/ / On June 4, 2009, in the City of Buenos Aires, Federal Capital of the Republic of Argentina, Courtroom I of the National Chamber of Criminal Cassation composed of Attorney at Law Raúl R. Madueño as Chair, and Attorneys at Law Juan Carlos Rodríguez Basavilbaso and Juan E. Fégoli as members, to resolve the appeal filed in this case under number 11,452, classified as: “Delgadillo Pozo, Teófila on the petition for cassation,” which case record **STATES:**

1)That Courtroom I of the Federal Court of Appeals of Bahía Blanca decided to reject the appeal filed by Attorney at Law Gabriel Darío Jarque, the Public Defender officially appointed to defend the accused and confirm the trial court's order that denied the request for house arrest (folios 80/81.)

The party mentioned above filed a petition for cassation against this decision, which was awarded under folio 103.

2)The appellant argued that the ruling results in a non-appealable lower court error by disregarding both its own and its family's fundamental rights, that was arbitrary to the extent that there was a departure from the evidence in the process, a lack of legal grounds, and a formal excess.

In this regard, it affirmed that the precepts understood as not observed and erroneously applied are Articles 1, 32 and other related Articles of Law 24,660; Article 314, and by analogy, Articles 495, 502 and the Civil Code of the National Code of Criminal Procedure (Código Procesal Penal de la Nación, CPPN); Articles 17 and 5 Number 6 of the American Convention on Human Rights; Article 10, Number 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 16, Number 3 of the Universal Declaration of Human Rights (UDHR); Articles 23 and 24 Number 1 and Article 10 Number 3 of the International Covenant on Civil and Political Rights (ICCPR); Articles 4 and 7 Numbers 1, and 9 and Article 14 Number 2 of the United Nations Convention on the Rights of the Child (CRC); Article 75, paragraph 22 of the National Constitution, to the extent that it incorporates the International Covenants cited above into the Supreme Law with the same legal order of priority, and Article 32 of Law 26,742.

He argued a) that the interpretation of the legal provisions must be consistent with the constitutional rights at stake, failing to take such consistency into account, in this case, and the particular circumstances related to his pupil; b) that the appeal only focused on confirming that the reports submitted did not constitute a new fact, and that they could not be considered mandatory when resolving the case, as they were deemed as evidence offered by one of the parties, failing to

address essential arguments for decision on the case —nothing was said about the validity of the constitutional rights of children and family members; c) that the court of appeals understood that Law 26,472 establishes the institute's expert application, without sharing that the detention modality proposed does not grant a benefit to the appellant, but is an obligation of the State embodied by the Judiciary, in this case, to respect commitments on Human Rights, whose failure to observe the same can, in fact, lead to supra-national responsibility; d) that the preservation of family ties, contact with minors and their education are fundamental rights inherent to the person, internationally recognized, which were awarded the highest rank; e) that proof was provided on time that the Ministry of Public Defense has the help of technical staff specifically qualified in social issues, prompting the preparation of a socio-environmental report about the accused party's family members to clearly reflect the results anticipated in the previous presentation rejected by the appellate judge; f) that consideration of such reports did not constitute a new fact, and was nonsense, as no technical study was added to the cause to provide information about the situation suffered by the appellant's family, so it was impossible to classify it as a new fact; and g) if there were any doubts about its findings, it was enough to add an extension of the limited socio-environmental report prepared by the appellate judge.

3) That once the pre-hearing established under Article 454 was held according to the provisions set forth in Article 465 bis of the Code of Criminal Procedural of the Nation, and having drawn lots so that the judges can cast their votes, Attorney at Law Raul R. Madueño was appointed in the first place, followed by attorneys Juan C. Rodríguez Basavilbaso and Juan E. Fégoli in the second and third places, respectively, the Court went on to discuss the case (Article 469 of the National Code of Criminal Procedure, CPPN.)

Justice Raul R. Madueño said:

I- First, it is important to note the following from the evidence provided in the case:

A- On November 28, 2008, during a routine control practiced on a passenger bus owned by Transportation Company Andesmar, a blue bag was found in the baggage bay identified with bag tag number 248. It contained five (5) packages with a substance that would be cocaine, concealed with shampoo and hair rinse, weighing a total of 5.5548 kg. The investigations performed led to the conclusion that Teófila Delgadillo Pozo was responsible for dispatching the bag. The prima facie conduct imputed is that she is criminally responsible for smuggling drugs in

terms of Article 5, sub-paragraph c) of Law 23,737, namely the transfer of a narcotic substance to the City of Río Gallegos, which was the destination of the bus on which she was traveling.

It is clear to me, for the reasons I will explain below, that this is the case of a drug mule or courier that smuggles illegal drugs using the body as a container by swallowing and carrying them in their stomachs, or attached to their bodies, or in their luggage, constituting the weakest link in the illegal drug traffic chain, as there is nothing to determine that the suspect participates in more serious cases and that she is the leading character of all drug traffic channels.

B- That, in so far as relevant, on February 26, 2009, the official defense reiterated its request for house arrest of the appellant (Folios 18/18 back of the page.) It included two reports prepared by the Commission on gender issues of the National Office of the Public Defender (Folios 9/17) and asked that they be considered as a new and conducive fact for deciding about this new request.

C- That on March 2, 2009, the appellate judge did not admit the submission (Folios 39/40 back of the page.) When deciding, it considered that on December 17, 2008, the decision was made to process the accused with preventive detention finding, prima facie, that she was criminally responsible for the crime of smuggling illegal drugs in terms of Article 5, sub-paragraph C of Law 23,737, and Articles 306 and 312 of the National Code of Criminal Procedure (CPPN) (Folios 27/31 back), which judgment was essentially confirmed by the Federal Court of Appeals of Bahía Blanca (Folios 32/33); and that the hypothesis invoked did not fall under any of the approving assumptions (Article 314 of the CPPN; Articles 33 and 11 of Law 24,660; Article 1, sub-paragraph f, and Article 4 subparagraph f of Law 26,472.) Thus, it held that the judge had the power to grant the concession or not; that the outcome of the report filed by the public defender on this occasion was not sufficient to justify the benefit under consideration since it brought nothing to rebut the evidence that was presented on time and considered to justify rejecting the request, since "family reorganization" is a consequence resulting from the adverse situation experienced by the family of a person

who is deprived of her freedom; that the fundamental conditions that serve to establish the projection announced by the Defender did not "come forth as proven" (sic), nor could they be regarded as exposed as a new fact that implied a treatment other than the one already performed; and that the opinion attached was sterile for the purposes intended, since the ruling principle of our law is *iura novit curia* and this was not found in the likely intervention as *amicus curiae,* therefore exempting it from pronouncing any judgment on the subject matter; and

D- That this verdict was upheld by Courtroom I of the Federal Court on March 5, 2009 (Folios 80/81.) To thus decide, and sharing the arguments of the appellate judge, he said that the reports provided by the defense were not new facts, but rather evidence submitted by one of the parties, comparable *mutatis mutandis,* to those carried out by the technical consultants according to Article 458 of the National Code of Criminal Procedure, CPPN) and that the conclusions reached could not be considered mandatory when it came time to decide; that Article 32 of Law 26,472 establishes that the judge "may" grant the benefit, so it is an option and not an obligation; and that the case could not be framed under subparagraph f of that law because Delgadillo Pozo's children are over five years of age.

II- The matter at hand submitted for consideration must be analyzed upon completion of this brief.

First of all, it is important to note that with the enactment of Law 26,472, which came into effect on January 20, 2009, amended Article 32 of Law 24,660 and Article of the 10 of the Criminal Code, which now read, respectively, and in so far as relevant, as follows: "The enforcement judge or the judge of competent jurisdiction may order the enforcement of the sentence under house arrest ... f) for the mother of a child younger than five years or a disabled person under her care"; and "may, at the discretion of the judge, serve the sentence of imprisonment or detention under house arrest ... f) the mother of a child under five (5) years of age or a disabled person under her supervision."

While it is true that the appellant is not expressly involved in any of these assumptions —since her children are seven, ten, and 12 years of age—, without underestimating the seriousness of the charge, I must note that it is not ultimately about protecting her personal situation that the legislator did not consider, but rather looking out for the custody of the children based on the aforementioned rights. So, in light of the considerations that I will present below, I must anticipate that given the

particular circumstances related to this specific case, I believe that it is feasible to grant the benefit sought on her behalf.

The report prepared by the Community Relations and Social Issues Program of the Office of the Public Defender eloquently illustrates the situation being experienced by the family members. The document was prepared by social workers Laura Grandoso and Romina Lobato (Folios 1/8), accompanied by the document included on Folios 9/17 prepared by public defenders Cecilia L. Mage and Alberto R.S. Giordano of the Ministry of Public Defense, to which I hereto assign a documentary value to resolve this case because it was produced by a constitutional entity (Constitutional Article 120). The substantial facts, in this case, are that the primary family is comprised by the accused, who is 50 years of age, Florentino Vásquez Montaño, who is 37, and their three children who are under age. Teófila Delgadillo Pozo has an older daughter from a previous marriage, who has formed her own family. She lives close to the family home and is the only person that is somehow present for the family on a daily basis. Vásquez Montaño has no relatives that can help out on an emotional or material level, so Delgadillo Pozo's arrest represents an irreplaceable absence for the family group that is currently facing a series of ailments.

It is important to note that before the arrest, the family group had reached a certain balance in the distribution of roles and functions. Vásquez worked as a metal worker in a car body repair shop, and was the family's main provider; the accused was primarily in charge of childcare and housework, while selling clothes to increase the family income; her arrest forced the family to reorganize leading to a consequent work overload for her domestic partner, who does his job and cares for their children and home at the same time. However, when he has to go to work, the family must implement certain strategies subject to their financial situation. There are times when the father pays his stepdaughter's friend to watch the children for a few hours, and there are other times when the 12-year-old son must assume this responsibility. So, although this is a family organization strategy it also implies child labor in the home, as the child must replace the adults and take on responsibilities

corresponding only to them. The child is not prepared for these tasks, and this constitutes a risk.

From the time Delgadillo Pozo was arrested, her sons visited her once, and her daughter visited her twice. They stay in touch with their mother by phone, twice a week.

Regarding Vásquez Montaño, it is important to note that he has a precarious job situation, because he is not a registered employee and work is unstable and subject to variable demand. After his domestic partner had been arrested, he had to reduce his work hours because he also had to care for their children and look after the home, seriously affecting the family's financial situation. Furthermore, he also suffers from Chagas disease and had to suspend his treatment after his domestic partner was arrested.

Lastly, Delgadillo Pozo's prolonged absence from the family nucleus is expected to further compound the family's material and subjective existence conditions. Firstly, and regarding the children, because their unstable emotional situation will get worse, and can affect their daily lives in general and their schooling, in particular, since their story shows that the mother played a fundamental role in her children's education.

The report concludes by stating that granting house arrest to Mrs. Delgadillo Pozo would provide the following benefits: a) the preservation of the maternal affiliate ties to ensure the healthy development of her children, based on the motherly care she has given her children; b) the family's reorganization and putting a stop to the child labor, since her presence would serve to redistribute the family roles and functions, so the eldest son would no longer have to take on the responsibilities he assumes in her absence, that correspond to an adult; c) an increase in the family's income, as Vásquez Montaño would be able to increase his work hours while reducing the family's expenses, thereby improving the family's financial situation.

III- The story above provides a clear description of the serious situation the family is facing, and especially the minors.

Given the above, it is imperative to examine the case in light of the principle of "Best Interests of the Child" established in the Convention on the Rights of the Child, and in the international treaties incorporated into our Constitution through Article 75, sub-paragraph 22, and Laws 26,061 and 26,472.

The validity of the internal rules of law must be compared with those to which the member of the constitutional convention granted constitutional hierarchy because they are included in the international agreements signed by our country. Such is the case of the Convention on the Rights of the Child signed by the Republic of Argentina, and Law 26,061 for the Comprehensive Protection of Children and Adolescents, as the instrument that refers to the best interests of the child as a top priority the State must guarantee.

The legal effect and operation of the fundamental rights of children evaluated with a sense that includes their interest and convenience must prevail over the reasons of caution that may justify a purely precautionary imprisonment. The interview with the minors referenced in the report mentioned in Section II has revealed —as established in Article 12 of the Convention on the Rights of the Child—, the damage caused by the mother's arrest, which serves to estimate the consequences and benefits of keeping her in that situation.

Several decisions handed down by the Supreme Court of Justice of the Nation, have indicated the primary consideration of the best interests of the child imposed by the International Convention on the Rights of the Child (Article 3.1) on any national authority in matters concerning children, and it directs and determines all rulings handed down by the courts in all cases submitted to judgment, including those decided by this Supreme Court as the supreme authority of one of the powers of the Federal Government; therefore, it is appropriate to apply —within the scope of its jurisdiction— the international treaties our country has signed and with the preeminence granted by the National Constitution. The main focus on the Best Interests of the Child referred to in the Article above points to two basic purposes, which consist of becoming a pattern when deciding on conflicts of interest and serving as a criterion for the institutional intervention focused on protecting minors. The principle, therefore, provides an objective parameter that serves to resolve the children's problems, in the sense that the decision focuses on what best benefits the children (SCJ "S.C. on adoption," resolved on 8/2/2005.)

Furthermore, it has also stated that the judges must use the judgments and opinions issued by the Inter-American Court of Human Rights as a guide in their decision-making processes (Final rulings 318:514.) In this regard, Consultative Opinion OC 17/2002 has established that the protection of children in international instruments is the ultimate goal of the harmonious development of their personalities, and the enjoyment of their recognized rights. The State must specify the measures to be adopted to encourage this development within its own sphere and jurisdiction, and support the family in its natural function by which it is responsible for providing protection for the children that are part of the family nucleus.

As I mentioned earlier, Articles 3.1 and 4 of the Convention on the Rights of the Child, an international instrument incorporated into the constitutional block by the 1994 reform, establishes two guidelines that must be used to analyze the State's obligations, namely the best interests of the child and the legal effect of the rights established by the Convention; that domestic law should regulate matters of childhood conceiving children as entitled to rights and not as mere recipients of welfare or social control measures implemented by the State (cfr. Nahid Cuomo, María de los Ángeles, "Implementation of the Convention on the Rights of Children by Argentine courts," in AA.VV. "Convention on the Rights of the Child," Santa Fe, 2002, p. 48); in which the principle of priority of the Best Interests of the Child acts as a guiding rule and is a constitutionally supervised guarantee that provides a framework for protection of children's rights, and Article 3 of the Convention binds the courts and the other branches of government, that all actions concerning children must focus their primary consideration on the best interests of such minors. This guiding consideration, far from establishing itself as a qualification to forgo all higher legal standards, constitutes a certain pattern that guides and determines the decisions handed down by the courts in all instances. Moreover, the internal hierarchy of the American Convention on Human Rights gives a special place to the rights of the child that cannot be suspended even in case of war, public danger, or other emergencies that threaten the State (Articles 27 and 29); the preamble of the UN Convention on the Rights of the Child confers special and irrevocable protection to the rights of the child, and the need for special protection and primary attention to the Best Interests of the Child provided in the Article 3, provide an objective parameter that can be used to solve the conflicts in which children are involved, considering the solution that proves to be most beneficial to them. This indicates that there is a marked presumption on behalf of the child, "that because of his physical and mental immaturity, needs special protection and care, including the

appropriate legal protection." This demands that the family, society and the State adopt custody measures to guarantee this purpose (cfr. Superior Council of the Judiciary (CSJN) *re:* "S.622.XXXIII. S., V. w/ M., D.A. on/ precautionary measures," resolved on 04/03/01). The Preamble also recognizes the family as "the fundamental group of society and the natural environment for the growth and well-being of all of its members and particularly children"; and on the other hand, Consultative Opinion 17/2002 of the Interamerican Court, stated that "(r)ecognition of the family as the natural and fundamental group unit of society, entitled to protection by society and the State, constitute a fundamental principle of the International Human Rights Law, established in Article 16.3 of the Universal Declaration, VI of the American Declaration, Article 23.1 of the International Covenant on Civil and Political Rights and 17.1 of the American Convention" (cfr. My vote in the cause "Mercado, María Elena on the petition for cassation," Cause number 8506, record Number 11,214, resolved on October 30, 2007.)

Before now, I maintained that children, especially in situations that affect their health and normal development, plus the special attention they need from those directly required to care for them, also require consideration of the judges and society, as a whole, as the primary consideration of the interest of national authority in matters concerning them is both oriented to conditioning the decision of the judges called the prosecution in these cases," citing the opinion of the Office of the Attorney General of the Nation referred to by the Court in Number 108.XXXIX, Neira, Luis Manuel and another against Swiss Medical Group S.A.," resolved on 8/21/03 (cfr. my vote *in case* "R., MN on the petition for cassation and unconstitutionality, case number 5212, resolved on 9/13/04, record number 6905 of Courtroom II.)

Having said this, it is important to specify what is meant by the Best Interests of the Child, a concept that allows and demands a classification and redefinition of each specific case, based on the specifications and circumstances related to the situation.

The Inter-American Court of Human Rights through cited OC-17/2002, noted that the term the "best interests of the child" as

established in Article 3 of the Convention on the Rights of the Child implies its development and the full exercise of their rights must be considered as guiding principles for the drafting of standards and their implementation in all areas related to the life of the child.

There is no disagreement regarding the fact that the Convention raised the Best Interests of the Child to a fundamental rule. This regulatory principle of the rules of children's rights is based on the very dignity of the human being, in the children's own characteristics, and the need to nurture their development, making full use of their potential and the nature and scope of the Convention on the Rights of the Child. The State and society must adhere to this criterion in their actions related to the protection of children and the promotion and preservation of their rights (IACHR, OC cit.)

Also, Article 6.2 of the Convention on the Rights of the Child further reinforces this concept by stating that State Parties must guarantee the survival and development of children, and this commitment must include the prevention and elimination of all those scourges that could prevent their proper and dignified development.

The international instruments mentioned represent the expression of the will of the international community in that they establish that the family is the central unit responsible for the primary socialization of the child, so our state is bound to take measures to promote their unity and harmony (Resolution 45/112 of the General Assembly of the United Nations.)

In summary, and in light of the provisions set forth in the National Constitution, the American Convention on Human Rights and other international documents pertaining to the case, establish the following principles, among others, according to the expression the "Best Interests of the Child" (Article 3 on the Convention on the Rights of the Child): 1) Principle of Socialization - Title IV, Article 10 section A), and Articles 11-19 on the RIAD Guidelines; 2) Principle of Humanity looking out for the welfare of the child, Articles 9 and 20 of the Convention, and Articles 1, 5, and 6 of The Beijing Rules, and Articles 32-39 of the RIAD Guidelines; 3) Principle of Jurisdictionality Articles 37 and 40 of the Convention, and 14 of The Beijing Rules; 4) the Principle of Identity and Intimacy Reserve, Articles 16 and 40 of the Convention, and 8 of The Beijing Rules; 5) Principle of Comprehensive Protection as the Responsibility of the State, Article 3 of the Convention, and 1 of The Beijing Rules, and Articles 1 and 10 of the RIAD Guidelines (cfr. my vote in the Mercado cause cited above.)

In short, the judges are bound to ensure the most consistent interpretation of the principle guaranteed by the National Constitution, because the Convention on the Rights of the Child binds the states-parties to protect the fundamental rights of the child —cfr. My votes *in case:* "R., M. N. on the petition for cassation and unconstitutionality," Cause Number 5212, record number 6905, resolved on 9/13/04, "C. F., M. R. on the inapplicability of the law," Agreement 2/06, Plenary number 12 of 06/29/2006."

IV- We must recall that the Appellant is the mother of three minors that are seven, ten and 12 years of age, a fact that cannot fail to take into account when deciding on the petition for house arrest based on the "best interests of the child." This binds us to pay special attention to the consequences that could affect the minors if the status quo is maintained. It is well known that incarceration affects the normal development of the family relationship, by touching on the rights of the minors. Protection of the elemental core for their development thus forces us to find a solution that protects their best interests while attempting, to the extent possible, to keep from frustrating the success of the investigation.

The right of the children to preserve their family relations calls for a harmonious interpretation of the provisions related to the incarceration. Law 26,061 regulating the Convention on the Rights of the Child, after enforcement of the criminal law, included among the rights of the children, the preservation of their family relations in accordance with that law, and to grow and develop in their family of origin, as also demonstrated in the international instruments mentioned above.

As such, the principle of the "best interests of the child" is raised as a true guiding principle of the entire system designed to protect the rights of the child.

The legal effect and operation of the fundamental rights of children, evaluated in the case with a sense that primarily includes their interests and convenience, especially weighing "the implications the decisions made

could produce on the developing personality" (Final rulings 293:273) should prevail over the reasons for caution regarding their mother.

It has been said that the effects of a mother's incarceration produce on families are generally more devastating than those usually generated when the father is in jail (cfr. Quaker United Nations Office, Women in Prison and Children of Imprisoned Mothers. The Women in Prison Project Group, August 2007, p. 11.)

House arrest only involves a method of compliance with the deprivation of liberty that is just as restrictive but less pressing than an institutional detention.

If a negative psychological, social and family situation for children is actually verified, —as I believe will happen in the sub examine—, it must be exceptionally addressed as an alternative to preventive detention that does not interfere with the maternal-filial bond and deepen the negative psychological impact caused by separating the mother from the children, as long as the beneficiary does not violate the conditions imposed, with the precariousness involved in the measure, subject to maintaining the situation that exists when the decision is made, such as strict compliance with the conditions imposed, which the appellant must be fully informed of in advance, making sure that she understands the scope of the measure and its consequences.

In short, the foregoing leads me to conclude, in this particular case, the convenience of granting house arrest to Teófila Delgadillo Pozo, based on the "best interests of the child" and to protect the family ties noted, subjecting that modality to her prohibition to leave the country, her obligation to stay at the home address established, reporting to the nearest Police Station once a week, and the oversight by the competent authority to ensure compliance with the conditions imposed, as we do not foresee any circumstances that would suggest that the appellant could evade justice or interfere with the ongoing investigation, which is, in fact, another element that further supports its feasibility, since the date to begin the oral trial in court has not yet been set, according to the certificate contained on Folio 112.

Judge Juan C. Rodríguez Basavilbaso said:

I. In the course of the hearing before this Court, the defense clearly summarized the grievances included in its petition for cassation, namely:

a) the arbitrariness of the sentence by separating the evidence from the record demonstrating the vulnerable situation the children face after their mother was arrested; for failing to respond to the leading grievances in the defense related to the Court's failure to invoke the international covenants established; and for considering the importance of an excess ritual asserting that the granting of house arrest is optional for the judge.

b) The unconstitutionality of the interpretation of Law 26,472 in stating that there can be no house arrest for mothers of children over five years of age. In this line of thoughts, he considered that the grounds used to set the limit must be analyzed in each specific case considering Articles 1 and 32 of Law 24,660, and Articles 314, 495 and 502 of the National Code of Criminal Procedure (CPPN); Articles 17 and 5.6 of the Inter-American [sic!] Convention on Human Rights, Article 10.1 of the International Covenant on Social and Cultural Rights; Article 16.3 of the Universal Declaration of Human Rights; Articles 23, 24 and 10.3 of the International Covenant on Civil and Political Rights; Articles 4, 7.1, 9, 14.2 of the Convention on the Rights of the Child, and Article 32 of Law 26,472.

II. While the trial judge is not bound to answer each proposal presented by the party, but only those that are conducive to solving the case, I understand that these assist the defense given that the courts of appeals have not handled relevant constitutional cases filed promptly.

Basically, I do not find that the decisions presented on Folios 39/40 back of the page, and Folios 80/81 treated the unconstitutionality of the restrictive interpretation of Article 32 of Law 24,660 —amended by Law 26,472— that establishes that house arrest can be arranged for the mother of a child under five years of age that she has under her care; and the party feels that this

omission mattered in that it privileged an unconstitutional rule over the constitutional rights invoked in their submissions presented and that were sent to the different courts.

I also believe that it failed to delve into the case, through the forced intervention of professional psychologists, to determine if the extenuating circumstances of the request, invoked with solid legal grounds for the defense, actually correspond to the entity to arrive at the conclusion that the psychophysical wellbeing of the three children is at risk from the absence of their mother from the family nucleus, following the deprivation of her liberty determined by the trial court and confirmed by the court of appeals. In fact, medical experts failed to investigate if the father of the children and the arrested party's domestic partner is seriously ill, as a result of his Chagas disease condition, as was alleged, to the point that it keeps him from carrying out the obligations inherent in his parental role.

They also failed to listen to the older half-sister of the children, who looks after them, to gather information about how she helps them, and their real possibilities in this regard.

The extremely brief social-environmental report provided on Folios 23/23 back of the page, substantiating the denials questioned, in no way covers the spectrum involved in investigating the situation alleged by the defense, since no one denies that the children live with their father in their own home and having the rest of their basic housing needs met, but the technical assistance claimed that they did not count the hours when the father goes to work and who looks after the basic needs of the children, and contains their emotions in light of their anxiety caused by being separated from their mother, which could result in psychological consequences could exceed the natural characteristics of the tragedy they are facing for the very first time in their lives, and that could undermine their self-confidence, integration in their academic activities, and in particular, the unfair duties and responsibilities imposed on the older brother who is only 12 years old.

These should be the issues used as grounds to determine to grant or deny the petition, among other relevant information. It is important to determine when the children go to school, how they do this and who looks after them until their father gets home. Since the maximum limit of five years of age established by law for the children was properly used for the purposes of deciding on the mother's house arrest, I believe that this limit is not insurmountable in the international covenants invoked by the defense, since this case cannot ignore the test of reasonableness that serves as the prism of the constitutional principles of equality, the Best Interests of the

Child, the interpretation of the *pro homine* and *pro libertate* rules, the minimum criminal participation, rehabilitation based on the purpose of punishment, a ban on giving the information to others, and proportionality of the coercive measure.

Furthermore, I did not find that the children were given the opportunity to express their views freely on the subject that clearly affects them, despite the provisions set forth in Article 12.1 of the Convention on the Rights of the Child that establishes that they have the right to do the same, so that their views are taken into account depending on their age and maturity reached in accordance with the principle of progressive capacity.

We are obviously not questioning the State's right to impose precautionary freedom-restricting measures when needed to guarantee the process, or society's right to defend itself against the crime (particularly serious in this case, as the scourge of drugs too often attacks the age pairs demanding protection, in this case, and destroys their future), but it does not seem sufficient to wield those powers in the abstract if specific proof were found in the case file confirming failure to guarantee the conditions of stability and well-being of the children of the accused.

The fact is that Article 4 of the Convention on the Rights of the Child of the Argentine State pledged to adopt the administrative, legislative or other measures that may be necessary to give a legal effect to the rights recognized in the Convention without distinction, and even above and beyond the status of their parents (Article 2.1), whose actions cannot be grounds for discrimination against them. When speaking of these rights, I must stress that growing up within a family nucleus, in an atmosphere of happiness, love and understanding (Preamble of the National Constitution), includes the right to special protection and care—even over rights of adults and the State itself.

As noted above, the National Constitution explicitly provides for the possibility that mediates arrest or detention of one or both parents (Article 9.4), but this, again, must be harmonized with the rest of the rules that make up the instrument and the one that interprets it, in particular the rule that requires

that these and other cases should primarily consider the Best Interests of the Child (Article 3), and the National Constitution says that you are a child until age 18. It is true that especially regarding young children or those classified as "early childhood" (defined by the Committee on the Rights of the Child as the period from birth to age eight - General Observation Committee number 7 of the year 2005), the party States must create conditions that nurture their welfare during that crucial phase of life, as they are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents or legal guardians, and are also less able to comprehend the circumstances of any separation, further compounded by the fact that children whose parents are incarcerated are considered among those with special protection needs (sections 9, 18 and 36 b) of said General Observation.)

However, the application of a rule that merely establishes an age cut without considering consistency of the exercise with the factual grounds presented, is arbitrary, as I said earlier, because the court is bound to first verify the facts substantiating the claim submitted by the defense, to prevent the enforcement of a law that would leave the children unprotected, and thus our country's international responsibility for the breach of the international commitments the nation has agreed to meet.

While the legislature adopted an age in which the absence of potential special circumstances allows the mother to be with their children even while serving a prison sentence or an injunction to the same effect, this does not preclude the possibility of the child's development at a later stage, and by analogy *in bonam part* of Article 32 of Law 24,660, not requiring the presence of their parents to ensure their survival, health and other rights. The development of legal standards does not exhaust —in the slightest sense of the word— the obligation of the States signatory to the National Constitution that pledged to fully respect the rights of children, as in the case punished by Law 26,472. Furthermore, in cases such as this, the rule may imply leaving the minors out of the protective umbrella that may require actions by the State in pursuit of their rights, either through the judicial recognition of their need to stay with their mother, or through other menas of positive state benefits that mean safeguarding their interests. It is important to seriously assess these alternatives to make sure they have sufficient legal grounds to achieve the objectives proposed as a nation committed to giving children the preferential treatment they need and deserve.

It is, therefore, necessary to recur to the petition of cassation for the defense on the basis of the theory of arbitrary judgment and annul

the decision recorded under Folios 80/81, issuing a new ruling under the new standards and guidelines set forth herein and the proof of evidence provided in this respect.

I. I must add, *obiter dictum* to the above, that the comprehensive control of the file that imposes the theory of maximum performance (C.S.J.N., Final ruling house arrest), I cannot help but notice that none of the resolutions related to Mrs. Delgadillo Pozo's detention, not even those addressing the resolution related to release described on Folios 35/38, have argued the existence part of any procedural risk does not exceed the argument related to the amount of the penalty applicable to the crime committed.

It is on this basis that I believe that the court should consider, in addition to analyzing if there are conditions that justify that she must personally care for her children and, if so, whether the conditional release mode of confinement proposed by the defense is justified, or if freedom during the release process, in her case, is the best way to safeguard the rights invoked in relation to the minors, always bearing in mind that the accused is currently protected by the presumption of innocence and that any attempted elusion, evasion, breach of the guidelines to be established or the commission of a new offense, shall be no more than a concrete element that must be taken into account to confirm whether the best interests of the children hereby invoked are safeguarded with the presence of the appellant, and that her behavior contrary to the commitments, show no intention of complying with her obligations regarding the burden she bears for her children's upbringing and development (Article 18 of the National Constitution.)

It is in that sense that I issue my vote.

Judge Juan E. Fégoli said:

I believe that the fundamental grounds and conclusions reached by my colleague who spoke before me, resolve the matter correctly and with a clear understanding.

Therefore, I issue my vote in the same sense.

Hence, and in recognition of the above agreement on the merits of the case, the majority of the court **RESOLVES:** TO ADMIT the petition for cassation filed by the defense on the basis of the theory of arbitrary judgment, and to annul the decision recorded under Folios 80/81, issuing a new ruling under the new standards and guidelines set forth herein, and based on the proof of evidence provided in this respect, and without costs (Articles 471, 530 and 531 of the CPPN.)

Put it on the record, and let it be known to the appointed parties, and promptly send it back to the court of origin, by kindly serving the note admitted.