Florence Detention Facility close to the Mexican border, where Respondents (Immigration and Customs Enforcement) are reportedly moving Cuban nationals across the border in an *ad hoc* and informal process without regard to required legal procedures, and in blatant disregard for individuals' safety and security. Petitioner seeks a temporary restraining order enjoining his removal because he fears illegal (and dangerous) physical ejection from the United States before his case can be heard. He seeks release because he has been held beyond 90 days under false pretenses and without *lawful* removal process (third country acceptance-notice-opportunity to respond).

To provide legal context: Petitioner has been in ICE custody since May 29, 2025, roughly 96 days, in a continuing violation of criteria and procedures for the revocation of post-order supervision. 8 U.S.C. § 1231(a)(3); § 1231(b)(2)(E)(vii); and 8 C.F.R. §§ 241.13(h)(i)(2) and (3). To date, and as carefully demonstrated on the record in Petitioner's Reply (Doc. 35) Respondents have yet to provide evidence to this Court that removal is "significantly" likely in the "reasonably foreseeable future" vis a vis affirmative acceptance by a third country. 8 U.S.C. § 1231(b)(2)(E)(vii). To date, Respondents have yet to provide evidence that required procedures for revocation were followed. 8 C.F.R. § 241.13(i). Respondents' declarations are inconsistent and self-contradictory (Doc. 35 pp 4-11). Not surprisingly, Petitioner would testify to facts contrary to Respondents' affidavits, and Petitioner is entitled to a hearing before this Court. 28 U.S.C. § 2243.

I. LEGAL ARGUMENT

A. Substantial Likelihood of Success on the Merits

i. Respondents have not followed regulatory procedures.

In the opposition's introduction, Respondents perpetuate the false narrative that supervision was revoked based on a determination that removal to Cuba was likely. Specifically, Respondents state Petitioner was arrested because he was nominated for the next "available charter flight to Cuba". (Doc. 38, p. 2) Yet a review of the rolling affidavits belies the falsity of this narrative. First and foremost, the law requires that *before* ICE can revoke supervision, removal must be "significantly likely" in the reasonably foreseeable future. 8 C.F.R. § 241.13(i)(2).

According to Officer Gonzalez' affidavit, dated June 12, 2025 (12 days after arresting Petitioner), ICE "nominated" Petitioner for removal to Cuba and charter flights go to Cuba

subject to "availability." (Doc. 17, Exh. 1) Now, bearing in mind that our Petitioner was on supervision for eleven years, the Court may wonder: what suddenly changed with Cuban-U.S.A. policy? Why now, after eleven years, is ICE suddenly able to move Jose Guerra? The answer is that nothing had changed, nor has changed, and Respondents *knew* Cuba was highly unlikely to accept Petitioner for removal because of the Joint Statement on Migration, dated January 12, 2017, in which Cuba agrees from that point forward to accept (on a case-by-case basis only) Cuban deportees. (Doc. 18 Exh. 5). In addition, Cuba will generally not accept their nationals if they have been in the United States more than four years. (Doc 18 Exh. 4).

In their Opposition, Respondents present the September 3, 2025, affidavit of Supervisor Erwin. (Doc. 34 Exh. 2) Here, Affiant Erwin concedes that after twice "nominating" Petitioner for a spot on a charter-- notwithstanding the January 12, 2017, Migration Accord *and* Cuba's well-known policies -- ICE had to concede that in fact removal to Cuba was not reasonably foreseeable. *Id.* Ninety days of a man's life, languishing in custody following revocation of supervision that by law should have been premised on a "significant" likelihood of removal in the imminent future. 8 C.F.R. 241.13(i)(2).

However, Supervisor Erwin continues, "[T]he Government of Mexico has agreed to accept the repatriation of Cuban citizens with final orders of removal from the United States." (*Id.*, at 11). Another vague statement. Respondents have failed to provide any evidence that Mexico is currently accepting Cuban nationals, much less specifically our Petitioner. The law requires that a third country (not Cuba) affirmatively accept the individual. 8 U.S.C. § 1231(b)(2)(E)(vii). And there are notice requirements, including the right to an interview with an officer, and a hearing before a judge. *Jama v. Immigration & Customs Enft.*, 543 U.S. 335, 341-341 (2005); *El Himri v. Ashcroft*, 378 F.2d 932, 939 (9th Cir. 2004).

According to yet a third ICE Officer, Mr. Garcia Ortega, on the day the decision to revoke supervision was made, that is-- when Petitioner dutifully checked in, there was no affirmation that Cuba was significantly likely to receive him for deportation. (Doc. 34 Exh. 2) Indeed, there was as of yet no "nomination" for a charter flight at the time Petitioner was arrested and taken into custody. And nothing had changed in terms of foreign policy. *Id.* Yet the law requires that "upon revocation" the alien "will be notified" of the reasons for revocation of release and a chance to respond. 8 C.F.R. § 241.13(i)(3). By Respondents' own admission (or omission, in terms of evidence), no such process was followed.

Thus by Respondents' own affidavits, Petitioner was arrested and detained without basis to believe removal to Cuba was significantly likely in the reasonably foreseeable future and without notice to Petitioner of the basis for revocation. Now, Respondents resist doing the right thing and releasing Petitioner by claiming without any proof that removal to Mexico is significantly likely. However Petitioner fears that Mexico is not lawfully or formally accepting Cuban nationals and that ICE is practicing illegal physical removals in dangerous conditions along the Southern border. Otherwise, where's the paperwork to back up the Supervisor Erwin's statements?

Respondents argue that they have followed their regulatory procedures by actively attempting to remove Petitioner; yet their procedures require that acceptance by a third country be all but nailed down prior to custody, and then, that proper notice and the opportunity for response be provided. *Cf.*, Doc. 38, p. 4, and 8 C.F.R. § 241.13(2) and (3) (notice of the reasons, in an informal interview; the opportunity to submit evidence that there is no significant likelihood; an evaluation of contested facts.)

Clearly, this habeas petition does not involve only issues of law, but also fact -- what happened on May 29, 2025 and since then-- and Petitioner should be brought before this Court for hearing. 28 U.S.C. § 2243.

ii. Courts overwhelmingly agree that 8 U.S.C. § 1252(g) does not foreclose habeas corpus jurisdiction in this context, the unlawful revocation of supervision.

In their opposition, Respondents contend Petitioner is unlikely to succeed on the merits because revocation of supervision is discretionary. (Doc. 38 p. 3) However, Petitioner argues that the OSUP revocation procedures were violated, which is a key distinction. *See Barrios v. Ripa*, Case No. 25-cv-22644-Gayles, 2025 WL 365006, 2025 U.S. Dist. LEXIS 153228, at 11 (S.D. Fla. Aug 8, 2025). After all, the regulations were put in place following a determination by the Supreme Court that there had to be some procedures in place so as to avoid violation of both the statute and the Constitution. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (Fifth Amendment applies to aliens in post-removal-order detention).

Although detention under or in connection with a final removal order always is related to the execution of that order, courts routinely assume jurisdiction over habeas petitions filed by individuals subject to a final order. *Cesay v. Kurzdorfer*, 71 F. Supp 3rd 137 [p. 19] (W.D. NY 2025). Jurisdiction lies where petitioner is contesting his detention and his due process rights, not the execution of the removal order. *Escalante v. Noem*, 9:25-CV-00182-MJT, 2025 U.S. Dist. LEXIS 148899; 2025 WL 2206113 p. 5 (E.D. TX Aug. 2, 2025).

iii. Third country removal requires a process.

Suffice here to say that Respondents have provided no evidence beyond a general assertion in an affidavit that Mexico is accepting Cubans for removal. Furthermore, Respondents mis-state Petitioner's position in this regard. *Cf. Doc. 38*, p. 6. Yes, third country removals can and do occur. Petitioner's position is that in the current context of his custody, involving a

revocation of supervision procedure, Respondents have not followed the required steps in terms of Cuba or Mexico. And in light of the interview, notice and evidentiary requirements of 8 C.F.R. § 241.13(i)(j), and the dearth of evidence in this record, Petitioner is likely to succeed on the merits of his argument that due process was violated.

B. Irreparable Injury

i. Illegal removal to Mexico

Respondents are aware of Petitioner's counsel's concerns that migrants are being brought individually in small groups and pushed over the border, where illegal armed groups await them, as well as environmental hazard. Respondents have presented no evidence to assuage those fears, lending credence to their veracity. A charter flight to Cuba is one thing; a push (perhaps blindfolded) over the border in rural Mexico is something else entirely. For this very reason, the INA requires assurances that the foreign government is willing to accept a third country deportee. This has become a matter of life and death for petitioner.

C. Public Interest

Petitioner is not contesting his removal order, nor the Respondents' right to remove him to a third country. He is "merely asking to be placed back on supervised release pending his removal pursuant to immigration regulations" wherein Respondents make the "required regulatory efforts" of showing a significant likelihood of release. *Escalante v. Noem, Id.*, 6-7. It is not in the public's interest to ignore the Constitution, the statute, and the regulations in favor of mass arrests and detentions to score some political point to a minority of misled Americans, nor send a husband and father to his death in the desert of Northern Mexico. Accordingly, Petitioner agrees with Respondents' statement that enforcing federal law is commensurate with the public's interest in enforcing the law. (Doc. 38 at 7). The problem is that Respondents are not upholding

or enforcing the law, they are practicing vigilante violation of the law. That does not serve the public interest.

III. Conclusion

For the reasons set forth herein, and incorporating Petitioner's arguments in his Motion for Temporary Restraining Order (Doc. 36) and Reply to Answer to Amended Complaint (Doc. 35), Petitioner seeks a restraining order enjoining his removal, ordering his release, and/or an evidentiary hearing wherein he is present before this Court. 28 U.S.C. § 2243.

Respectfully Submitted:

/s/ Mary Kramer

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