IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

13-1324

UNITED STATES OF AMERICA

Appellee,

v.

JOSE MILLAN-VASQUEZ

Appellant.

INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
HONORABLE DONALD E. O'BRIEN, U.S. DISTRICT COURT JUDGE

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

Background

Defendant, Jose Millan-Vasquez ("Mr. Millan"), is currently under indictment in the Northern District of Iowa based upon allegations that he committed the offense of aggravated unlawful reentry after deportation. Prior to his first appearance on that charge, Immigrations and Customs Enforcement ("ICE") detained Mr. Millan for potential removal proceedings. Thereafter, ICE reinstated Mr. Millan's prior removal order. As a result of the reinstated order, when Mr. Millan was transferred into criminal custody for his initial appearance, he did so subject to an ICE Detainer. Based upon that detainer and his reinstated removal order, a Magistrate Judge ordered Mr. Millan detained.

On December 13, 2012, Mr. Millan sought release from custody pending resolution of the instant criminal charges. Mr. Millan contended that detention based solely upon an ICE Detainer and prior removal order was improper under the relevant law. (*See generally* Transcript of Detention Hearing held December 13, 2012). In support of that argument, Mr. Millan initially relied upon two past cases on a similar question decided by the Magistrate Judge's predecessor in the Sioux City branch of the Northern District of Iowa. (*See, e.g., id.* at 16-17.) On December 19, 2012, the Magistrate Judge rejected Mr. Millan's contention that he

should be released pursuant to the reasoning in the foregoing cases. (Order of Detention dated 12/19/12).

First, the Magistrate Judge indicated that he believed the cases were distinguishable because of language that indicated the removal of the defendants was merely speculation and not a certainty. (*Id.* at 4-6.) Here, in contrast, the Magistrate Judge found that removal was definite and would certainly occur before trial. (*Id.*)

Second, the Magistrate Judge rejected Mr. Millan's contention that the Bail Reform Act is concerned with preventing volitional flight from the jurisdiction and not with protecting one executive agency from the actions of another executive agency. (*Id.* at 8.) Specifically, the Magistrate Judge determined that his primary concern was the presence of Mr. Millan throughout the criminal process and not who would otherwise cause his absence. (*Id.*)

Mr. Millan appealed the Magistrate Judge's order to the presiding District Judge on December 21, 2012. On January 31, 2013, the District Judge issued an order rejecting Mr. Millan's appeal and adopting the Magistrate Judge's reasoning as his own. (Order on Magistrate Appeal dated 1/31/13.) On February 11, 2013 Mr. Millan timely noticed an interlocutory appeal to this Court.

ORAL ARGUMENT REQUEST

Pursuant to this Court's letter of February 13, 2013, this matter is subject to an expedited briefing schedule. Notwithstanding that limitation, because this issue appears to be one of first impression before this Circuit, Mr. Millan requests 15 minutes of oral argument.

STANDARD OF REVIEW

As this is a review of a detention order, this Court "appl[ies] the clearly erroneous standard to factual findings of the district court but independently review[s] the ultimate conclusion that detention is required . . . ." *United States v. Cantu*, 935 F.2d 950, 951 (8th Cir. 1991).

ARGUMENT

I. THE DISTRICT COURT ERRED *AB INITIO* BY REQUIRING A DETENTION HEARING NOTWITHSTANDING THE ABSENCE OF ANY LIKELIHOOD THAT MR. MILLAN WOULD FLEE

Section 3142(f) of Title 18 of the United States Code provides that the court must hold a hearing to detain an individual pending resolution of their criminal case. The court must hold a hearing in any case "that involves . . . a serious risk

that [the accused] will flee . . . ." 18 U.S.C. § 3142(f)(2)(A).[1] If, after a hearing pursuant to section 3142(f), the court "finds that no condition or combination of conditions will assure the appearance of the person as required . . . [, the court must] order the detention of the person before trial." *Id.* § 3142(e)(1). If none of the enumerated bases of section 3142(f) are present, the Court may not hold a detention hearing and may not order an individual detained pending trial. *See United States v. Gardner*, CR13-3004, 2013 U.S. Dist. LEXIS 17092, at *9 (N.D. Iowa Feb. 7, 2013) ("[P]retrial detention is not authorized unless the Court finds that at least one of the seven enumerated circumstances [from section 3142(f)] is applicable."); *see also United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992) ("Detention can be ordered . . . only in a case that involves one of the six circumstances listed in [section 3142](f) . . . ."); *United States v. Ploof*, 851 F.2d 7, 10 (1st Cir. 1989) ("[Section] 3142(f) does not authorize a detention hearing whenever the government thinks detention would be desirable, but rather limits such hearings to the [enumerated] instances."). As such, a court cannot consider whether conditions will reasonably assure a defendant's appearance where the Government "does not first establish that there is a serious risk defendant will *flee* . . . ." *United States v. Marinez-Patino*, No. 11 CR 064, 2011 WL 902466, at

[1]The Government has not argued that any other provision of 18 U.S.C. § 3142(f) applies.

*1 (N.D. Ill. Mar. 14, 2011) (unpublished).

Although the primary dispute addressed in the opinions below concerns whether detention was proper under section 3142(e), the impropriety of considering detention at all warrants reversal. The sole basis the magistrate and district judges appear to have relied upon in holding a detention hearing was that of the risk of Mr. Millan failing to appear for trial because of the possibility that the Government would deport Mr. Millan before the same Government was finished prosecuting him. (*See generally* Order on Detention and Order on Magistrate Appeal.) It cannot be disputed that defendant's absence must be volitional for a defendant to be deemed likely to "flee". *See* 18 U.S.C. § 3142(f)(2)(A) (requiring a "serious risk that such person will flee").

Although, the Magistrate Judge's opinion addressed the question of whether the meaning of section 3142(e) was restricted by the words of 3142(f), he did not address the corresponding concern of whether a detention hearing was proper in the first place. Thus, the Magistrate Judge's conclusion that "[r]egardless of the reason that a defendant may fail to appear . . . [the court] is primarily concerned with whether there are any conditions . . . that can reasonably assure the defendants' appearance as required[,]" (Order on Detention at 8), was premature in that it answered a question that the Court was not yet empowered to ask pursuant

to section 3142(f).

Mr. Millan was not alleged to be a flight risk and rather was approached as being likely to be removed by the Government in advance of trial. As a result, a detention hearing and the resulting detention were inappropriate. To accept the Government's invitation "to conflate risk of flight and assuring appearance would have the effect of reading out of the [Bail Reform Act] the threshold showing that there is a serious risk that the defendant will flee." *Marinez-Patino*, 2011 WL 902466, at *1.

II. THE DISTRICT COURT ERRED BY FINDING THAT THE THREAT THAT THE GOVERNMENT WOULD PREVENT THE GOVERNMENT'S OWN PROSECUTION BY EFFECTUATING A REMOVAL WAS A BASIS FOR DETENTION UNDER SECTION 3142(e).

Even if this Court accepts the propriety of considering detention in this matter, the magistrate and district judges erred in finding that a threat of removal by the Government prior to resolution of criminal charges is a permissible basis for denying pretrial release. So holding was an improper interpretation of the statutory language and would create a *de facto* violation of the Constitutional separation of powers.

A. Finding that volitional non-appearance is not the sole concern under section 3142(e)(1) was error

As is noted *supra*, pursuant to 18 U.S.C. § 3142(f)(2)(A), the Court must hold a detention hearing where, either on the government's motion or *sua sponte*, the court determines that the case "involves . . . a serious risk that [the defendant] will flee . . . ." *See generally* 18 U.S.C. § 3142(f). If, after a section 3142(f) hearing, the court finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required[,]" the court must order the defendant detained. *Id.* § 3142(e)(1). As a general matter, "Congress intended . . . that very few defendants will be subject to pretrial detention." *United States v. Orta*, 760 F.2d 887, 890-91 (8th Cir. 1985).

This Court has consistently interpreted the factor of "appearance of the person as required" to address the risk that a defendant will *choose* to flee rather than appear to face trial. *See, e.g.*, *United States v. Sazenski*, 806 F. 2d 846, 848 (8th Cir. 1986) ("either danger to the community or *risk of flight* is sufficient to authorize detention" (emphasis added)); *see also United States v. Kisling*, 334 F.3d 734, 735 (8th Cir. 2003) (finding flight risk based on "attenuated community ties and a history of fleeing his legal troubles); *United States v. Maull*, 773 F.2d 1479, 1488 (8th Cir. 1985) (finding flight risk based on length of possible sentence and previous attempt to flee). This Court has *not* considered, in determining the risk of

a defendant's nonappearance, anything other than whether a defendant, by his own conduct, will abscond rather than appear for trial.

This is also clear from the plain language of the statute. When determining the meaning of words within a statute, "statutory language cannot be construed in a vacuum." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Rather, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*

Section 3142(e) expressly notes that its provisions guide the decision to be reached under a section 3142(f) hearing. Thus, the proper contextual reading of section 3142(e) requires accounting for the volitional flight-related language of section 3142(f).

Moreover, although section 3142(e), expressly refers to section 3142(f), the latter provision is by no means the only statutory implication of a volitional requirement. For example, section 3146 describes penalties that an individual will face should they "fail to appear" as required. 18 U.S.C. § 3146.[2] Therein, the

[2]Other examples of use of volitional flight language abound. For example, 18 U.S.C. § 3143(a) permits release after an individual is found guilty, but before an individual is sentenced, only after a finding that "the person is not likely to flee . . . ." 18 U.S.C. § 3143(a)(1). Similarly, 18 U.S.C. § 3148(b)(2)(A) allows revocation of release if "there is no condition . . . that will assure that the person will not flee"). *See also id.* ("If the judicial officer finds that there are conditions of release that will assure the that the person will not flee . . . .").

Code provides that "uncontrollable circumstances" preventing an individual's presence at trial is an affirmative defense to a failure to appear charge. *Id.* As Magistrate Judge Piester of the District of Nebraska notes in regards to that provision:

> There is no reason to believe that "failure to appear" as used in section 3142 means something different from "failure to appear" as used in section 3146. Thus, [Judge Piester] conclude[d] that "failure to appear" as used in the Bail Reform Act is limited to the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions and will. If the government – through ICE or any other authority – prevents his appearance, he has not "failed" to appear.

United States v. Montoya-Vasquez, 4:08CR3174, 2009 U.S. Dist. LEXIS 2148, at *13-14 (D. Neb. Jan. 13, 2009).

The legislative history of the statute also demonstrates that Congress was concerned about volitional absence in enacting the Bail Reform Act. For example, the Senate Judiciary Committee's Report recommending the passage of the Bail Reform Act explained the basis for making available certain vocational and educational conditions was that "[t]he Committee believe[d] that each of these conditions [wa]s applicable to individual defendants on the issues of *flight* or assuring community safety. S. Rep. 98-224, *reprinted in*, 1984 U.S.C.C.A.N. 3182, 3197 (emphasis added). Likewise, the Committee generally used language of volitional flight interchangeably with the concept of failure to appear.

See, e.g., *id.* at 3196-97 (noting that then-current under-utilization of conditions of release possibly was because the conditions were "more relevant to the question of danger to the community than they are to the risk of flight").

In addition, if Congress intended to effectively preclude any individual with pending immigration issues from garnering pretrial release, a Constitutionally-suspect move, *see infra,* presumably "it would have said so clearly – not obliquely through an ambiguous" phrase. *Cf Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (rejecting dramatic alteration of patent law because Congress did not clearly state such a change was made); *see also United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009) ("Congress has not, of course, told a court to consider the existence of an ICE detainer . . . the ICE detainer is an externality not under defendant's control. As such, it must be excluded from the detention analytic.").

In ruling that Mr. Millan must be detained, the lower court judges relied upon a reading of the phrase "assure the appearance" of a defendant without acknowledging this Court's longstanding case law or the broader, comprehensive statutory scheme established by the Bail Reform Act. Thus, the district court erred by reading section 3142(e) in a vacuum, without accounting for the remainder of the statutory language.

Thus, this Court should find that the conditions at issue in section 3142(e) are only intended to prevent voluntary absence. On that basis, this Court should reverse the district court and grant pretrial release of Mr. Millan.

B. Defendant Must Be Treated Like Any Other Defendant For Bail Purposes Because the Government Has Chosen to Pursue His Criminal Prosecution Instead of His Removal

Furthermore, the district court failed to recognize that a provision of the Bail Reform Act, 18 U.S.C. § 3142(d), specifically accounts for the circumstance in which a federal criminal defendant is also subject to a civil removal order.

Therein, the statute permits the temporary detention of an individual if the court determines that an individual "is not a citizen of the United States or lawfully admitted for permanent residence . . . ." 18 U.S.C. § 3142(d)(1)(B). In such circumstances, the court is required to detain the defendant for up to ten days to allow time for the government to notify immigration authorities. *Id.* at (d)(2). If, within that time, immigration "fails or declines to take such person into custody . . . , such person shall be treated in accordance with the other provisions" of the Bail Reform Act. *Id.*

Congress thus specifically provided for the situation of a federal criminal defendant who is subject to a competing request for custody. In such circumstances, section 3142(d) requires the agencies seeking custody to determine

the order in which defendant should answer to the two charges. The Government can choose to go directly into its attempts to immediately remove that individual. Or, in the alternative, the Government can pursue the relevant Federal criminal charges.[3] Where the Government chooses the latter, however, it must accept that the accused is entitled to all of the same statutory and constitutional rights that any citizen defendant is entitled to. *See, e.g.*, *United States v. Xulam*, 84 F.3d 441, 444 (D.C. Cir. 1996); *United States v. Trujillo-Alvarez*, 3:12-CR-00469-SI, 2012 WL 5295854, at *1 (D. Or. Oct. 29, 2012) ("When the Executive Branch decides that it will defer removal . . . in favor of . . . criminal prosecution, then all applicable laws governing such prosecutions must be followed . . . ."). Included among those rights is the right to be released pending resolution of one's criminal case unless the Bail Reform Act provides otherwise.

By contrast, no provision of the United States Code requires that the United States must pursue both outcomes simultaneously. Any conflict that exists between the two stems not from the United States code, but rather, from the improper choice of the Government to pursue the two procedures simultaneously.

[3]In this option the Government can, of course, still pursue removal, it simply must wait until the criminal process has run its course. *See United States v. Trujillo-Alvarez*, 3:12-CR-00469-SI, 2012 WL 5295854, at *1 (D. Or. Oct. 29, 2012) (noting that Executive may "defer" removal to allow for prosecution).

C. Contrary to the lower court's finding, removal is not inevitable

The Magistrate Judge found that, because Mr. Millan is subject to a reinstated removal order, Mr. Millan would inevitably be removed within, at most, ninety days and, likely a briefer time of three to four weeks. (Order on Detention at 8-9 (citing 8 U.S.C. § 1231(a)(1)(A)).) This finding of inevitability of removal, however, was in error.

As the Supreme Court recently noted, "[a] principal feature of [Congress's] removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). Immigration officials have broad discretion with regards to actual removal of individuals. *Id.* In particular, ICE possesses extensive discretion to stay or not enforce its own removal orders. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("the Executive has discretion to abandon" the prosecution of immigration cases at any stage of litigation, including the execution of removal orders).

In finding that Mr. Millan would be removed within three to four weeks, the lower court relied upon the incorrect finding that the Executive had no choice but to follow through on the 90 day timetable for removal set forth in 8 U.S.C. § 1231(a)(1)(A) (providing that the Attorney General "shall remove" a noncitizen within 90 days after entry of the removal order). However, the statute and

implementing regulations make clear that the phrase "shall remove" is not mandatory, but merely "direct[s] the discharge of a specified duty." *United States v. Marinez-Patino*, 2011 WL 902466, at *8 (N.D. Ill. Mar. 14, 2011) (citing *Barthlomew v. United States*, 740 F.2d 526, 531 (7th Cir. 1984)). Indeed, regulations interpreting section 1231 specifically authorize ICE to stay a removal order as "appropriate," *see* 8 C.F.R. § 241.6(a), and ICE itself declined to effectuate Mr. Millan's removal immediately upon reinstating his order. *See also* Doris Meissner, Commissioner, INS, *Exercising Prosecutorial Discretion*, Nov. 7, 2000, at 3 *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view (explaining that "a statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion").

In sum, this Court should not be persuaded that removal is inevitable and should reverse the lower court.

III. A *DE FACTO* RULE BARRING PRETRIAL RELEASE IN AN ARTICLE III COURT PROCEEDING BASED ON AN ARTICLE II EXECUTIVE DETERMINATION IS A VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS

In ruling that Mr. Millan's potential removal made him ineligible for pretrial release, the Court established a *de facto* bar to pretrial release to any individual with an ICE Detainer and reinstated removal order.[4] In so doing, the district court essentially relinquished the Judiciary's role of determining pretrial release into the hands of the Executive, thus establishing a rule that is proscribed by the constitutional separation of powers. This was error.

A. Allowing the Executive to Dictate the Outcome of a Judicial Bail Reform Act Hearing is a Violation of the Separation of Powers

The doctrine of separation of powers ensures not only the "[d]eterrence of arbitrary or tyrannical rule", but also "create[s] a National Government that is both effective and accountable." *Loving v. United States*, 517 U.S. 748, 757 (1996). "Although the doctrine of separation of powers does not mean that th[e] three

[4]The District Judge rejected the proposition that ruling in the Government's favor created this *de facto* bar. (Order on Magistrate Appeal at 6.) Notwithstanding that assertion, where the court permits the risk that the Government will procure a defendant's absence to serve as a basis for criminal detention, it is hard to imagine any scenario in which an individual with an ICE Detainer will ever qualify for release even under the promised individualized review. The opinions below serve as proof positive of that fact. Both opinions are essentially devoid of any discussion of a factor other than the ICE Detainer and reinstated removal order would make Mr. Millan fail to appear. As such, the fair implication is that, but for the removal and detainer issues, Mr. Millan would be released pending resolution of his criminal proceedings.

departments ought not to have partial agency in, or no controul [sic] over the acts of each other, it remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another." *Id.* (internal citations, quotations, and brackets omitted).

Judge Rosenbaum of the District of Minnesota has succinctly explained the manner in which the decision below stands to muddle the separation of powers:

> The problem here is not that defendant will absent himself from the jurisdiction, but that two Article II Agencies will not coordinate their respective efforts. The Executive, in the person of the Attorney General, wishes to prosecute defendant. The same executive, in the person of the Assistant Secretary of Homeland Security for ICE, . . . want[s] to deport him. It is not appropriate for an Article III judge to resolve Executive Branch turf battles. The Constitution empowers this Court to apply the will of Congress upon a criminal defendant on a personal and individualized basis. This Court ought not to run interference for the prosecuting arm of the government.

United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111-12 (D. Neb. 2009).

Judge Rosenbaum's analysis is entirely applicable to the instant case. Neither an order of this Court nor a directive of the Code requires that the Government simultaneously handle its immigration and criminal matters. That attempting to traverse both an administrative and judicial proceeding at once presents difficulties for the Government is not a concern for this Court. It is incumbent upon the Executive Branch to determine its priorities and to pursue those priorities in accordance with the law as it is, not the law as it would be if the

Court lent the Government a helping hand. In finding that an ICE Detainer serves as a *de facto* bar to relief under the Bail Reform Act, the lower court adopted the role of problem solver for the Executive branch. Such a role is beyond the purview of an Article III tribunal.

Because the *de facto* rule below runs afoul of the separation of powers, this Court should reverse the lower court and order Mr. Millan released pending disposition of his criminal case.

B. In the Alternative, this Court Should Avoid the Constitutional Concerns that arise from the Lower Court's Holding

The Federal courts are disinclined to address constitutional concerns unless absolutely necessary. *Cf United States v. Smith*, 331 U.S. 469, 475 (1947) ("That a serious constitutional issue would be presented by such a procedure is enough to suggest that we avoid a construction that will raise such an issue."). As such, the Supreme Court has "instructed 'the federal courts to avoid constitutional difficulties by adopting a limiting interpretation if such construction is fairly possible.'" *Skilling v. United States*, 130 S. Ct. 2896, 2929-30 (2010) (quoting *Boos v. Barry*, 485 U.S. 312, 331 (1988)) (internal ellipsis and brackets omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (noting that avoiding potentially unconstitutional statutory construction is "a cardinal principle" of statutory interpretation).

At the very least, the district court's ruling raises the specter of a violation of the doctrine of separation of powers. Conversely, requiring that the United States either opt for immediate, administrative removal proceedings, or instead pursue criminal prosecution and entitle a defendant to the full panoply of criminal rights, in no way raises those concerns. Where this Court has an option between a potentially unconstitutional statutory interpretation and a clearly constitutionally authorized interpretation, the latter should be this Court's holding. As such, this Court should find that the Executive's determination in an administrative matter cannot deprive this Judiciary of its decision making power vested in it by the Bail Reform Act.

CONCLUSION

For the foregoing reasons, Mr. Millan respectfully requests that this Court reverse the lower court's denial of pretrial release and order Mr. Millan released on appropriate conditions.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 6, 2013, I electronically filed the foregoing interlocutory brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. The brief and addendum were scanned for viruses using Symantec Endpoint Protection 11.0.6005. I also certify that on the aforementioned date, I served a paper copy of this brief on defendant-appellant by mailing him a copy at Dakota County Jail, P.O. Box 305, 1601 Broadway, Dakota City, NE 68731.

I further certify that, within five days of receipt of the notice that the brief has been filed, I will transmit 10 paper copies of the brief to the Clerk of Court and one (1) paper copy to the appellee as noted below.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN AND CENTRAL DIVISIONS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ISAEL RAMIREZ-HERNANDEZ,

Defendant.

No. CR12-4111-DEO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE MILLAN-VASQUEZ,

Defendant.

No. CR12-4102-DEO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HIPOLITO ROQUE-CASTRO,

Defendant.

No. CR12-3053-MWB

ORDER ON DETENTION

These cases are before me on motions by the plaintiff (the Government) for pretrial detention of defendants Isael Ramirez-Hernandez (case number CR12-4111-DEO), Jose Millan-Vasquez (case number CR12-4102-DEO), and Hipolito Roque-Castro (case number CR12-3053-MWB). Because the issues presented are similar, and with the consent of the parties, I held a consolidated hearing on December 13, 2012. Assistant United States Attorney Kevin Fletcher appeared for the Government. All

three defendants appeared in person and with their attorney, Assistant Federal Public Defender Max Wolson. The Government offered the testimony of Robert Green, a deportation officer with Immigration and Customs Enforcement (ICE). The defendants did not offer the testimony of any witnesses.

Each defendant is a citizen of Mexico who is charged with illegal reentry and is subject to an ICE detainer.[1] Defendant Ramirez-Hernandez is charged under 8 U.S.C. § 1326(a) for being found knowingly and unlawfully in the United States after having been previously removed from the United States to Mexico on February 26, 2010. Defendant Millan-Vasquez is charged under 8 U.S.C. § 1326(a) and (b)(2) for being an aggravated felon found knowingly and unlawfully in the United States after having been previously removed from the United States to Mexico on October 19, 2009. Defendant Roque-Castro is also charged under 8 U.S.C. § 1326(a) and (b)(2) after having been previously removed on March 19, 2007, subsequent to a felony conviction of illegal reentry as a felon.

In deciding whether to grant the Government's motion for detention, I must determine whether any condition or combination of conditions will reasonably assure the defendants' appearance as required, as well as the safety of any other person and the community. 18 U.S.C. § 3142(e). A defendant may be detained on the basis of a showing of either dangerousness or risk of nonappearance; it is not necessary to show both. *United States v. Apker*, 964 F.2d 742, 743 (8th Cir. 1992) (per curiam); *United States v. Sazenski*, 806 F.2d 846,848 (8th Cir. 1986) (per curiam). Here, the Government does not argue dangerousness but does argue that there is a substantial risk of nonappearance if the defendants are released. The charge of illegal reentry carries no presumption of detention. 18 U.S.C. § 3142(e). The Government bears the burden

[1] An ICE detainer "serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody . . . ." *See* 8 C.F.R. § 287.7.

of proving by a preponderance of the evidence that there is no condition or combination of conditions that would "reasonably assure" the defendant's appearance at trial. *United States v. Orta*, 760 F.2d 887, 890-91, n.20 (8th Cir. 1985).

The Government argues that the defendants must be detained pending trial because of the ICE detainers that will lead to automatic removal from the United States if they are released on bond. It argues that such removal means there is no condition or combination of conditions that will reasonably assure their appearance at trial, as required. Defendants argue that the Government cannot demonstrate a serious risk that they will flee because even if I release them in these cases, they will remain subject to mandatory detention through ICE. They point out that ICE detainers do not create a *per se* rule of mandatory detention under the Bail Reform Act (Act). They argue that I should analyze the factors listed in 18 U.S.C. § 3142(g), as I would in any other type of case, and that "failure to appear" is limited to the risk that a defendant may choose to flee by his own volition and actions. Thus, they contend the risk that they will be forcibly removed to Mexico by ICE before their trials is not a risk of "flight" within the meaning of the Act. Defendants cite *United States v. Jocol-Alfaro*, 840 F. Supp. 2d 1116 (N.D. Iowa 2011) in support of this argument.

In *Jocol-Alfaro*, the Honorable Paul A. Zoss referenced one of his previous decisions, *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 857 (N.D. Iowa 2010). In that case, the defendant was charged with making false claims of United States citizenship and using a false Social Security number. *Villanueva-Martinez*, 707 F. Supp. 2d at 856. There was no charge of illegal reentry. Judge Zoss reasoned that it was improper for the court to speculate on the "risk" of an order of removal by immigration, which the court had no control over. *Id.* at 857 (citing *United States v. Montoya-Vasquez*, No. 4:08CR3174, 2009 WL 103596, at *4 (D. Neb. Jan. 13, 2009)). He stated, "If the court could consider as determinative the speculative probabilities that a defendant would be removed from this country by ICE once he is placed in ICE custody, it would effectively mean that no aliens against whom ICE

places detainers could ever be released on conditions." *Id.* Ultimately, Judge Zoss found the Government failed to prove by a preponderance of the evidence that no conditions of release would reasonably assure the defendant's appearance as required and released the defendant on bond. *Id.* at 858.

In *Jocol-Alfaro*, defendant Jocol-Alfaro was charged with illegal reentry as well as making false claims of United States citizenship, using false Social Security numbers, and fraudulently using state-issued identification cards to obtain employment in the United States. *Jocal-Alfaro*, 840 F. Supp. 2d at 1117. It is not clear from his order whether the Government presented evidence of reinstatement of a previous removal order. Judge Zoss conducted a similar analysis to *Villanueva-Martinez* and after assessing the factors of the Act, released the defendant on bond. I find that the cases before me are distinguishable from *Jocal-Alfaro* and *Villanueva-Martinez* based on the charges at issue and Green's testimony regarding the certainty of removal if any of these defendants are released to ICE custody pursuant to the detainers.

Green testified that Ramirez-Hernandez was previously ordered to be removed from the United States on October 26, 2009. On January 29, 2010, his order of removal was reinstated after he was found in the United States again, and he was subsequently removed on February 26, 2010. As for his criminal history, Ramirez-Hernandez was convicted in the United States District Court for the Southern District of Texas for illegal entry under 8 U.S.C. § 1325(a)(1) on February 2, 2010. On November 16, 2012, he was convicted in the Iowa District Court for Woodbury County for operating while intoxicated. He has an active warrant out of Nobles County, Minnesota, for various charges. Green testified that if I release Ramirez-Hernandez on bond in this case, he would be turned over to Nobles County officials to address the charges there. Once those charges are resolved, he would be returned to ICE custody and removed to Mexico within three to four weeks.

Green testified that Millan-Vasquez was previously ordered to be removed from the United States on October 19, 2009. If I release him on bond in this case, he would

be detained by ICE and then removed from the United States to Mexico within three to four weeks.

Finally, Green testified that Roque-Castro was previously removed on April 27, 2001, January 29, 2002, and March 19, 2007. He has a previous conviction of illegal reentry from 2006. Green testified that if he were to be released, he would be detained by ICE, and would subsequently be removed to Mexico within three to four weeks.

I find that the Government has met its burden of proving by a preponderance of the evidence that there is no condition or combination of conditions that would "reasonably assure" the defendants' appearance at trial. All three defendants have previously been removed from the United States and are now charged with illegal reentry. Green testified that if they are released, they will go into ICE custody pursuant to the ICE detainer and will then be removed to Mexico pursuant to the reinstatement of previous removal orders. There is no conflicting evidence in the record. Moreover, this result is consistent with the statute regarding previously removed aliens.

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1231(a)(5). *See also* 8 C.F.R. § 241.8 ("An alien who illegally reenters the United States after having been removed . . . shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances."). Under these circumstances, removal is not uncertain and speculative, as it was in *Jocol-Alfaro* and *Villanueva-Martinez*. Instead, the Government has shown that removal is certain. And, of course, removal to

Mexico would make it extremely unlikely that any defendant would appear here for his trial.

Several courts have found the certainty of removal to weigh heavily in the analysis of whether there are conditions that could reasonably assure the appearance of the defendant as required. In *United States v. Lozano*, the defendant was charged with illegal reentry in violation 8 U.S.C. §§ 1326(a) and (b)(2) after a previous removal for an aggravated felony conviction. The magistrate judge noted that the defendant presented "the relatively unusual case of a defendant for whom detention and removal by the immigration authorities prior to the conclusion of prosecution appear[ed] to be a certainty" and ordered detention. *United States v. Lozano*, CR No. 1:09cr158-WKW, 2009 WL 3052279, at *6 (M.D. Ala. Sept. 21, 2009). The order of detention was affirmed on supplemental grounds by the district judge. *See United States v. Lozano*, No. 1:09-CR-158-WKW [WO], 2009 WL 3834081 (M.D. Ala. Nov. 16, 2009) (finding that the only congruous result between the language and policies of the Bail Reform Act and Immigration and Nationality Act is one that allows the United States Attorney to prosecute the defendant, and upon his release, to allow ICE to take him into custody for the purpose of removal).

The certainty of removal was also mentioned as a heavily-weighted factor in favor of detention in *United States v. Lucas*. In that case, the defendant was released on bond partly because the court refused to speculate on whether an immigration judge would order removal. The defendant had not been the subject of previous removal proceedings and there was no outstanding order of removal. The judge noted, "This situation differs markedly from one in which a defendant has already been the subject of a removal order. An outstanding order of removal would be strong evidence of likely nonappearance." *United States v. Lucas*, No. 4:08CR3139, 2008 WL 5392121, at *3 (D. Neb. Dec. 19, 2008). Similarly in *United States v. Castro-Inzunza*, the court stated that it was not the ICE detainer that informed the decision for detention, but the valid, enforceable removal order. *United States v. Castro-Inzunza*, No. 3:11-cr-00418-

MA, 2012 WL 1952652, at *7 (D. Or. May 30, 2012). The judge noted that if the removal had not been final, he may have reached a different conclusion. *Id.* Because each of the defendants here has a prior removal order that would be reinstated to remove defendants if placed in ICE custody, the Government has shown that it is a near certainty defendants will not appear at trial if released on bond.

Defendants encourage me to interpret nonappearance under the Act as only a defendant's intentional decision to flee. They argue I cannot order detention based on risk of flight because they would be held involuntarily pursuant to the ICE detainer. However, the express language of the statute mandates detention if "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person in the community." 18 U.S.C. § 3142(e). Nothing about this language suggests that I can consider only the risk of intentional flight when assessing the "appearance" factor.

Under subsection (f), which addresses the need to hold a detention hearing, the statute does state that the judicial officer shall hold a hearing in a case that involves "(A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." However, courts disagree on the effect of this section in the detention analysis. In *Lozano*, the court stated,

> Because the Government's detention motion raises the issue of flight, the court finds that the case *involves* this issue, and that a detention hearing was properly held. That the court had to *find* a serious risk of flight in order to detain Mr. Lozano under subsection (e) is not clear from the language of the statute, but what is abundantly clear is that the history and policy considerations underlying the bail analysis for centuries have revolved around the Government's substantial interest in securing appearance of the accused to answer for the charges.

Lozano, 2009 WL 3834081, at *5 (emphasis in original) (citing *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). *But see United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 966-67 (E.D. Wis. 2008) (pointing out that subsection (e) states detention may be ordered only after a hearing pursuant to the provisions of subsection (f) and that if subsection (f) limits the cases in which such hearings may be held, "it follows that the court may not order detention unless one of the circumstances in § 3142(f) exists.").

Regardless of the reason that a defendant may fail to appear, whether by his own volition or by way of a removal order, I am primarily concerned with whether there are any conditions or combination of conditions that can reasonably assure the defendants' appearance as required. Because it is undisputed that each defendant is subject to an administrative removal order, the, answer, I believe, is clearly "no." "[W]hen an alien is ordered removed, the Attorney General *shall* remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A) (emphasis added). "Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible . . . or deportable . . . ." *Id.* § 1231(a)(2). "Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal." *Id.* § 1231(a)(4)(A). Moreover, the District Court has no authority to review removal decisions involving aliens. *Lozano*, 2009 WL 3834081, at *4 n.4 (finding no statutory or other authority that would allow a court to direct the Attorney General to stay or interrupt defendant's removal proceedings) (quoting 8 U.S.C. § 1252(g), "[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.")).

Under these circumstances, if I release the defendants there are no conditions available to reasonably assure their appearance for trial. Defendants have suggested no such conditions. If I release them, they will return to ICE custody and it will simply be a race against the clock that will decide whether they are removed to Mexico or

prosecuted for these charges. While the statute provides 90 days for removal, Green's undisputed testimony establishes a much shorter timeframe: three to four weeks.

Trial is set in each of these cases for February 4, 2013. Based on the record before me, it is extremely unlikely that the defendants would still be in the United States on that date if I release them. Nor do I have the power to impose any condition or combination of conditions to reasonably assure their appearance if released. As such, I find that all three defendants must be detained prior to trial.

Based on the foregoing:

1. Defendants are committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.

2. The Attorney General shall afford defendants reasonable opportunity for private consultation with counsel while detained.

3. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver defendants to the United States Marshal for the purpose of an appearance in connection with a court proceeding.

4. If a "review" motion for revocation or amendment is filed, pursuant to 28 U.S.C. § 3145(a) or (b), the party requesting a change in the original order *must*:

(a) Attach a copy of the release/detention order to the appeal;

(b) Promptly secure a transcript.

5. There is *no automatic stay* of this Order. Therefore, defendants must request such relief from the court.

IT IS SO ORDERED.

DATED this 19th day of December, 2012.

LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff vs. JOSE MILLAN-VASQUEZ Defendant.	**No. 12-CR-4102-DEO** **ORDER ON MAGISTRATE APPEAL**

Currently before the Court is a Magistrate Appeal of a detention order in case 12-CR-4102. At the time of the hearing, two cases were argued together because they presented identical legal arguments. However, the second of those cases, U.S.A. v. Ramirez-Hernandez, 12-CR-4111 is no longer before this Court because the Defendant has decided to plead.

Previously, Magistrate Judge Leonard T. Strand entered a combined order on the two cases. In his order, the Magistrate ordered that the Defendant be detained prior to trial. The Defendant filed an appeal of the Magistrate's order pursuant to 18 U.S.C. § 3145(b). The Defendant and the Government appeared for a telephone hearing on January 25, 2013. After considering the parties' arguments, the Court took the matter under advisement and now enters the following.

I. FACTS

The Defendant is a citizen of Mexico who is charged with illegal reentry and is subject to an ICE detainer. Specifically, Mr. Millan-Vasquez is charged under 8 U.S.C. § 1326(a) and (b)(2) for being an aggravated felon found knowingly and unlawfully in the United States after having been previously removed from the United States to Mexico on October 19, 2009.

II. STANDARD

According to the Code, "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court... A judge of the court may reconsider any pretrial matter under this subparagraph...where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C.A. § 636(b)(1)(a).

Similarly, Federal Rule of Civil Procedure 72 states that when a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections

to the order. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law. Fed. R. Civ. P. 72(a).

III. ANALYSIS

The Court has reviewed Judge Strand's Order, along with the entire file, and finds Judge Strand's analysis is appropriate and correct. Accordingly, this Court adopts Judge's Strand's Order, Docket #11, and incorporates it completely into this ruling.

In deciding whether to grant the Government's motion for detention, the Court must determine whether any condition or combination of conditions will reasonably assure the defendant's appearance as required, as well as the safety of any other person and the community. 18 U.S.C. § 3142(e). A defendant may be detained on the basis of a showing of either dangerousness or risk of nonappearance; it is not necessary to show both. United States v. Apker, 964 F.2d 742, 743 (8th Cir. 1992) (per curiam); United States v. Sazenski, 806 F.2d 846, 848 (8th Cir. 1986) (per curiam). In this case, the Government argued that there is a substantial risk of

nonappearance if Mr. Millan-Vasquez is released. The charge of illegal reentry carries no presumption of detention. 18 U.S.C. § 3142(e).

As set out in Judge Strand's Order, this Court is persuaded that detention of Mr. Millan-Vasquez is appropriate under that standard. The Government has demonstrated not only a substantial risk of non-appearance, but a certainty of non-appearance if the Defendant is released to ICE.

The Defendant relied on United States v. Jocol-Alfaro, 840 F. Supp. 2d 1116 (N.D. Iowa 2011) and United States v. Villanueva-Martinez, 707 F. Supp. 2d 855, 857 (N.D. Iowa 2010)[1] to argue that detention is not appropriate in this case because the only risk of non-appearance is due to the Government's own actions. (Namely, deporting the Defendant.) In those two cases, former Magistrate Zoss released defendants who were also in the United States illegally. Magistrate Zoss found that he would have to 'speculate' on the risk of non-

[1]In turn, those two cases relied upon the reasoning from United States v. Montoya-Vasquez, No. 4:08-CR-3174, 2009 WL 103596, at *1 (D. Neb. 2009), which says that "[Vasquez] has lived in Lincoln, Nebraska, for five years. He resides here with his parents, his wife of twenty years, their five children who were all born in the United States, and two adult brothers."

appearance to detain the defendants prior to trial.

The Defendant argues, as set out in Judge Zoss' order in Jocol-Alfaro, 840 F. Supp. at 1118, that the bail reform act is limited to risk that a defendant may flee or abscond. That is to say the rule only applies to situations where there is a risk that defendants will fail to appear by virtue of their own volition, actions, and will. If the Government, through ICE, prevents their appearance, they have not failed to appear. The Court is not disturbing the holdings in Judge Zoss' cases. However, this Court is not persuaded that in this case, where the Defendant is subject to jail if convicted, that the Defendant can be released to ICE. Releasing the Defendant, who is subject to certain deportation would essentially effect a dismissal of this case.

To come to that conclusion, Judge Strand cited the testimony of ICE agent Robert Green. Mr. Green testified that if any of the Defendants then before the Court were transferred to ICE, they would be deported in three or four weeks. Judge Strand stated that "I find that the cases before me are distinguishable from Jocol-Alfaro and Villanueva-Martinez based on the charges at issue and Green's

testimony regarding the certainty of removal if any of these defendants are released to ICE custody pursuant to the detainers." Docket #11, p.4. This is certainly true. Moreover, this Court notes that the defendants in Judge Zoss' cases had significant long time ties to the Sioux City area which is another distinguishing factor. Accordingly, Magistrate Strand was well within in his discretion to distinguish this case from those cited by the Defendant and find that there was a significant risk of non-appearance if Mr. Millan-Vasquez is released.

Finally, the Court notes that during the hearing, the Defendant argued that affirming the Magistrate would create a defacto rule that all similarly situated defendants would be detained prior to trial. This Court firmly rejects that argument. Before detaining any defendant, the Court must make a considered analysis of the specific facts of the case to determine the danger a defendant may not appear, as both Judge Strand and Judge Zoss did in the cases discussed above. Accordingly, this ruling creates no rule, defacto or otherwise. This Court and the Magistrate will continue to consider each detention motion on a case by case basis.

IV. CONCLUSION

IT IS THEREFORE HEREBY ORDERED that this Court affirms and adopts Judge Strand's Order.

IT IS SO ORDERED this 31st day of January, 2013.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa No