WINNING DETENTION HEARINGS FOR OUR NONCITIZEN CLIENTS: EDUCATING JUDGES TO REJECT THE MYTHS

By

Joan Politeo

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I. **Materials** – Oregon district court case, *United States v. Trujillo-Alvarez*, 900 F. Supp.2d 1167 (D.Or. 2012), provides a roadmap of the arguments addressed in this webinar. *See also* Mr. Trujillo-Alvarez's motion for an order holding the ICE agents in contempt for defying the court's order setting conditions of release. The article from the National Immigration Project of the National Lawyers Guild (NIPNLG) by Lena Graber and Amy Schnitzer, June 2013, discusses, in even greater detail, the prosecutor's mythological arguments at the detention hearing on risk of flight based upon undocumented status, ICE holds and the impropriety of transfers of noncitizens to ICE detention facilities during the pendency of the federal criminal case. *See also* sample bail motions attached to the NIPNLG's article. Also, review Mr. Castro-Inzunza's emergency appeal to the Ninth Circuit, and defense counsel's Memorandum in Support of Appeal from Order Revoking Release.

II. **Additional Authority**

1. **Bail Reform Act of 1984 (BRA)** mandates the release of all persons facing trial unless no condition, or combination of conditions, will "reasonably assure" the appearance of the person as required and the safety of the community.
   18 U.S.C. **§** 3142(c)(2).

2. **Undocumented Status Not Presumptive Evidence of Flight Risk, Court Must Properly Weigh Factors Under 18 U.S.C. § 3142(g):**

   (1) the nature and circumstances of the crime charged;
   (2) the weight of the evidence against the defendant (least of factors to consider);
   (3) the history and characteristics of the defendant, including family ties, employment, community ties, past conduct;
   (4) the nature and seriousness of the danger to the community or to an individual.

   See United States v. Trujillo-Alvarez, 900 F. Supp.2d 1167 (D.Or. 2012); *United States v. Xulam*, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (deportable alien not a flight risk where

conditions could be imposed to ensure return to court); *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985) (concluding that the fact that defendant is alien "does not tip the balance either for or against detention."); *United States v. Chavez-Rivas*, 536 F.Supp.2d 962, 968 (E.D. Wis. 2008) (finding that illegal reentry defendant's "status as a deportable alien does not mandate detention"); *United States v. Adomako*, 150 F.Supp. 2d 1302, 1304 (M.D. Fla. 2001) ("Congress chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings"); *United States v. Hernandez*, 747 F.Supp.846 (D. Puerto Rico 1990) (ordering release of noncitizen defendant charged with illegal reentry where the evidence showed he was not a flight risk).

3. <u>Immigration Detainer</u>

"The detainer is a request that such agency advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. **§** 287.7(a).

United States v. Santos-Flores, 794 F.3d 1088 (9th Cir. 2015), District court erred in relying on existence of ICE detainer and probability of alien's immigration detention and removal from the United States to find that no condition or combination of conditions would reasonably assure his appearance; *United States v. Trujillo-Alvarez*, 900 F. Supp.2d 1167 (D.Or. 2012), government's argument that an "ICE detainer" should be viewed as exception to BRA has been rejected. *United States v. Castro-Inzunza*, 2012 WL 6622075 (9th Cir. 2012) (Ninth Circuit reversed district court finding that "no conditions or combination of conditions will reasonably assure the [defendant's] appearance," government failed to show that it lacks the ability to stay or defer removal.); *United States v. Barrera-Omana*, 638 F.Supp.2d 1108, 1111 (D.Minn.2009) (government's argument that ICE detainer swallows the BRA is without merit); *United States v. Jocol-Alfaro*, 840 F.Supp. 1116 (N.D. Iowa 2011) (Illegal alien charged with false claims of citizenship and false use of Social Security numbers shall be released on conditions, despite detainer filed by ICE);

United States v. Xulam, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (the mere fact that a detainer has been lodged does not necessarily mean that defendant will be taken into custody by immigration authorities if released).

Immigration Detention

The Bail Reform Act cautions against the judicial officer's consideration of the applicability of deportation or exclusion law in determining whether an individual qualifies for bail. 18 U.S.C § 3142(d) (bail determinations for noncitizens must be made "notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.")

The federal prosecutor has control over whether a criminal defendant is deported. Deportation of an alien who is a party in a criminal case pending in a court in the Unites States shall be "deemed prejudicial to the interests of the United States." 8 C.F.R. § 215.3(g); 22 C.F.R. § 46.3(g) ("[a]ny alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States **with the consent of the appropriate prosecuting authority** unless such alien is otherwise prohibited from departing under the provisions of this part." If government elects to deliver the undocumented individual to the USAO for prosecution, instead of removing him or her immediately, government may not use its discretionary power of removal to trump a defendant's right to an individualized determination under the Bail Reform Act. *See United States v. Santos-Flores,* 794 F.3d 1088, 1091 (9th Cir. 2015). Risk of nonappearance must be volitional. *Id.*

Transfer to immigration custody after conditions of release set by judicial officer for purposes of the criminal case is in violation of the law. The Court has the authority to order the defendant released without consideration of the ICE detainer. If the immigration authorities do not take the individual into custody for removal under Section 3142(d), "such person shall be treated in accordance with the other provisions of the law governing release pending trial or deportation or exclusion proceedings."

UNITED STATES V. TRUJILLO-ALVAREZ

Portland, Oregon

Motion for Order to Show Cause Re Finding of Contempt

Christopher J. Schatz, OSB No. 915097
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, OR 97204
Tel: (503) 326-2123
Fax: (503) 326-5524
Email: Chris_Schatz@fd.org
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,	**Case No. 3:12-cr-00469-SI**
Plaintiff,	**MOTION FOR ORDER TO SHOW CAUSE RE FINDING OF CONTEMPT, FOR CERTIFICATION OF FACTS TO THE DISTRICT COURT, AND FOR INJUNCTIVE RELIEF.**
vs.	
ENRIQUE TRUJILLO-ALVAREZ,	
Defendant.	***HEARING REQUESTED***

Defendant Enrique Alvarez-Trujillo,[1] through his attorney of record, Assistant Federal Public Defender Christopher J. Schatz, hereby moves the Court, pursuant to 18 U.S.C. § 401(3) and/or this Court's inherent civil and criminal contempt powers, to enter an order directing ICE Director John Morton and ICE Special Agent John Claypool (hereinafter referred to as the "ICE Respondents") to show cause why they should not be held in contempt for deliberately frustrating the Order Setting

[1]Although charged as "Trujillo-Alvarez," Defendant's true and correct name is "Enrique Alvarez-Trujillo."

Conditions Of Release, entered by Magistrate Judge John Acosta, in the instant matter on September 11, 2012. Defendant Alvarez-Trujillo further moves the Court to determine whether the procedures set forth in 28 U.S.C. § 636(e)(6)(B) should be employed and, if so, Defendant Alvarez-Trujillo moves this Court to assign this motion to Magistrate Judge Acosta for initial decision as regards certification of facts to the District Court in accordance with 28 U.S.C. § 636(e)(6)(B)(ii) and (iii).

In aid of the relief requested above, Defendant Alvarez-Trujillo further moves the Court to **immediately** enter an order enjoining the ICE Respondents and the Bureau of Immigration and Customs Enforcement ("ICE") from removing Defendant from the United States, and further directing said agency to release Defendant from custodial confinement and provide him with transportation back to the District of Oregon.

Said motions are based on the following circumstances and allegations based on information and belief:

1. On September 11, 2012, Magistrate Judge Acosta, after full and thorough consideration of the issues presented by application of 18 U.S.C. § 3142 to Mr. Alvarez-Trujillo, entered an Order Setting Conditions Of Release and directed that Mr. Alvarez-Trujillo be immediately released from confinement.
2. On or about September 12 or 13, 2012, ICE agents seized Mr. Alvarez-Trujillo and removed him from the District of Oregon.
3. Mr. Alvarez-Trujillo is now being held at the ICE detention facility in Tacoma, Washington.

4. By seizing and transporting Mr. Alvarez-Trujillo out of the District of Oregon, Defendant Alvarez-Trujillo alleges on information and belief that the ICE Respondents are engaged in an attempt to intimidate the Court into declining to comply with the dictates of the Bail Reform Act to the extent said Act requires that individual consideration be given to defendants who, appearing before the Court charged with violation of the immigration laws, do not present a flight risk or danger to the community that cannot be adequately addressed by pretrial supervision conditions.

5. The acts of the ICE Respondents have frustrated effectuation and implementation of a lawful order of this Court.

Request for Determination as to Initial Hearing Judge: Insofar as the contemptuous conduct at issue in this motion occurred outside the presence of Magistrate Judge Acosta, in accordance with 28 U.S.C. § 636(e)(6)(B), it would appear that an appropriate course of action would be for the instant motion to be submitted to Magistrate Judge Acosta for consideration as to whether the facts as set forth above should be certified to the District Court for further action.

Request for Certification of Facts to the District Court: In the event that the procedure set forth in 28 U.S.C. § 636(e)(6)(B) is employed in this matter, Defendant Alvarez-Trujillo requests that Magistrate Judge Acosta certify the facts set forth above, and in the Statement of Fact set forth in his supporting Memorandum, to District Judge Michael Simon, and further enter an Order directing the ICE Respondents to appear before Judge Simon upon a day certain to show cause why they should not be adjudged in contempt by reason of the facts so certified.

Request for Hearing: Defendant Alvarez-Trujillo requests that the instant motion be calendared for evidentiary hearing at this Court's first available opportunity.

Request for Expedited Briefing Schedule: In light of the uncertainty of his status while in ICE custody, Defendant Alvarez-Trujillo requests that the Court expedite the briefing schedule and the scheduling of the hearing in this case.

Time Estimate: Defendant Alvarez-Trujillo estimates that approximately two hours will be required for the taking of evidence and determination of the issues raised by the instant motion.

Bail/Custody Status of Defendant: Defendant Alvarez-Trujillo is presently detained in the custody of ICE at the ICE detention facility in Tacoma, Washington.

Respectfully submitted this September 24, 2012.

/s/ Christopher J. Schatz
Christopher J. Schatz
Assistant Federal Public Defender

Christopher J. Schatz, OSB No. 915097
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, OR 97204
Tel: (503) 326-2123
Fax: (503) 326-5524
Email: Chris_Schatz@fd.org
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **ENRIQUE TRUJILLO-ALVAREZ,** **Defendant.**	**Case No. 3:12-cr-00469-SI** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE RE FINDING OF CONTEMPT, CERTIFICATION OF FACTS TO THE DISTRICT COURT, AND FOR INJUNCTIVE RELIEF.**

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OTHER

Defendant Enrique Alvarez-Trujillo, by and through his attorney of record, Assistant Federal Public Defender Christopher J. Schatz, submits the points and authorities hereinafter set forth in support of his Motion For Order To Show Cause Re Finding Of Contempt, Certification Of Facts To The District Court, And For Injunctive Relief filed concurrently herewith.

INTRODUCTORY STATEMENT

In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Supreme Court upheld the Bail Reform Act of 1984 as being consistent with the respect for liberty that has characterized the American justice system:

> In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.

Despite this grand pronouncement, for many years in the District of Oregon aliens of Hispanic origin charged with illegal reentry and other crimes have routinely been denied any consideration whatsoever for release from pretrial confinement per the terms of 18 U.S.C. § 3142. Instead of the individualized consideration contemplated by the Bail Reform Act, the members of this one class of defendants have been denied pretrial release solely due to the presence of an ICE detainer. Given that year after year these same defendants have constituted 30% or more of the District Court's case docket, contributing by their numbers significantly to the District Court's budgetary requests for fiscal appropriations, it is reasonable to assume that many otherwise releaseable defendants have been detained solely as a consequence of the ICE detainers lodged against them. But, as discussed in foot note 1, the ICE detainer is neither a warrant nor a judicial order; it is nothing more than a

notice and a request that, in the event of release, the defendant alien be held so that ICE can take custody of him or her for purposes of implementing their removal from the United States.[1]

Mr. Alvarez-Trujillo appeared before Magistrate Judge Acosta for purposes of arraignment and a detention hearing on September 11, 2012. Prior to his appearance in court, Mr. Alvarez-Trujillo was interviewed by Pretrial Services Officer Chris Song. Although Ms. Song was provided with information verifying (a) Mr. Alvarez-Trujillo's lengthy employment history in the United States; (b) the fact that his eight year-old daughter, Carmelita, had just recently returned home after two months in the hospital where she had been treated for a severe occurrence of encephalitis; (c) the fact that Mr. Alvarez-Trujillo was his family's sole financial supporter; and (d) that he had not incurred any convictions for violations of law for over a decade, she nevertheless recommended that

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[1]The only and non-statutory authority for issuance of an ICE detainer is found in 8 C.F.R. § 287.7(a) which provides, in relevant part:

> A 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 the release of the alien, in order for the Department to arrange to assume custody, in situations where gaining immediate physical custody is either impracticable or impossible.

In the event such a detainer is lodged with a criminal justice agency, and the subject of the detainer is subsequently released, 8 C.F.R. § 287.7(d) provides that "such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department." Use of ICE detainers against aliens not charged with, or convicted of, controlled substance offenses has been challenged as being without congressional authorization. *See* Christopher N. Lasch, "*Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*", 35 Wm. Mitchell L. Rev. 164, 193 (2008) ("DHS's routine practice of placing detainers on persons not arrested for controlled substances offense is unsupported by statutory authority.").

Mr. Alvarez-Trujillo be detained on the ground that there were no conditions or combination of conditions that could assure his appearance.[2] Magistrate Judge Acosta disagreed:

> The Pretrial Services Report reflects a background, putting aside the ICE detainer, that we often see when considering detention or release of an individual defendant. Ties to the community, family members present for an extended period of time, the individual present for an extended period of time, he has stable employment history, he has at least two other non-family members who have come forward to talk on his behalf with respect to his personal characteristics, both of whom are decidedly favorable in that regard. I do not see, and I do not, Mr. Nyhus correct me if I am wrong, I don't hear the government arguing that Mr. Alvarez-Trujillo is a danger to the community if released. The government's question was more to the risk of flight. I find on this record that the government hasn't met its burden that he is a flight risk if released.

See Partial Transcript Of Detention/Release Hearing, attached hereto as Exhibit A, at p. 2.[3] In light of this finding, Magistrate Judge Acosta entered an Order Setting Conditions Of Release [Docket No. 10].[4]

AUSA Nyhus' request for a stay of the release order was denied. Rather than seeking relief from the District Court, the following day agents of ICE seized Mr. Alvarez-Trujillo and transported him out of the District of Oregon.

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[2]Given the facts and circumstances of Mr. Alvarez-Trujillo's life, the only plausible rational for Ms. Song's recommendation is that an ICE detainer had been lodged against him.

[3]In the course of his remarks, Magistrate Judge Acosta referred to a similar release decision that he had recently made in the case entitled *United States v. Ezequiel Castro-Inzunza*, District Court Case No. 3:11-cr-00418-MA. A copy of Magistrate Judge Acosta's written opinion in that case is attached hereto as Exhibit B. Magistrate Judge Acosta's release order in *Castro-Inzunza* was subsequently affirmed by Order of the Ninth Circuit. A copy of this Order is attached hereto as Exhibit C.

[4]A copy of this Order is attached hereto as Exhibit D.

Mr. Alvarez-Trujillo is currently being held at the ICE detention facility in Tacoma, Washington. Mr. Alvarez-Trujillo does not know the identity(ies) of the ICE agent(s) who made the decision to countermand Magistrate Judge Acosta's order by removing him from the District of Oregon. However, it is assumed that the seizure and transportation of Mr. Alvarez-Trujillo was conducted by the ICE case agent who was present at Mr. Alvarez-Trujillo's detention/release hearing, ICE Special Agent John Claypool, with the approval, whether implicit or explicit, of ICE Director John Morton. Director Morton and Special Agent Claypool are hereinafter identified as the "ICE Respondents."

Mr. Alvarez-Trujillo sought release so that he could be with and provide care for his family, and in particular his eight-year-old and still recovering daughter. For the ICE Respondents to seize and transport him out of the District of Oregon in order to defeat Magistrate Judge Acosta's release order manifests a level of cruelty that should not be tolerated in a constitutional democracy governed by the rule of law.[5] The government and the agents of its client agency, ICE, would do well to consider that law does not exist to serve as a shield or excuse for cruelty, and that history may one day expose them as being petty and intolerant given the trauma they have perpetrated on

[5]Denial of access to release on supervision is not the only harm imposed on Mr. Alvarez-Trujillo as a result of the government's response to entry of the Order Setting Conditions Of Release. Within hours of the detention/release hearing, AUSA Nyhus advised the undersigned that, on the basis of the showing made in Mr. Alvarez-Trujillo's effort to demonstrate that he is not a flight risk, the government had withdrawn its fast-track settlement offer of a sentence of one-year and one-day, and that any future settlement proposal would involve a significantly longer period of incarceration for Mr. Alvarez-Trujillo.

Mr. Alvarez-Trujillo and his family. As the renowned legal philosopher Lon Fuller noted in the course of addressing the status of 'laws' proclaimed by the Nazi's during Hitler's reign in Germany:

> If we felt that the law itself was our safest refuge, would it not be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law? And is it not clear that this hesitancy itself derives, not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?

Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professot Hart*, 71 Harv. L.Rev. 630, 637 (1958). Given this Nation's commitment to "family values," it is reasonable to declare that the demand of morality here was to enable Mr. Alvarez-Trujillo to be united with his family for the brief period of time that the litigation of his case will involve. For the ICE Respondents to have robbed him of that opportunity was not only an act of disregard for this Court's authority, but a base and unconscionable act that should be addressed by this Court by means of its inherent contempt powers.

STATEMENT OF THE CASE

On September 5, 2012, at the request of AUSA Gregory R. Nyhus, the Grand Jury for the District of Oregon returned an indictment charging Enrique Trujillo-Alvarez with the crime of illegal reentry, in violation of 8 U.S.C. § 1326(a). On September 7, 2012, Mr. Alvarez-Trujillo was arraigned on the indictment and entered a plea of not guilty. The determination as to whether Mr. Alvarez-Trujillo would be detained was continued to September 11, 2012. A trial date of November 13, 2012, was set, and Mr. Alvarez-Trujillo was detained by Magistrate Judge Paul Papak pending further hearing.

On September 11, 2012, Mr. Alvarez-Trujillo appeared before Magistrate Judge John Acosta. After entertaining argument, Magistrate Judge Acosta entered an Order Setting Conditions Of

Release for Mr. Alvarez-Trujillo. AUSA Nyhus' motion to stay implementation of the release order was denied. No appeal of Magistrate Judge Acosta's order has been filed to date.

STATEMENT OF FACT

Mr. Alvarez-Trujillo is 46 years of age. He has no formal education. He has resided in Portland area for the last 18 years. He has a stable residence and stable relationship with Julia Calderon that has lasted for 15 years. Together, they have three children – all of whom are U.S. citizens.

Mr. Alvarez-Trujillo does not use drugs. He last consumed alcohol over eight years ago. Mr. Alvarez-Trujillo is employed. His principal employer, Dale Sooter, reports that he is a "very good and loyal employee." *See* Investigation Report re Interview with Dale Sooter, dated September 10, 2012, attached hereto as Exhibit E. Another employer, Kathryn Wells, states that Mr. Alvarez-Trujillo "was an excellent, excellent worker." *See* Investigation Report re Interview with Mrs. Kathryn Wells, dated September 10, 2012, attached hereto as Exhibit F.

In May of this year, Mr. Alvarez-Trujillo's youngest daughter, Carmelita, became extremely ill with encephalitis (*i.e.* inflammation of the brain). As a result of her illness, Carmelita was hospitalized for approximately two months. During her hospital stay, Mr. Alvarez-Trujillo was with his daughter "the whole time she was in the hospital." *See* Investigation Report re Interview with Julia Calderon, attached hereto as Exhibit G, at p. 1. Mr. Alvarez-Trujillo is the sole financial support for his family. *Id.* at p. 2.

In the early 1990's, Mr. Alvarez-Trujillo had some problems with the criminal law. The most serious of these law violations was a delivery of controlled substance conviction he sustained in

Multnomah County Circuit Court in July of 1993. As a consequence of this conviction, Mr. Alvarez-Trujillo received a 30 day jail sentence. Following service of this sentence, Mr. Alvarez-Trujillo was deported pursuant to an order of deportation on September 13, 1993.

On August 8, 2012, Mr. Alvarez-Trujillo was arrested for driving while his driver's license was suspended. As a result of this law enforcement contact, for which he had been booked and released, Mr. Alvarez-Trujillo came to the attention of ICE agents. On August 27, 2012, ICE Immigration Enforcement Agent R. Stewart arrested Mr. Alvarez-Trujillo. On that same date, Mr. Alvarez-Trujillo's case was reviewed by ICE agents and he was designated for prosecution in federal court for illegal reentry. Mr. Alvarez-Trujillo's 1993 Order of Deportation was also reinstated on August 27, 2012, in accordance with § 241(a)(5) of the Immigration and Nationality Act.

On September 7, 2012, Mr. Alvarez-Trujillo was brought before Magistrate Judge Paul Papak for arraignment on an indictment charging him with a single count of illegal reentry following deportation, in violation of 8 U.S.C. § 1326(a). Mr. Alvarez-Trujillo entered a plea of not guilty and requested that he be granted an opportunity to prepare for a detention/release hearing, which request was granted.

On September 11, 2012, Mr. Alvarez-Trujillo appeared before Magistrate Judge John Acosta for purposes of a detention/release hearing. Although an ICE detainer had been lodged against him, Magistrate Judge Acosta entered an Order Setting Conditions of Release for Mr. Alvarez-Trujillo.

On September 12 or 13, 2012, ICE Special Agent John Claypool executed the ICE detainer against Mr. Alvarez-Trujillo and took him into ICE custody. Mr. Alvarez-Trujillo was then removed

from the District of Oregon and taken to the NW Regional Immigration Detention Center located in Tacoma, Washington. As of September 24, 2012, Mr. Alvarez-Trujillo is still at the detention center.

ARGUMENT

THE SEIZURE AND REMOVAL OF MR. ALVAREZ-TRUJILLO FROM THE DISTRICT OF OREGON, IN RESPONSE TO THE ENTRY OF AN ORDER ADMITTING HIM TO PRETRIAL SUPERVISION, CONSTITUTES A DELIBERATE AND UNCONSTITUTIONAL INTRUSION UPON THE JUDICIAL POWERS OF THE DISTRICT COURT.

The Bail Reform Act contemplates that individuals brought before the district court on criminal charges will be allowed to remain in the community pending determination of those charges in the absence of cause to believe that conditions of supervision do not exist that will reasonably serve to ensure their presence before the court and/or the safety of the community. *See* 18 U.S.C. § 3142(b). In addition to the Act's clear preference for the release of most individuals facing criminal charges, it is also clear that in promulgating the Act Congress "chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings." *United States v. Adomako*, 150 F.Supp.2d 1302, 1303 (M.D. Fla. 2001). Nevertheless, in the course of the detention hearing held in the instant case on September 11, 2012, AUSA Nyhus argued that, insofar as an ICE detainer had been lodged against Mr. Alvarez-Trujillo and a previous order for his deportation/removal had been administratively reinstated, he should be detained.

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., as amended, provides that ICE must custodially detain any alien who has been convicted of an aggravated felony, 8 U.S.C. §§ 1231(a)(2), 1227(a)(2)(A)(iii). Further, the INA provides that "the Attorney General shall remove

[a detained] alien from the United States within a period of 90 days," 8 U.S.C. § 1231(a)(1)(A), which time period begins to run upon the first of several events, including an alien's release from detention or confinement. *See* 8 U .S.C. § 1231(a)(1)(B)(iii) ("[i]f the alien is detained or confined (except under an immigration process), [the removal period begins on] the date the alien is released from detention or confinement").[6] During the removal period, the [Secretary of Homeland Security] shall detain the alien, and "under no circumstance" release him. 8 U.S.C. § 1231(a)(2).[7] Mr. Alvarez-Trujillo anticipates the government's position in response to the instant motion will be that, in accordance with these provisions, ICE is authorized to remove him from the United States irrespective of the criminal case pending against him. Consequently, he believes that the government will contend that Magistrate Judge Acosta erred by admitting him to release on pretrial supervision.

As an initial point for consideration, it should be noted that § 1231(a)(1)(B)(iii) does not further define the circumstances that qualify for consideration as "release[] from detention or

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[6]8 U.S.C. § 1231(a)(4)(A) provides that an alien's "[p]arole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal." However the "possibility of arrest or further imprisonment" does not specifically address the situation here, where Mr. Alvarez-Trujillo has already been arrested and now faces a pending prosecution.

[7]Another Immigration and Nationality Act provision, 8 U.S.C. § 1226(c)(1), provides that the Attorney General shall take into custody any inadmissible alien or alien deportable by reason of having committed certain crimes including aggravated felonies, "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." In *United States v. Rembao-Renteria*, No. 07mj399 (JNE/ABJ), 2007 WL 2908137, at *3 (D. Minn. Oct. 2, 2007), District Judge Joan N. Ericksen rejected application of § 1226(c)(1) in the course of reviewing, and affirming, a decision releasing an illegal reentry defendant on pretrial supervision:

> Parole, supervised release, probation, and the possibility of being imprisoned *again* all assume a conviction. The Court does not read this list to include conditions placed on a defendant who has been charged but not convicted.

confinement." Rather than encompassing release on conditions during the pendency of a federal criminal case, a more reasonable interpretation of the state of affairs connoted by "detention and confinement" is incarceration pursuant to a final judgment of conviction as entered by a court of competent jurisdiction, state or federal.

On July 23, 2012, in *United States v. Ezequiel Castro-Inzunza*, Ninth Circuit Court of Appeals Case No. 12-30205, a Ninth Circuit panel headed by Chief Judge Kozinski issued an Order reversing a decision of the Oregon District Court denying release to a defendant alien subject to an ICE detainer, and directing the District Court "to establish appropriate conditions of release, including a stay of the removal period."[8] In the course of announcing its decision in this regard, the panel observed:

> The government has failed to meet its burden to show that the removal period of 8 U.S.C. § 1231(a)(1)(A) will begin while defendant is "in custody" on pretrial release, subject to restraints not shared by the public generally that significantly confine and restrain his freedom.

Order, at 2; *see also Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (Declaring that a person released on his own recognizance was "in custody" for purposes of the habeas corpus statute, 28 U.S.C. §§ 2241(c), 2254(a).).

The Bail Reform Act (18 U.S.C. § 3141, *et seq.*) prescribes a two-step inquiry by which a court must determine whether a defendant will be released pending trial. A court must first determine whether the government has shown the existence of a serious risk that the defendant will flee, and/or by clear and convincing evidence, that the defendant is a danger to some person or the

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[8]A copy of the *Castro-Inzunza* Order is attached hereto as Exhibit C.

community generally. 18 U.S.C. § 3142(f)(2); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).[9] If the government makes that showing, the Act authorizes the pretrial detention of a defendant only if the Court further finds that "no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of the community." *See* 18 U.S.C. §§ 3142(f), (e). This process reflects the congressional judgment, underlying the promulgation of the Act, that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

No argument has been raised to date in the instant case to the effect that Mr. Alvarez-Trujillo currently represents a risk of danger to any person or the community. Insofar as an ICE detainer "is an externality not under defendant's control," it cannot serve, standing alone, as a basis for finding that a particular defendant presents a flight risk that cannot be addressed by appropriate supervision conditions. *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009).[10]

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[9]18 U.S.C. § 3142(e) provides that detention may be ordered only "after a hearing pursuant to the provisions of subsection (f) of this section." Insofar as Mr. Alvarez-Trujillo is not charged with an offense listed in 18 U.S.C. § 3142(f)(1), "he may not be detained as a danger to the community." *United States v. Chavez-Rivas*, 536 F.Supp.2d 962, 968 (E.D.Wis. 2008); *but see United States v. Holmes*, 438 F. Supp. 2d 1340, 1348-50 (S.D. Fla. 2005).

[10]Under § 3142(f)(2)(A) a "serious risk that such [a] person will flee" is the impetus for holding a detention hearing in the first place. To show that there is a serious risk that a defendant will flee, the government must show that the defendant would seek to leave through some type of voluntary act. *See, e.g., Barrera–Omana*, 638 F.Supp.2d at 1111 ("[t]he risk of nonappearance" must involve "an element of volition"); *United States v. Montoya–Vasquez*, No. 4:08CR3174, 2009 WL 103596, at *5 (D. Neb. Jan.13, 2009) (" 'failure to appear' as used in the [BRA] is limited to the risk that the defendant may flee or abscond"); *Rembao–Renteria*, 2007 WL 2908137, at *3 ("[T]he certainty of deportation does not translate into [the] certainty of flight"). Only if a defendant is shown to be a serious risk of flight must a court then consider whether there are conditions, or combinations of conditions, that will reasonably assure his or her appearance at future court proceedings. *See Chavez–Rivas*, 536 F. Supp. 2d at 967 (explaining that because "§ 3142(f) limits

The argument that the provisions of the Bail Reform Act may be defeated by ICE's taking custody of a defendant and deporting him, and that the U.S. Attorney is powerless to prevent such action, has been subjected to scrutiny and rejected by a significant number of courts across the Nation. *See, e.g., United States v. Barrera-Omana*, 638 F.Supp.2d 1108, 1111 (D. Minn. 2009) ("In fine, the government argues that any defendant encumbered by an ICE detainer must be detained pending trial or sentence. This cannot be.").[11] In response to the actions of the government in the instant case, Mr. Alvarez-Trujillo contends that (1) an ICE detainer does not supercede the provisions of the Bail Reform Act, (2) the existence of an ICE detainer does not constitute a statutory basis for his detention under the Act, (3) to deny him release, notwithstanding the provisions of the Bail Reform Act, raises serious due process and equal protection concerns, and (4) his seizure and removal by ICE agents from the District of Oregon constitutes a violation of the principle of separation of powers insofar as an agency of the Executive Branch has deliberately frustrated implementation of a lawful order of the District Court. Mr. Alvarez-Trujillo further contents that the remedies to be employed to address the ICE Respondent's actions are (a) issuance of an Order to Show Cause re Contempt; (b) issuance of an order directing that he be released and provided with

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the cases in which [detention] hearings may be held, it follows that the court may not order detention unless one of the circumstances in § 3142(f) exists"). Consequently, if a defendant is not a serious flight risk, there is no occasion to consider what condition(s) may reasonably assure appearance.

[11]In *Barrera*, District Judge James M. Rosenbaum further noted that, if the government's argument concerning the nullifying effect of an ICE detainer were accepted, "Congress's carefully crafted detention plan, set forth at 18 U.S.C. § 3142, would simply be overruled by an ICE detainer. No other factor matters; neither danger to the community nor risk of flight, nor any kind of individualized consideration of a person before the Court. Each, according to the government, has been swallowed by an ICE detainer." 638 F. Supp. 2d at 1111.

transportation back to the District of Oregon; and (c) issuance of an order staying the removal time period while proceedings in the instant case run their course.

In *United States v. Martinez-Patino*, a decision by Magistrate Judge Sidney I. Schenkier in the Northern District of Illinois, the court rejected an argument that the ICE detainer should thwart a defendant's release because ICE would deport the alien defendant in the event of a release order:

> [C.F.R] Section 215.3(g) represents ICE's determination that, when a party to a pending criminal case exits the country without the prosecuting authority's consent, his absence is prejudicial to the interests of the United States. Indeed, when ICE took custody of the defendant in December, ICE could have deported him in the first instance. *See* 8 U.S.C. § 1231(a)(5) (if the Attorney General finds that an alien has reentered the United States illegally after having been removed under an order of removal "the alien shall be removed under the prior order at any time after entry"). ICE did not do so, but instead held the defendant so that the United States Attorney's Office could exercise its discretion to prosecute the defendant. By delivering the defendant to the United States Attorney's Office in this case, rather than simply deporting him immediately, ICE yielded to the judgment of the prosecutorial arm of the Executive Branch that the public's interest in criminally prosecuting the defendant was greater than the public's interest in swiftly deporting him.
>
> Defendant's prosecution is thus the result of both the United States Attorney's Office and ICE – two Executive Branch agencies – exercising their discretion in a coordinated effort to serve the public interest as they see it to argue now, as the government does, that ICE's interest in deporting the defendant would suddenly trump the United States Attorney's interest in prosecuting the defendant ignores the cooperation (and exercise of discretion) that brought, the defendant before this Court in the first place. It also presumes that ICE would immediately remove a defendant retained on bond and thus frustrate his criminal prosecution, when ICE itself has found that the departure of a defendant to a pending criminal proceeding is prejudicial to the interests of the United States.
>
> We reject the proposition that if the defendant were released on bond, ICE would act in a way that can only be described as irrational. We likewise, reject the government's argument that Congress has statutorily-mandated such an irrational result.

2011 WL 902466, at *7 (N.D.Ill. Nov. 28, 2011).[12]

Contrary to the expectation announced in *Martinez-Patino*, ICE has proceeded to act in a manner contrary to the public interest represented by the prosecution of Mr. Alvarez-Trujillo. But rather than simply an irrational action, the decision to take Mr. Alvarez-Trujillo into ICE custody should be seen for what it in fact is – a direct attempt to intimidate the District Court for the District of Oregon into categorically refusing to extend pretrial supervision to aliens against whom ICE detainers have been lodged.

A. Detention Of An Alien Defendant Solely On The Ground That ICE Will Remove Or Deport Him After Criminal Proceedings Have Concluded Violates The Bail Reform Act And Raises Serious Equal Protection And Due Process Issues.

The Bail Reform Act does not create any per se category of persons who must be detained absent an individualized inquiry into their risk of flight or danger to the community. Certain offenses are subject to a "rebutable presumption" of detention, *see* 18 U.S.C. § 3142(e), but illegal reentry is not among them. To the contrary, even in situations where a person may be temporarily detained for seven days to permit revocation of conditional release, deportation or exclusion, lack of legal status in the United States does not automatically trigger detention. Under § 3142(d), a judicial officer may authorize the temporary detention of a person who does not pose a danger to the community only if: (1) that person is (and was at the time of the offense) "not a citizen of the United

[12]In *Martinez-Patino*, the court determined that the defendant qualified for pretrial supervision notwithstanding that, prior to turning him over to the United States Attorney for prosecution, ICE administratively reinstated a previously issued "removal order against the defendant, and defendant signed a form stating he would make no statement contesting his removal." 2011 WL 902466, at *2.

States or lawfully admitted for permanent residence," and (2) that person "may flee." *See* 18 U.S.C. §§ 3142(d)(1)(B), 3142(d)(2). Thus, it is the risk that a defendant will flee, and not just his immigration status, that gives rise to a detainer or release decision under Section 3142(d).

In *Adomako*, 150 F. Supp. 2d at 1304, the Court observed that, in promulgating the Bail Reform Act, "Congress chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings." "An immigration removal order does not create a serious risk that a defendant will flee, and the likelihood of a defendant's deportation is not among the § 3142(g) factors that the court may consider." *Martinez-Patino*, 2011 WL 902466, at *6.[13]

When ICE transferred custody of Mr. Alvarez-Trujillo to the District of Oregon so that he could be prosecuted under the indictment in the instant case, two co-equal agencies of the Executive Branch—the Department of Homeland Security and the Justice Department—through their coordinated efforts invoked the jurisdiction of the district court, as well as all the law ordained procedures and processes involved in the adjudication of a criminal case. When Mr. Alvarez-Trujillo appeared before the district court, the first proceeding he participated in involved the procedures described in the provisions of the Bail Reform Act. The District Court and its Magistrate Judges were and are obliged to "treat defendant like any other [alleged] offender under the Bail

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[13]While not dispositive, the existence of an ICE detainer may be viewed as a relevant factor in assessing the risk a particular defendant will flee. *See Chavez-Rivas*, 536 F. Supp. 2d at 964, n.3. However, any "risk" that an alien defendant will be seized and removed by ICE if released is not an appropriate consideration insofar as the risk of flight component of the Bail Reform Act addresses a defendant's own volitional activity: "The Bail Reform Act does not permit this court to speculate on the 'risk' that a defendant would not appear in this court due to his being removed from this country by the same government that is prosecuting him." *Montoya-Vasquez*, 2009 WL 103596, at *4.

Reform Act." *Chavez-Rivas*, 536 F. Supp. 2d at 964. To hold otherwise would run contrary to the protections afforded liberty by the Due Process Clause and the proscriptions against discrimination on the basis of race and alienage advanced by the principle of equal protection of the laws.

In 18 U.S.C. § 3142(d), the Bail Reform Act sets forth the procedures to be followed when an individual, subject to immigration law proceedings, appears before the district court in a criminal case:

> d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion. If the judicial officer determines that–
>
> (1) such person–
>
> (A) is, and was at the time the offense was committed, on–
>
> (I) release pending trial for a felony under Federal, State, or local law;
>
> (ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or
>
> (iii) probation or parole for any offense under Federal, State, or local law; or
>
> (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(20)); and
>
> (2) such person may flee or pose a danger to any other person or the community;
>
> such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, **or the appropriate official of the Immigration and Naturalization Service**. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, **notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.** If temporary detention is sought under paragraph (1)(B) of this subsection, such

> person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(emphasis added.) The "temporary detention" of an alien defendant pursuant to § 3142(d) is only permissible if the district court first finds that "such person may flee or pose a danger to any person or the community." Moreover, § 3142(d) clearly provides that, once ICE has received notification that an undocumented alien is being held in the custody of a district court, if ICE refuses to take action "such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings."

According to the doctrine of "doctrinal equality," individuals charged with crimes are, "regardless of alienage," protected "by the Fourth, Fifth, and Sixth Amendments in proceedings overseen by Article III judges and adjudicated by grand juries and jury trials." Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1292-93 (2010); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (aliens have constitutional protections once they enter the United States); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (observing that "even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995) (aliens within the United States are entitled to all protections under the Bill of Rights that explicitly are not restricted to citizens).[14] Furthermore, it

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[14]In *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Supreme Court declared:

> The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property

is a basic principle of statutory construction that a precisely drawn statute dealing with a specific subject controls over a statute covering a more generalized spectrum. *Brown v. Gen. Services Admin.*, 425 U.S. 820, 834-35 (1976); *see also MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling.") (citation omitted).[15]

The text of § 3142(d) is specifically formulated to address the status of aliens involved in criminal law proceedings before the district court. Its terms must therefore prevail over the more general provisions of the Immigration and Nationality Act dealing with inadmissible and/or deportable aliens. Moreover, as noted by Magistrate Judge James G. Glazebrook in *Adomako*, § 3142(d) specifically excludes consideration of other provisions of law governing aliens once its own requirements have been met:

> The government's argument skips over the very statute in which Congress reconciles the release and detention statutes with the administrative deportation statutes.

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

[15]The Supreme Court has also stated that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Moreover, when two statutes appear to be in conflict, or even if only a certain tension exists between them, the more specific statute will be deemed to govern. *NISH v. Rumsfeld*, 348 F.3d 1263, 1272 (10th Cir. 2003); *Angelica Textile Services, Inc. v. United States*, 95 Fed. Cl. 208, 222 (Fed. Cl. 2010) ("Where, as here, the statutes exist in tension, albeit not in direct conflict, the Department was entirely reasonable in concluding in its New Guidelines that the Veterans Benefits Act should have priority."); *Asquino v. FDIC*, 196 B.R. 25, 29 (D. Md. 1996) ("It is a rule of statutory construction that, in reconciling the inconsistent requirements of two separate statutes, the more general provision must yield to the more specific.").

> Congress expressly instructs this Court to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial:
>
> > If the official fails or declines to take such person into custody during that period, such person *shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.*
>
> 18 U.S.C. § 3142(d) (emphasis supplied). Congress instructs this Court to apply the normal release and detention rules to a deportable alien (i.e., "such person shall be treated in accordance with the other provisions of this section"). Aware of the existence of 8 U.S.C. § 1252(b)(9) and (g), Congress further instructs this Court to apply the normal release and detention rules without regard to the applicability of those other provisions ("notwithstanding the applicability of other provisions of law governing release pending... deportation or exclusion proceedings").
>
> This Court had no choice but to decide whether Adomako should be released or detained pending trial. This is a real decision in a real case or controversy, not a preordained, hypothetical, advisory, or inoperative decision. Adomako is not barred from release because he is a deportable alien.

150 F. Supp. 2d at 1307 (emphasis in original).

If "Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not." *Montoya-Vasquez*, 2009 WL 103596, at *5. As a matter of both due process and equal protection of the laws, Mr. Alvarez-Trujillo was and is entitled to implementation of the procedures established by Congress to govern the release of individuals charged with crimes in federal court. Magistrate Judge Acosta did *not* err in entering an Order Setting Conditions of Release for Mr. Alvarez-Trujillo. If the government's agency client (ICE) was unhappy with Magistrate Judge Acosta's order, the government could have initiated an appeal of that decision to the district court. 18 U.S.C. § 3145(a). By circumventing the appropriate procedure for review, as well as the order admitting Mr. Alvarez-Trujillo to pretrial supervision, the ICE

Respondents have not only denied him the benefits of due process and equal protection to which he is entitled, but have directly undermined the independence and authority of this District Court.

B. By Seizing Mr. Alvarez-Trujillo And Removing Him From The District Of Oregon, The ICE Respondents Have Undermined The Independence And Authority Of The District Court In Violation Of The Separation Of Powers Doctrine.

In the face of circumstances similar to those before the Court in the instant case, District Judge Rosenbaum observed:

> 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, may want 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 run interference for the prosecuting arm of the government

Barrera-Omana, 638 F. Supp. 2d at 1111-1112.

The doctrine of separation of powers – as between the executive, judicial, and legislative branches – has long been viewed as a fundamental bulwark against tyranny. *Loving v. United States*, 517 U.S. 748, 756 (1996). Separation of powers does not require that the three departments of the government be hermetically sealed off from one another, or that one department may "have no *partial agency* in, or no *controul* [sic] over the acts of each other." *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989) (quoting The Federalist No. 47, 325-326 (J. Cooke ed. 1961) (emphasis in original). Nevertheless, it "remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Thus, even when a branch does not arrogate power to itself, "the separation-of-powers doctrine

requires that a branch not impair another in the performance of its constitutional duties." *Id.*; *see also United States v. Klein*, 80 U.S. 128, 147 (1871) (Congress may not deprive a court of jurisdiction based on the outcome of a case or undo a Presidential pardon).

In its more recent separation of powers holdings the Supreme Court has taken a "pragmatic, flexible view of differentiated governmental power" that recognizes "that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" *Mistretta*, 488 U.S. at 381 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)). Notwithstanding this flexible approach, the Court has remained vigilant to prevent encroachment by one branch on the prerogatives of power reposed in other branches:

> Accordingly, as we have noted many times, the Framers "built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S., at 122, 96 S.Ct., at 684. *See also INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983).
>
> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *Ibid.* **Accordingly, we have not hesitated to strike down provisions of law that** either accrete to a single Branch powers more appropriately diffused among separate Branches or that **undermine the authority and independence of one or another coordinate Branch**.

Id. at 381-382 (emphasis added).

By seizing and transporting Mr. Alvarez-Trujillo out of the District of Oregon, the ICE Respondents appear to be attempting to intimidate the Court into refusing to comply with the dictates of the Bail Reform Act to the extent said Act requires that individual consideration be given to

defendants, irrespective of alienage, who appear before the Court charged with a violation of the immigration laws but who do not present a flight risk or danger to the community that cannot be adequately addressed by pretrial supervision conditions. This gambit should be seen for exactly what it is – a contemptuous affront to the dignity and authority of the District Court and its personnel.

A Judiciary "free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217–218 (1980). In *Northern Pipeline Const. Co. v. Marathon Pipe Line*, 458 U.S. 50, 60 (1982), the Supreme Court emphasized the need to take action to preserve the independence of the judiciary when attacked:

> In sum, our Constitution unambiguously enunciates a fundamental principle – that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

The "deliberate and flagrant disregard of a federal court order by an executive arm of the Government challenges the very separation of powers upon which our system of government is based." *Schrader v. Selective Serv. Sys. Local Bd. No. 76 of Wisconsin*, 470 F.2d 73, 78 (7th Cir. 1972) (Eschbach, J., dissenting). The "district court has *inherent* authority to impose sanctions upon those who would abuse the judicial process." *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 73 (3d Cir. 1994). As the Supreme Court made clear in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), "[i]t has long been understood that 'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" Among the inherent powers in a court's arsenal is the power to punish contempt:

> [I]t is firmly established that "[t]he power to punish for contempts is inherent in all courts." This power reaches both conduct before the court and that beyond the court's confines, for "[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial."

Id. at 44 (alterations in original) (citations omitted). In addition, the inherent powers of the district court also include issuance of writs and other injunctive relief to prevent obstruction of their lawful orders. As was noted by the court in *United States v. Wallace*, 218 F. Supp. 290, 292 (D.C. Ala. 1963), in the course of granting a temporary injunction against the Governor of Alabama from obstructing implementation of an order concerning the enrollment of African Americans in the University of Alabama:

> Too well settled in the law to admit of persuasive arguments to the contrary are the twin propositions that the courts of the United States have statutory authority under 28 U.S.C.A. 1651 as well as inherent power to enter such orders as may be necessary to effectuate their lawful decrees and to prevent interference with, and obstruction to, their implementation, and that the United States has standing to seek the injunctive relief for which it prays.

In light of the above, Mr. Alvarez-Trujillo submits that, in order to protect the integrity of its orders, and as well its authority and independence from coercive efforts on the part of the ICE Respondents to influence its implementation of the Bail Reform Act, this Court should find that, in seizing and removing him from the District of Oregon, the ICE Respondents violated the separation of powers doctrine. Mr. Alvarez-Trujillo further submits that, to rectify this unconstitutional and contemptuous conduct, this Court should exercise its injunctive powers to (1) direct the ICE Respondents to immediately release Mr. Alvarez-Trujillo and provide him with transportation back

to the District of Oregon, and (2) stay all removal proceedings involving Mr. Alvarez-Trujillo until proceedings in the instant criminal case have concluded.

C. The Seizure And Removal Of Mr. Alvarez-Trujillo From The Jurisdiction Of The District Court Was A Direct Affront To The Independence And Authority Of The District Court That Should Be Addressed And Sanctioned By A Finding Of Contempt.

In *United States v. Rylander*, 714 F.2d 996, 1001-1002 (9th Cir. 1983), the Ninth Circuit observed that a "federal court may punish, as criminal contempt of its authority, disobedience or resistance to its lawful order. Criminal contempt is established when it is shown that the defendant is aware of a clear and definite court order and willfully disobeys the order."[16] District courts may also invoke their civil contempt power in order to address violations of their lawful orders.

The distinction between civil and criminal contempt cannot turn on the nature of the act, since as the Supreme Court has pointed out, "[c]ommon sense would recognize that conduct can amount to both civil and criminal contempt." *United States v. United Mine Workers*, 330 U.S. 258, 298-99 (1947). Rather, what constitutes a civil as opposed to a criminal contempt proceeding is determined by the nature of the sanction imposed and/or the relief sought:

> Contempt is "criminal" if its purpose is to punish the contemnor, vindicate the court's authority, or deter future conduct. In contrast, civil contempt proceedings may be classified into two categories-coercive or remedial. Sanctions for civil contempt are designed either to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy. Coercive sanctions seek to induce future behavior by attempting to coerce a recalcitrant party or witness to comply with an express court directive. "Remedial sanctions, by contrast, are backward-looking and seek to compensate an

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[16] *See* 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.").

> aggrieved party for losses sustained as a result of the contemnor's disobedience." "A monetary penalty for a wrong committed in federal court is civil in nature, if the payment is designed to compensate for harm done."

United States v. Dowell, 257 F.3d 694, 699 (7th Cir. 2001) (citations omitted).

Agencies of the federal government's executive branch are not immune from judicial orders that are necessary to enforce judicial decisions. *See, e.g., Save Our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 2d 292, 309 (D. R.I. 1974) ("This Court certainly has the power to enjoin proposed federal action until the delinquent agency complies with the procedural mandates of the Act . . .."). Similarly, agents of the Bureau of Immigration and Customs Enforcement may be held in contempt for actions that frustrate or violate court orders. *Cf. Przhebelskaya v. U.S. Bureau of Citizenship and Immigration*, 338 F.Supp.2d 399, 406 (E.D. N.Y. 2004) ("Because the relief sought by plaintiffs' motion for contempt is the same as that sought by their motion to compel, the court declines to reach the issue of whether the Agency's noncompliance with the September 24, 2003 Order rises to the level of contempt. Plaintiffs may, however, renew their motion for contempt should defendants fail to comply with this Order.").

Here, Mr. Alvarez-Trujillo moves the Court to issue an Order to Show re Contempt to the ICE Respondents directing them to show cause why they should not be cited for contempt in light of the seizure and removal of Mr. Alvarez-Trujillo from the District of Oregon in frustration and contravention of the Order Setting Conditions of Release. Although Director Morton may not have played any direct role in this activity, he is subject to a civil contempt citation in his role as the employer of Special Agent Claypool. *Cf. Commodity Futures Trading Comm'n v. Premex, Inc.*, 655

F.2d 779, 784 n.10 (7th Cir. 1981).[17] Moreover, even if the acts of the ICE Respondents are ultimately determined not to have been willful, such does not defeat this Court's power to find those acts contemptuous. Violations of a court order need not be willful to constitute civil contempt. *Id.* at 784 n.9.[18]

1. Request For Certification Of Facts By Magistrate Judge Acosta.

Although Magistrate Judge Acosta's Order Setting Conditions of Release may properly be viewed as an order of this District Court such that its violation is a contempt against the Court itself, Magistrate Judge Acosta also has authority to issue a citation of contempt for the thwarting of his

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[17]In *Premex*, the Seventh Circuit upheld a civil contempt citation that had been issued against a corporation and its president based on the conduct of an employee noting that "[u]nder common law principles of respondeat superior, a principal is liable for the deceit of its agent, if committed in the very business the agent was appointed to carry out. This is true even though the agent's specific conduct was carried out without the knowledge of the principal." *Id.* at 784 n.10.

[18]As the court noted in *In re Snider Farms, Inc.*,

> Since civil contempt serves a remedial purpose by either coercing a respondent into compliance with the Court's Order or compensating the complainant for losses sustained, **willfulness of the offending party need not be shown for a finding of contempt; it is sufficient that the Court order violated is specific and definite and that the offending party has knowledge of the Court's order.**

125 B.R. 993, 997 (Bankr. N.D. Ind. 1991) (emphasis added). Special Agent Claypool was in the courtroom when Magistrate Judge Acosta entered the Order Setting Conditions Of Release. Under the "rule of imputation" ICE Director Morton is imputed to have the same knowledge of the Order as was acquired by his agent, Special Agent Claypool. *See, e.g., Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 773 (4th Cir. 1995) ("[u]nder the rule of imputation the principal is chargeable with the knowledge the agent has acquired, whether the agent communicates it or not"); *see also In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 796 (E.D. N.Y. 1984) ("Under principles of agency law, knowledge in the possession of an agent – here a government employee – who has a duty to transmit or receive the information is knowledge in the possession of the principal – here the United States or an appropriate agency.").

lawful order. In accordance with 28 U.S.C. § 636(e), a "United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection." In matters where the Magistrate Judge does not sit pursuant to the consent of the parties, subsection (e)(6) provides as follows:

> (e)(6) Certification of other contempts to the district court.–Upon the commission of any such act–
>
> (A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or
>
> (B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where–
>
> > (I) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,
> >
> > (ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or
> >
> > (iii) the act constitutes a civil contempt,
>
> the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

In light of the provisions of subsection (e)(6)(B), Defendant Alvarez-Trujillo submits that this Court may wish to request review of the instant motion by Magistrate Judge Acosta. In the event of such review, Defendant Alvarez-Trujillo requests that Magistrate Judge Acosta certify the facts set forth in Defendant's Motion, and in the Statement of Fact hereinbefore set forth, to the District Court (District Judge Simon), and that Magistrate Judge Acosta issue an order requiring the ICE Respondents to appear on a day certain to show cause before District Judge Simon as to why they should not be adjudged in contempt by reason of the facts so certified.

CONCLUSION

Those who wield great power should be held to high standards of fairness and justice. The cowardly actions of the ICE Respondents in this case deserve to be condemned. When executive branch agencies act so as to thwart lawful court orders, while ignoring processes otherwise available for review of any complaints those agencies might have with respect to such orders, the rule of law is imperiled. This Court must act to protect its Constitutionally based independence and authority. Failure to act will only embolden renegade Executive Branch agencies to conduct further inroads on the tripartite system of shared powers the Founders so carefully crafted.

Respectfully submitted this September 24, 2012.

/s/ Christopher J. Schatz
Christopher J. Schatz
Assistant Federal Public Defender

Emily Seltzer
Legal Research Assistant

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900 F.Supp.2d 1167 (D.Or. 2012)

law. To the extent Pulse's motion in limine is an attempt to move for summary judgment on the issue of the adequacy of notice, it is untimely and the Court will not consider it. Therefore, the Court will not preclude Hansen from opining the damages period began in 2002 at this time.

E. Reference to Pulse's Total Worldwide Sales of the Accused Products

[6] Finally, Pulse contends that Hansen and Halo should be precluded from referring to Pulse's total worldwide sales of the accused products. Pulse argues even if Hansen's 30% royalty base is admitted, only the sales figures for the accused products that ultimately ended up in the U.S. are relevant. Halo argues the worldwide sales figures are relevant to calculate damages for induced infringement, for 2 factors in the royalty rate analysis, and for other non-damages issues.

Halo has shown Pulse's total worldwide sales figures for the accused products are relevant. To calculate Halo's infringement damages, Hansen applied his royalty base to Pulse's total worldwide sales figures, and then he applied his reasonable royalty rate to the resulting figure. (Hansen Report at 41–42.) Therefore, the worldwide sales figures are relevant to the damages analysis. Pulse's worldwide sales figures are likewise relevant to the royalty rate analysis. Factor 6 considers whether the patented technology promotes the sale of other products, for either the patentee or licensee. *Georgia–Pacific*, 318 F.Supp. at 1120. Therefore, the extent of Pulse's worldwide sales of the accused products is relevant to determining its effect on the sale of Pulse's other products internationally. (Hansen Report at 20–21.) Factor 8 considers, among other things, the commercial success of the product, and the worldwide sales figures are relevant to that determination as well. (Hansen Report at 22); *Georgia–Pacific*, 318 F.Supp. at 1120.

Finally, Pulse's worldwide sales figures may be relevant to non-damages issues. Specifically, Halo has shown the worldwide sales figures are probative of the patented products' commercial success, a factor relevant to analyzing the obviousness of the patented products. *See Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1380 (Fed. Cir.2012) (finding the patentee's worldwide sales of the patented products relevant to the commercial success analysis); *Gambro Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573, 1579 (Fed.Cir.1997) (finding the accused infringer's sales relevant to the commercial success analysis). Therefore, the Court will not exclude reference to Pulse's worldwide sales figures for the accused products.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendants Pulse Electronics, Inc., and Pulse Electronics Corporation's Daubert Motion/Motion in Limine No. 1 to Preclude Certain of Plaintiff's Expert Opinions (Doc. # 338) is hereby **DENIED.**

UNITED STATES of America

v.

Enrique TRUJILLO–ALVAREZ, Defendant.

Case No. 3:12–CR–00469–SI.

United States District Court,
D. Oregon,
Portland Division.

Oct. 29, 2012.

Background: Defendant who was charged with illegal reentry moved for an order to

show cause why Bureau of Immigration and Customs Enforcement (ICE) should not be found in contempt of court for keeping him in custody despite a court order granting pre-trial release.

Holding: The District Court, Simon, J., held that the Executive Branch had the option either to release defendant pending trial or to abandon criminal prosecution and proceed directly with removal.

Motion granted in part and denied in part.

1. Bail ⇐42

When the Executive Branch decides that it will defer removal and deportation of an alien in favor of first proceeding with federal criminal prosecution, then all applicable laws governing such prosecutions must be followed, including the Bail Reform Act (BRA); in such cases, if a judicial officer determines under the BRA that a particular defendant must be released pending trial because that defendant does not present a risk of either flight or harm, and the government has chosen not to appeal that determination, the Executive Branch may no longer keep that person in physical custody. 18 U.S.C.A. § 3141 et seq.

2. Aliens, Immigration, and Citizenship ⇐462

Criminal Law ⇐303.30(1)

After magistrate judge determined that defendant who was charged with illegal reentry did not present risk of flight or danger to community if released, and ordered pursuant to Bail Reform Act that defendant be released pending trial, the Executive Branch, which held defendant in Bureau of Immigration and Customs Enforcement (ICE) custody on an ICE detainer, had the option either to release defendant pending trial as directed by magistrate judge, or to abandon criminal prosecution and proceed directly with defendant's removal and deportation, and thus, if Executive Branch did not promptly return defendant to district in which he was charged and release him subject to conditions previously determined by magistrate judge, the district court would dismiss the criminal charges with prejudice. 18 U.S.C.A. § 3142; 8 C.F.R. § 287.7(a).

3. Bail ⇐42

Persons who are not citizens of the United States must be treated under the Bail Reform Act like all other persons charged with an offense. 18 U.S.C.A. § 3142(g).

4. Aliens, Immigration, and Citizenship ⇐469

Defendant who was charged with illegal reentry and ordered by magistrate judge under Bail Reform Act to be released pending trial with pre-trial release conditions was "confined," for purposes of the Immigration and Nationality Act (INA) provision under which the 90-day period within which the Executive Branch had to remove an alien who was subject to a removal order did not begin to run until the alien was released from detention or confinement, because the defendant was subject to restraints not shared by the public generally that significantly confined and restrained his freedom, and thus, since the 90–day removal period had not yet commenced, there was no legal requirement that Bureau of Immigration and Customs Enforcement (ICE) detain the defendant in order to remove and deport him. Immigration and Nationality Act, § 241, 8 U.S.C.A. § 1231; 18 U.S.C.A. § 3142.

5. Bail ⇐49(4)

When a defendant facing criminal charges is subject to a Bureau of Immigration and Customs Enforcement (ICE) detainer, the existence of the ICE detainer and the possibility that the person may be removed or deported by ICE before trial is not sufficient under the Bail Reform Act (BRA) to satisfy the government's burden

of showing that there are no conditions that will reasonably assure the appearance of the defendant at trial. 18 U.S.C.A. § 3142; 8 C.F.R. § 287.7(a).

6. Federal Courts ⇐3.1

A district court has inherent supervisory powers over its processes and those who appear before it; these supervisory powers include, but are not limited to, the ability to implement a remedy for a violation of recognized rights.

7. Criminal Law ⇐303.30(1)

Dismissal of criminal charges is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available.

S. Amanda Marshall, United States Attorney, Gregory R. Nyhus and Ryan W. Bounds, Assistant United States Attorneys, Portland, OR, for United States of America.

Christopher J. Schatz, Assistant Federal Public Defender, Portland, OR, for Defendant.

OPINION AND ORDER

SIMON, District Judge.

This case requires the Court to reconcile the Bail Reform Act of 1984 ("BRA"), as amended, 18 U.S.C. § 3141, *et seq.*, with the Immigration and Nationality Act of 1965 ("INA"), 8 U.S.C. § 1101, *et seq.* A reconciliation is necessary because a tension has emerged in the application of these two laws by two separate departments within the Executive Branch, the U.S. Department of Justice and the U.S. Department of Homeland Security.

The Office of the U.S. Attorney, which is part of the U.S. Department of Justice, is the government's primary agency responsible for the prosecution of federal offenses.[1] In the BRA, Congress established a comprehensive set of rules and procedures for determining when, and under what conditions, a person charged with a federal offense must be released from custody while awaiting trial. The Bureau of Immigration and Customs Enforcement ("ICE"), which is part of the U.S. Department of Homeland Security, is the government's primary agency responsible for the removal and deportation of aliens who have no lawful right to be in the United States.[2]

When an alien who has no lawful right to be in the United States is found in this country, ICE may remove and deport that person under the authority of the INA. Alternatively, if such an alien is believed to have committed a federal offense, including illegal reentry, ICE may choose to postpone the removal and deportation of that person while the U.S. Attorney's Office brings a criminal prosecution.[3] Which

1. The term "offense" means "any criminal offense ... which is in violation of an Act of Congress and is triable in any court established by Act of Congress." 18 U.S.C. § 3156(a)(2).

2. The duties performed by ICE were previously undertaken by the Immigration and Naturalization Service ("INS") within the U.S. Department of Justice. The Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135, created both the U.S. Department of Homeland Security and the cabinet-level position of Secretary of Homeland Security. ICE was created under the authority of the Homeland Security Act and now ultimately reports to the Secretary for Homeland Security. The INS ceased to exist under that name in 2003 when most of its functions were transferred to the Department of Homeland Security.

3. ICE may also choose to postpone removal and deportation while state or local criminal prosecution occurs, but that is not at issue in this case.

pathway to take in any given case is a policy decision, and it is for the Executive Branch to determine.

[1] When the Executive Branch decides that it will defer removal and deportation in favor of first proceeding with federal criminal prosecution, then all applicable laws governing such prosecutions must be followed, including the BRA. In such cases, if a judicial officer [4] determines under the BRA that a particular defendant must be released pending trial because that defendant does not present a risk of either flight or harm, and the government has chosen not to appeal that determination, the Executive Branch may no longer keep that person in physical custody. To do so would be a violation of the BRA and the court's order of pretrial release.

In this case, the Defendant is alleged to be an alien and citizen of Mexico with no lawful right to be in the United States. He has been charged with the crime of illegal reentry. He also has longstanding ties to and connections with the local community. He has lived with his wife in the local area for more than 15 years, and they have three minor children who are all U.S. citizens. He also has a history of stable employment in the area and is not accused of a crime of violence. For these reasons, a United States Magistrate Judge determined under the BRA that the Defendant does not present a risk of flight or any danger to any person or to the community if released while awaiting his upcoming trial. Under the BRA, the Magistrate Judge ordered that the Defendant be released pending trial, subject only to those specific conditions imposed by the Magistrate Judge. If the Executive Branch chooses not to release the Defendant and instead decides to abandon criminal prosecution of the pending charge and proceed directly with Defendant's removal and deportation, the law allows the Executive Branch to do that. If, however, the Defendant is not released pending trial as directed by the Magistrate Judge pursuant to the BRA, the pending criminal prosecution of the Defendant may not go forward. To hold otherwise would deprive the Defendant of his statutory right to pretrial release under the Bail Reform Act and possibly even deprive the Defendant of his Fifth Amendment and Sixth Amendment rights to due process and effective assistance of counsel, respectively.

As explained more fully below, the Executive Branch will be provided with a reasonable, albeit limited, time in which to make this decision. The Executive Branch has one calendar week from the date of this Opinion and Order to return the Defendant to the District of Oregon and release him subject to the conditions previously determined by the Magistrate Judge. If that does not occur, the criminal charge now pending against the Defendant will be dismissed with prejudice.

I. FACTUAL BACKGROUND

Enrique Alvarez–Trujillo [5] is 46–year–old male of Hispanic heritage. He has lived in the Portland metropolitan area for

4. The term "judicial officer" is defined in 18 U.S.C. § 3156(a)(1) and includes, among others, any Justice or Judge of the United States and any United States Magistrate Judge.

5. Although charged as "Enrique Trujillo–Alvarez," Defendant's counsel represents that Defendant's true and correct name is "Enrique Alvarez–Trujillo." Many of the background facts describing Mr. Alvarez–Trujillo are taken from his counsel's representations to the Court, without objection from the government for the purposes of the pending motions. Other background facts come from the testimony and exhibits received during the evidentiary hearing held on October 10, 2012, in connection with the pending motions. Doc. 22. Citations to the official court transcript from that hearing appear in this Opinion and Order as "Tr."

the last 18 years. He has a home, where he and his wife, with whom he has been living for the past 15 years, are raising their three children, all of whom are U.S. citizens. He is employed in several jobs. His primary employer reports that Mr. Alvarez–Trujillo is a "very good and loyal employee." Another employer states that Mr. Alvarez–Trujillo is an "excellent worker." In May 2012, Mr. Alzarez–Trujillo's youngest daughter, who was then eight years old, became seriously ill with encephalitis and was hospitalized for approximately two months. During her hospital stay, Mr. Alvarez–Trujillo was with his daughter "the whole time she was in the hospital." He is the sole financial support for his family. Mr. Alvarez–Trujillo does not use drugs and last consumed alcohol more than eight years ago.

While in his twenties, Mr. Alvarez–Trujillo had some problems with the criminal law. He was convicted of a drug trafficking offense in California in 1989. On September 17, 1993, he was deported from the United States as an alien and citizen of Mexico pursuant to an Order of Deportation.

On August 8, 2012, Mr. Alvarez–Trujillo was arrested in the Portland area for driving with a suspended driver license.[6] He was booked and released. As a result of this contact with local law enforcement, Mr. Alvarez–Trujillo came to the attention of ICE. On August 27, 2012, an ICE agent arrested Mr. Alvarez–Trujillo and placed him under ICE custody. ICE then served Mr. Alvarez–Trujillo with a Notice of Intent/Decision to Reinstate Prior Order (Form I–871) and advised him of his rights. Mr. Alvarez–Trujillo declined to make a statement. After concluding that Mr. Alvarez–Trujillo was an alien subject to removal, an ICE officer reinstated Mr. Alvarez–Trujillo's 1993 Order of Deportation, in accordance with Section 241(a)(5) of the INA, 8 U.S.C. § 1231(a)(5).

Also on August 27, 2012, an ICE Deportation Officer, following prosecution guidelines developed by the U.S. Attorney's Office, presented the case against Mr. Alvarez–Trujillo to the U.S. Attorney's Office for criminal prosecution. On September 4, that same ICE Deportation Officer caused an Immigration Detainer—Notice of Action (an "ICE detainer") to be lodged against Mr. Alvarez–Trujillo. Under this ICE detainer, the U.S. Department of Homeland Security informed the U.S. Marshals Service in Portland that ICE had "[o]btained an order of deportation or removal from the United States" for Mr. Alvarez–Trujillo. The ICE Deportation Officer explained that such an immigration detainer is filed in every case submitted to the U.S. Attorney's Office for prosecution "[i]n order to ensure that the alien returns to ICE custody at the end of their proceedings...." Tr. 42.

An indictment against Mr. Alvarez–Trujillo was returned by the grand jury in the District of Oregon on September 5, 2012, and was filed with the District Court on September 6. Doc. 1. The indictment charges one count of illegal reentry in violation of 8 U.S.C. § 1326(a). *Id.* On September 7, ICE transported Mr. Alvarez–Trujillo to the U.S. District Court in Portland and turned him over to the U.S. Marshals Service. Later that day, Mr. Alvarez–Trujillo was brought before United States Magistrate Judge Paul Papak for arraignment on the indictment. Mr. Alvarez–Trujillo entered a plea of not guilty, and the court set a trial date of

6. In 2008, the Oregon Legislature amended the state law governing Oregon driver licenses; under the new law, "proof of legal presence in the United States" was required to obtain either an initial license or a renewal of a previously-issued license. Or.Rev.Stat. § 807.021.

November 13, 2012, in Portland. Doc. 6. During his arraignment, Mr. Alvarez–Trujillo, through his court-appointed counsel, requested that he be allowed an opportunity to prepare for a detention/release hearing. Judge Papak granted that request.

On September 11, 2012, Mr. Alvarez–Trujillo appeared before United States Magistrate Judge John Acosta for a detention/release hearing. The ICE Deportation Officer, serving as the government's case agent, sat at counsel table next to the Assistant United States Attorney. At the conclusion of the detention/release hearing, Judge Acosta stated, among other things, that:

> The Pretrial Services Report reflects a background, putting aside the ICE detainer, that we often see when considering detention or release of an individual defendant. Ties to the community, family members present for an extended period of time, the individual present for an extended period of time, he has stable employment history, and he has at least two other non-family members who have come forward to talk on his behalf with respect to his personal characteristics, both of whom are decidedly favorable in that regard. I do not see, and I do not, Mr. [Assistant United States Attorney] Nyhus correct me if I'm wrong, I don't hear the government arguing that Mr. Alvarez–Trujillo is a danger to the community if released. The government's question was more to the risk of flight. I find on this record that the government hasn't met its burden that he is a flight risk if released. Whether or not ICE picks him up once he is released, that's up to ICE and that's not within my control. If there is a valid detainer or deportation order that's out there and ICE can execute it, Mr. Alvarez–Trujillo will have to deal with that in a different forum, but that's not for this Court to decide one way or the other. On this record, I think the defendant is releaseable and I'm going to order his release.

Doc. 14–1, at Ex. A, p. 2. Judge Acosta then signed an Order Setting Conditions of Release, Doc. 10, which included as conditions of pretrial release that Mr. Alvarez–Trujillo report as directed by the U.S. Pretrial Services Office and that he limit his travel to Multnomah County, Washington County, and Clackamas County, Oregon, unless he receives prior approval from U.S. Pretrial Services. The government, through its Assistant United States Attorney, moved Judge Acosta to stay the execution of his order pending review. Judge Acosta denied that motion. Doc. 14–1, at Ex. A, p. 3. The government did not seek review by an Article III judge of the release order issued by Judge Acosta or otherwise appeal Judge Acosta's decision.

On September 12, 2012, ICE agents took Mr. Alvarez–Trujillo into custody under the previously lodged ICE detainer. ICE then removed Mr. Alvarez–Trujillo from the District of Oregon and transported him to the ICE Northwest Regional Immigration Detention Center in Tacoma, Washington. An Assistant Field Office Director with ICE Enforcement and Removal Operations testified that ICE has the discretion whether to execute on such a detainer. Tr. 66.

On September 24, 2012, Mr. Alvarez–Trujillo moved for an order to show cause why ICE should not be found in contempt of court; Mr. Alvarez–Trujillo also moved for certification of facts to the district court by the magistrate judge and for other relief as appropriate. Doc. 13. This Court set a hearing on Defendant's motion for October 10, 2012. On September 28, 2012, Mr. Alvarez–Trujillo moved for a stay of his removal proceeding and for an order directing ICE to transport him to the District of Oregon to attend the hearing set for October 10, 2012. Doc. 17. On

October 3, 2012, the government filed its responses to Defendant's two motions.

On October 10, 2012, this Court held a hearing on Defendant's motions. The Court had not yet ruled on Defendant's motion for an order directing ICE to transport Mr. Alvarez–Trujillo back to the District of Oregon for purposes of attending the October 10th hearing, and he was not present during that hearing. The two witnesses from ICE who testified during the hearing were the ICE Deportation Officer and the Assistant Field Office Director with ICE Enforcement and Removal Operations, referred to above. Doc. 22. In addition, several exhibits were received. *Id.* At the conclusion of the hearing, the Court requested supplemental briefing, which was received on October 17 and 18, 2012.

II. DISCUSSION

A. The Bail Reform Act of 1984, as Amended

The Eighth Amendment to the U.S. Constitution states, in relevant part: "Excessive bail shall not be required...." In enacting the Bail Reform Act of 1966, Congress declared:

> The purpose of this Act is to revise the practices relating to bail to assure that *all persons*, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, *when detention serves neither the ends of justice nor the public interest.*

Pub. L. 89–465 (emphasis added). In 1984, the Bail Reform Act was again revised, and it has since been amended even further. But these underlying principles, tracing their roots back to 1791 and beyond, still guide the law.

Under the BRA, Congress has determined that any person charged with an offense under the federal criminal laws *shall* be released pending trial: (a) on personal recognizance; (b) upon execution of an unsecured appearance bond; or (c) on a condition or combination of conditions, *unless* a "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 and the community." 18 U.S.C. § 3142(e)(1); *see also* 18 U.S.C. § 3142(a), (b). *See generally United States v. Salerno,* 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (upholding Bail Reform Act of 1984 and noting that it "authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel"); *United States v. Sabhnani,* 493 F.3d 63, 75 (2d Cir.2007) (the Bail Reform Act requires a court to order the pretrial release of a defendant on personal recognizance or an unsecured appearance bond "unless the [court] determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community") (quoting 18 U.S.C. § 3142(b)).

[2] The government does not argue that Mr. Alvarez–Trujillo presents any danger to the safety of any other person or to the community. In addition, although the existence of an ICE detainer may be considered as a factor in assessing the risk that a particular defendant will flee, *United States v. Chavez–Rivas,* 536 F.Supp.2d 962, 964 n. 3 (E.D.Wis.2008), Judge Acosta determined that based on Mr. Alvarez–Trujillo's longstanding ties to the community and other related factors, he did not pose a risk of voluntary flight pending trial if released on the condition that he be subject to supervision by U.S. Pretrial Services in the District of Oregon. As stated

above, the government did not seek review of that determination.

In promulgating the BRA, "Congress chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings." *United States v. Adomako,* 150 F.Supp.2d 1302, 1304 (M.D.Fla.2001). In fact, the BRA expressly refers to persons who are not citizens of the United States in only one portion of the BRA. Section 3142(d) provides, in relevant part, that if the judicial officer determines that a person is not a citizen of the United States *and* "such person may flee or pose a danger to any other person or the community," then the judicial officer shall order the *temporary* detention of such person in order for the attorney for the government to notify the "the appropriate official of the Immigration and Naturalization Service." 18 U.S.C. § 3142(d).

[3] There is nothing else in the BRA that places any special or additional conditions on persons who are not citizens or who are awaiting trial on charges of illegal reentry. In fact, 18 U.S.C. § 3142(g) expressly lists the factors that a court should consider when determining whether a particular defendant should be released under pretrial supervision or confined pending trial, and alien status is not a listed factor. Thus, persons who are not citizens must be treated under the BRA like all other persons charged with an offense, which is precisely what Judge Acosta did.

B. The Immigration and Nationality Act, as Amended

The Immigration and Nationality Act of 1965, as amended, 8 U.S.C. § 1101, *et seq.* ("INA"), contains the basic body of immigration law in the United States. Among other things, the INA charges the U.S. Secretary of Homeland Security with "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, [or] Attorney General,...." 8 U.S.C. § 1103(a)(1). Section 241 of the INA also expressly provides for the detention and removal of aliens who are ordered removed. 8 U.S.C. § 1231.

[4] When an alien is subject to a removal order, the INA provides that the Executive Branch "shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). This is referred to as the "removal period." *Id.* In this case, however, the 90–day removal period has not yet commenced.

The removal period only begins to run on the *latest* of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) *If the alien is detained or confined* (except under an immigration process), *the date the alien is released from detention or confinement.*

8 U.S.C. § 1231(a)(1)(B) (emphasis added). Although the statutory phrase "released from detention or confinement" is not defined, in the context of the entirety of Section 1231 the most reasonable interpretation of that phrase is that it refers to release from incarceration pursuant to a final judgment of conviction as entered by a court of competent jurisdiction. *See, e.g.,* 8 U.S.C. § 1231(a)(4)(A) ("Except as provided in section 259(a) of title 42 and paragraph (2), the Attorney General [now, the Secretary of Homeland Security] may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, [post-conviction] supervised release, probation, or pos-

sibility of arrest or further imprisonment is not a reason to defer removal."); *see also United States v. Rembao–Renteria*, No. 07–mj–399 (JNE/ABJ), 2007 WL 2908137, at *3 (D.Minn. Oct. 2, 2007) ("Parole, supervised release, probation, and the possibility of being imprisoned *again* all assume a conviction. The Court does not read this list to include conditions placed on a defendant who has been charged but not convicted.").

In addition, a person who has been released subject to conditions of pretrial supervision is still "confined" because they are subject to restraints not shared by the public generally that significantly confine and restrain their freedom. *Cf. Hensley v. Mun. Ct.*, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (holding that a person is in "custody" for purposes of the habeas corpus statute when the person is subject to restraints "not shared by the public generally"); *see also United States v. Castro–Inzunza*, No. 12–30205, Dkt. 9, 2012 WL 6622075 (Order) (9th Cir. July 23, 2012) (citing *Hensley* in support of the same proposition in the context of the INA).

Thus, the 90–day removal period has not yet commenced. Accordingly, there is no legal requirement, or even any practical necessity, that ICE detain Mr. Alvarez–Trujillo in order to remove and deport him before the pending criminal proceedings can be concluded.

Moreover, even if the 90–day removal period had begun, there is still no legal requirement that ICE detain Mr. Alvarez–Trujillo. The INA provides:

> During the removal period, the Attorney General [or the Secretary of Homeland Security] shall detain the alien. Under no circumstance during the removal period shall the Attorney General [or the Secretary of Homeland Security] release an alien who has been found inadmissible under section 1227(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2). Mr. Alvarez–Trujillo is not accused of committing any of these specified crimes; the only charge that is pending against him is for illegal reentry. Thus, he is not among the category of aliens who "[u]nder no circumstance" may be released, even after the 90–day removal period begins.

C. The "ICE Detainer" Under the Regulatory Framework of the INA

The INA also provides:

> If the Attorney General [or the Secretary of Homeland Security] 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). Under the statutory authority of 8 U.S.C. § 1103(a)(3), the Executive Branch has issued certain regulations, including one that creates what is called an "ICE detainer." According to this regulation:

> Any authorized immigration officer may at any time issue a Form I–247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency. A 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, in situations when gaining immediate physical custody is either impracticable or impossible.

8 C.F.R. § 287.7(a) (emphasis added). As expressly stated in this regulation, the purpose of an ICE detainer is for "arresting and removing the alien." Thus, if the Executive Branch intends to exercise its ICE detainer for the purpose of removing and deporting Mr. Alvarez–Trujillo, it appears that it may well have the legal authority to do so. ICE does not, however, have the authority to detain Mr. Alvarez–Trujillo for the purpose of avoiding the pretrial release provisions of the BRA.

D. Reconciling the BRA and the INA

[5] The interplay between the BRA and the INA has caused both confusion and tension. In numerous cases throughout the United States, the government has argued for the retention of persons charged with illegal reentry who are the subject of an ICE detainer. In those cases, the government has argued that the existence of the ICE detainer and the possibility that the person may be removed or deported by ICE before trial is sufficient under the BRA to satisfy the government's burden of showing that there are no conditions that will reasonably assure the appearance of the defendant at trial. In addition, in the present case, the government argues that there has been no violation of the BRA because Mr. Alvarez–Trujillo is being held by ICE and not at the direction of the U.S. Attorney's Office. Both arguments are without merit.

1. The government's argument for an "ICE detainer" exception to the BRA

The government's first argument has been rejected by many courts. In *United States v. Barrera–Omana*, 638 F.Supp.2d 1108, 1111 (D.Minn.2009), District Judge James M. Rosenbaum explained,

> the government argues that any defendant encumbered by an ICE detainer must be detained pending trial or sentence. This cannot be. *See United States v. Delker*, 757 F.2d 1390, 1399 (3d Cir.1985) ("[T]he characteristics that will support pretrial detention may vary considerably in each case, and thus Congress has chosen to leave the resolution of this question . . . to the sound discretion of the court's acting on a case-by-case basis.") (quotations omitted). If the Court accepted the government's argument, Congress's carefully crafted detention plan, set forth [in the Bail Reform Act] at 18 U.S.C. § 3142, would simply be overruled by an ICE detainer. No other factor matters; neither danger to the community nor risk of flight, nor any kind of individualized consideration of a person before the Court. Each, according to the government, has been swallowed by an ICE detainer.

Id. (ellipses in original). As interpreted by Judge Rosenbaum, "[t]he risk of nonappearance" must involve "an element of [the defendant's own] volition. *Id.*

Similarly, in *United States v. Montoya–Vasquez*, No. 4:08–CR–3174, 2009 WL 103596 (D.Neb. Jan. 13, 2009), the court stated:

> Thus, I conclude 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.
>
> 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. Such a harsh result is nowhere expressed or even implied in the Bail Reform Act. Instead, the Act simply requires temporary detention and the giving of notice by the court to immigration officials so they can investigate and determine whether they wish to pursue filing a detainer against the alien defendant. 18 U.S.C. § 3142(d)(1)(B). If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not.

Further, had Congress barred aliens against whom immigration detainers are filed from eligibility for release on conditions, such action would raise serious Constitutional issues, not the least of which would be claims of excessive bail, violation of equal protection of the laws, and violation of the separation of powers. I conclude that the risk of removal by ICE, if cognizable at all under the Act, cannot be determinative of the question of a defendant's eligibility for release.

Montoya-Vasquez, 2009 WL 103596, at *5; *see also Rembao-Renteria*, 2007 WL 2908137, at *3 ("the certainty of deportation does not translate into certainty of flight").

In *United States v. Marinez-Patino*, No. 11-CR-64, 2011 WL 902466 (N.D.Ill. Mar. 14, 2011), the court determined that the defendant qualified for release under pretrial supervision notwithstanding that, before turning the defendant over to the United States Attorney for prosecution, ICE administratively reinstated a previously-issued removal order against the defendant. The court rejected the government's argument that the ICE detainer should preclude the defendant's release because ICE could deport the defendant before trial. According to the magistrate judge in that case:

> . . . Section 215.3(g) represents ICE's determination that, when a party to a pending criminal case exits the country without the prosecuting authority's consent, his absence is prejudicial to the interests of the United States. Indeed, when ICE took custody of the defendant in December, ICE could have deported him in the first instance. *See* 8 U.S.C. § 1231(a)(5) (if the Attorney General finds that an alien has reentered the United States illegally after having been removed under an order of removal "the alien shall be removed under the prior order at any time after entry"). ICE did not do so, but instead held the defendant so that the United States Attorney's Office could exercise its discretion to prosecute the defendant. By delivering the defendant to the United States Attorney's Office in this case, rather than simply deporting him immediately, ICE yielded to the judgment of the prosecutorial arm of the Executive Branch that the public's interest in criminally prosecuting the defendant was greater than the public's interest in swiftly deporting him.
>
> Defendant's prosecution is thus the result of both the United States Attorney's Office and ICE—two Executive Branch agencies—exercising their discretion in a coordinated effort to serve the public interest as they see it. To argue now, as the government does, that ICE's interest in deporting the defendant would suddenly trump the United States Attorney's interest in prosecuting the defendant ignores the cooperation (and exercise of discretion) that brought the defendant before this Court in the first place. It also presumes that ICE would immediately remove a defendant retained on bond and thus frustrate his criminal prosecution, when ICE itself has found that the departure of a defendant to a pending criminal proceeding is

prejudicial to the interests of the United States.

Marinez–Patino, 2011 WL 902466, at *7. The same analysis applies in the case of Mr. Alvarez–Trujillo.

The issue of whether a defendant's anticipated deportation by ICE under a reinstated removal order on its own justified detention under the BRA was recently presented before the Ninth Circuit in *United States v. Castro–Inzunza.* In an unpublished Order, the Ninth Court held that a reinstated removal order did not, on its own, justify detention under the BRA. In that *per curiam* Order, the panel wrote:

> The district court erred in finding that the government met its burden of showing, by a preponderance of the evidence, that "no condition or combination of conditions will reasonably assure the [defendant's] appearance." *See* 18 U.S.C. § 3142(e), (g); *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985). The government has failed to meet its burden to show that the removal period of 8 U.S.C. § 1231(a)(1)(A) will begin while defendant is "in custody" on pretrial release, subject to restraints not shared by the public generally that significantly confine and restrain his freedom. *See* 8 U.S.C. § 1231(a)(1)(B); *cf. Hensley v. Mun. Ct.*, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973). Indeed, the government has not shown that defendant's trial, currently set for August 14, 2012, cannot be completed prior to the expiration of the removal period of 8 U.S.C. § 1231(a)(1)(A).
>
> The government also has failed to meet its burden to show that the district court may not assure defendant's appearance at trial by, for example, requiring the surrender of his passport and any other travel documents; enjoining him from obtaining or using any new travel documents; or enjoining the government from interfering with his ability to appear at trial. Additionally, the government has not shown that it lacks the ability to stay or defer defendant's removal through a stay or departure control order if it believes that his removal before trial would be contrary to public interest.
>
> Accordingly, the district court's detention order is reversed. This case is remanded to the district court to establish appropriate conditions of release, including a stay of the removal period.

Castro–Inzunza, No. 12–30205, Dkt. 9 (9th Cir. July 23, 2012), at *2–3.

2. The Executive Branch's prioritizing criminal prosecution over removal

The government also argues in this case that "[t]he Ninth Circuit [in *Castro–Inzunza*] properly concluded that [the ICE detainer] did not [by itself justify detention under the BRA], but the court of appeals said nothing about ICE's ability to take the defendant back into administrative custody." Govt.'s Am. Supplemental Mem. of Law, at 8 (Doc. 24). The government may be correct that ICE retains the ability to take Mr. Alvarez–Trujillo back into administrative custody—for the purpose of deporting him—but nothing permits ICE (or any other part of the Executive Branch) to disregard the congressionally-mandated provisions of the BRA by keeping a person in detention for the purpose of delivering him to trial when the BRA itself does not authorize such pretrial detention.

Two other regulations issued under the authority of the INA are relevant here. The first provides: "No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of § 215.3." 8 C.F.R. § 215.2(a). The second states that the

departure from the United States of any alien shall be "deemed prejudicial to the interests of the United States" if, among other reasons, the alien is a party to "any criminal case . . . pending in a court in the United States." 8 C.F.R. § 215.3(g). Thus, under existing INA regulations no alien shall depart from the United States while that alien is a defendant in a criminal case pending in a court in the United States.[7] In this fashion, the Executive Branch by regulation has made the determination that a criminal proceeding takes priority over removal and deportation. This is also fully consistent with the statutory provisions of the INA. *See, e.g.*, 8 U.S.C. § 1231(a)(1)(B)(iii) (the 90–day removal period will not begin to run until, "[i]f the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement").

In addition, in the BRA itself Congress explained how to reconcile the release and detention provisions of that statute with the administrative deportation provisions of the INA. Under the BRA, if a judicial officer determines both that a person is not a citizen of the United States *and* that "such person may flee or pose a danger to any other person or the community," the judicial officer shall order the temporary detention of such a person for the purpose of allowing the government to notify "the appropriate official of the Immigration and Naturalization Service." 18 U.S.C. § 3142(d), especially § 3142(d)(2). The BRA continues: "If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings." 18 U.S.C. § 3142(d). In this case, the judicial officer determined that Mr. Alvarez–Trujillo does not present either a risk that he may flee or a danger to any other person or the community. Thus, there is no statutory basis under the BRA for him to be further detained by ICE. Finally, it bears repeating: "If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not." *Montoya–Vasquez*, 2009 WL 103596, at *5.

Accordingly, the Executive Branch has a choice to make. It may take an alien into custody for the purpose of removing or deporting that individual or it may temporarily decline to do so while criminal proceedings are maintained against that person. If ICE takes custody of Mr. Alvarez–Trujillo for the purpose of removing or deporting him, there is little (and probably nothing) that this Court can do about that, which is precisely what Magistrate Judge Acosta stated on the record. If, however, ICE declines to take custody of Mr. Alvarez–Trujillo for the purpose of removing or deporting him, then, as Congress plainly declared in the BRA, such a person shall be treated "in accordance with the other provisions" of that law, which require his pretrial release subject to the conditions imposed by Judge Acosta. What neither ICE nor any other part of the Executive Branch may do, however, is hold someone in detention for the purpose of securing his appearance at a criminal trial without satisfying the requirements of the BRA.

E. Remedy

Because the Executive Branch has a choice of whether to deport Mr. Alvarez–Trujillo or have him stand trial on the criminal charge of illegal reentry that is pending against him, it does not yet appear to this Court that any member of the Executive Branch has violated any court

7. There are certain exceptions, but they are not relevant to the pending motions.

order. Thus, Defendant's request for a finding of contempt is unwarranted. There is also not need for the magistrate judge to certify any facts. Further, because ICE may proceed with the removal of Mr. Alvarez–Trujillo from the United States under the INA, this Court will not order a stay of removal proceedings and will not order that Mr. Alvarez–Trujillo be brought back to this district on Defendant's pending motion. Accordingly, those motions are denied to the extent they seek such relief.

This does not mean, however, that this Court is powerless to prevent the Executive Branch from ignoring its obligations under the BRA. As stated by District Judge Rosenbaum in the *Barrera–Omana* case:

> The problem here is not that defendant will absent himself from the jurisdiction, but that two Article II [Executive Branch] 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, may want 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 run interference for the prosecuting arm of the government.

Barrera–Omana, 638 F.Supp.2d at 1111–12.

As noted above, Mr. Alvarez–Trujillo's trial is currently scheduled for November 13, 2012, in Portland. He has been kept by ICE in Tacoma, Washington, and out of the District of Oregon for more than one month. Not only has this deprived Mr. Alvarez–Trujillo of the comfort and support of his family and friends, it has deprived him and his court-appointed counsel of the ability to meet and work together to prepare for his defense at trial without undue inconvenience or hardship, thereby jeopardizing not only his statutory rights under the BRA, but also his rights under the Fifth, Sixth, and Eighth Amendments and under basic principles of fundamental fairness.

[6, 7] A district court has inherent supervisory powers over its processes and those who appear before it. *See generally United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). These supervisory powers include, but are not limited to, the ability "to implement a remedy for a violation of recognized rights." *United States v. W.R. Grace*, 526 F.3d 499, 511 n. 9 (9th Cir.2008) (citation omitted); *see also United States v. Stinson*, 647 F.3d 1196, 1210 (9th Cir.2011) (recognizing that even when government conduct does not rise to the level of a due process violation, a court nonetheless may dismiss an indictment using its supervisory powers). As the Ninth Circuit expressly recognized: "Dismissal is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available." *United States v. Barrera–Moreno*, 951 F.2d 1089, 1092 (9th Cir.1991). It is unclear, however, whether a lesser remedial action is available, and the Executive Branch will be afforded an opportunity to show that it is.

Thus, if the Executive Branch chooses to forgo criminal prosecution of Mr. Alvarez–Trujillo on the pending charge of illegal reentry and deport him from the United States, as previously stated, there is nothing further for this Court to do. If, however, the Executive Branch chooses to pursue the criminal prosecution of Mr. Alvarez–Trujillo under the pending charge, then he must be promptly returned to the

District of Oregon and released pending trial on the pretrial release conditions previously imposed by Magistrate Judge Acosta in accordance with the BRA. That is Defendant's statutory right under the BRA, and its continuing violation threatens Defendant's constitutional rights.

Accordingly, if Mr. Alvarez–Trujillo is returned to this district and released on the conditions previously imposed by Magistrate Judge Acosta by 5:00 p.m. Pacific time on Monday, November 5, 2012, then the pending criminal prosecution may proceed. If, however, he is not returned and released by that date and time, the pending criminal charge will be dismissed with prejudice.[8]

III. CONCLUSION

Defendant's motion for an order to show cause, for certification of facts, and for other relief as appropriate (Doc. 13) is GRANTED IN PART AND DENIED IN PART. The Executive Branch has one week from the date of this Opinion and Order to return Defendant to the District of Oregon and release him subject to the conditions previously determined by Magistrate Judge Acosta. If that does not occur by 5:00 p.m. Pacific time on Monday, November 5, 2012, the criminal charge now pending against Defendant will be dismissed with prejudice. Defendant's motion for a stay of his removal proceeding and for an order directing his transport to the District of Oregon to attend the hearing set for October 10, 2012 (Doc. 17) is DENIED.

8. The government also urges that dismissal is an extraordinary remedy and is unnecessary in this case because the Court could issue a Writ of Habeas Corpus *ad prosequendum*. Under 28 U.S.C. § 2241, a district court is empowered to issue a writ to secure the presence of a defendant for testimony or for trial. The government is correct that such a writ may be used to bring a prisoner into a district court in order to stand trial. *See generally Carbo v. United States*, 364 U.S. 611, 619, 81 S.Ct. 338, 5 L.Ed.2d 329 (1961). The government is incorrect, however, that the issuance of such a writ will remedy the violation of a defendant's right to *pretrial release* under the BRA. Because such a writ will not result in the pretrial release of Mr. Alvarez–Trujillo in the District of Oregon subject only to the conditions imposed by Judge Acosta, it will not remedy the violation of Defendant's rights under that law to pretrial release. To allow the Executive Branch to present Mr. Alvarez–Trujillo in the District Court on the day scheduled for his trial, November 13, 2012, and thereby declare that the government elects to proceed with his criminal prosecution would, for all practical purposes, deprive Mr. Alvarez–Trujillo of his right to pretrial release under the BRA. Thus, the Executive Branch must make its election at a time that meaningfully precedes the scheduled trial date.

Patrick CILLO; International Union of Police Associations, AFL–CIO ("IUPA"), Plaintiffs,

v.

CITY OF GREENWOOD VILLAGE, a body corporate and politic; Donnie Perry, in his individual capacity; Joseph Harvey, in his individual capacity; and James Sanderson, in his individual capacity, Defendants.

Civil Action No. 10–cv–03116–MSK–MJW.

United States District Court, D. Colorado.

Sept. 28, 2012.

Background: Former police officer and police officers union brought § 1983 action against city, police chief, lieutenant, and

National Immigration Project of

National Lawyers Guild

The Bail Reform Act and Release from Criminal And Immigration Custody for Federal Criminal Defendants

by Lena Graber and Amy Schnitzer

national IMMIGRATION project
of the National Lawyers Guild

The Bail Reform Act and Release from Criminal and Immigration Custody for Federal Criminal Defendants[1]

by Lena Graber and Amy Schnitzer[2]
June 2013

I. Introduction

Noncitizen defendants in federal criminal cases find themselves in a difficult position with regard to bail. U.S. Immigration and Customs Enforcement ("ICE") routinely issues detainers advising that it seeks such defendants' custody in order to pursue their removal from the country. As a result, the government will frequently argue that a noncitizen defendant should be denied bail because he or she will be detained and deported by ICE upon release, thus frustrating the criminal prosecution. And in fact, noncitizen defendants who do make bail are often transferred to immigration custody instead of being released. This practice is so common that some noncitizens do not seek bail because they fear such a transfer.

However, most courts have recognized that the mere existence of a detainer does not bar a federal criminal defendant's release on bond. Section 3142 of Title 18 of the United States Code, part of the Bail Reform Act of 1984, governs custody determinations for *all* criminal defendants prosecuted for federal offenses, regardless of their immigration status. Section 3142(b) commands release pending trial unless the judge finds that release will not reasonably assure the appearance of the person at court, or will endanger the safety of the community, and section 3142(c) lays out the menu of conditions that Congress envisioned.[3] Subsequent sections of this advisory detail what factors determine other custody decisions, and what conditions courts may apply to determine bail.

We argue that despite the general perception that transfers to immigration custody once a person is released on bail are valid, they often are not. Congress intended the provisions of 18 U.S.C. § 3142 to prevent ICE from taking custody of federal criminal defendants who have been ordered released by a federal judge pending trial. This means that noncitizen defendants should in many cases be able to win release pending trial, and not simply face transfer to immigration detention if they pay bail. Furthermore, if ICE does take custody of a pre-trial criminal defendant, it must be for removal purposes, and therefore the defendant can argue that the prosecution must be dismissed.

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[2] Lena Graber is a Soros Justice Fellow at the National Immigration Project of the National Lawyers Guild, whose work focuses on ICE detainers and the intersection between police and immigration enforcement. Amy Schnitzer is an associate at Goulston & Storrs, PC, and a former fellow at the National Immigration Project. Special thanks to Ingrid Eagly, Michael Tan, and Sejal Zota for their feedback, edits, and inspired litigation on this issue. Please send questions to Dan Kesselbrenner: dan@nipnlg.org.

[3] 18 U.S.C. § 3142(b), (c).

II. General Overview of § 3142

The right to bail pending trial is one of the cornerstones of the American criminal justice system.[4] The Bail Reform Act sought to balance community safety with the respect for access to counsel required by the Constitution.[5] The Act retained the constitutional presumption in favor of release, although it imposed substantial presumptions against bail for prior offenders.[6]

Congress created the Bail Reform Act to address "the alarming problem of crimes committed" by persons released on bail.[7] The Act sets forth the circumstances under which a defendant can be held pre-trial: (1) when no set of conditions will assure the defendant's appearance; and (2) when no set of conditions will protect the public from future harm. Congress did not exclude noncitizens from consideration for release in criminal proceedings, but specifically provided for immigration considerations in § 3142(d).[8]

Bail Structure under the BRA

The Bail Reform Act repeats the presumption in favor of release and preference for minimal conditions for release in each section of 3142. The government bears the burden of persuading the court that no condition or combination of conditions will reasonably assure defendant's presence at trial.[9]

- Section 3142(a) lays out four options: release on recognizance, release on conditions, temporary detention to permit deportation, and detention.[10]
- Section 3142(b) states that a defendant shall be released on personal recognizance, unless no condition or combination of conditions can secure the defendant's appearance at trial or the safety of the community.
- Section 3142(c) lists the conditions that may be applied if the defendant is not released under (b), providing that judges should order the least restrictive conditions necessary.
- Section 3142(d) orders that, if there is a risk that the defendant may flee or pose a danger to the community, the defendant may be temporarily detained for up to ten days, to permit revocation of conditional release or removal from the United States.

Congress entitled 3142(d) "Temporary Detention to Permit Revocation of Conditional Release, Deportation, or Exclusion." The title demonstrates Congress's intention to permit the immigration service either to pursue deportation or exclusion proceedings (now called removal proceedings) in lieu of criminal prosecution, or to wait until after prosecution and sentencing.[11]

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[4] *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning").
[5] *See United States v. Salerno*, 481 U.S. 739, 742 (1987).
[6] *See* 18 U.S.C. § 3142(e).
[7] *United States v. Salerno*, 481 U.S. 739, 742 (1987) *quoting* S.Rep. No. 98-225, p. 3 (1983).
[8] *See* 18 U.S.C. § 3142(d); *United States. v. Adomako*, 150 F. Supp. 2d 1302, 1304 (M.D. Fla. 2001).
[9] *United States v. Perez-Franco*, 839 F.2d 867, 870 (1st Cir. 1988).
[10] 18 U.S.C. § 3142(a).
[11] A statute's heading lends insight into Congress's intent where the meaning of the statute is ambiguous. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute"); *Trainmen v.*

Pursuant to 18 U.S.C. § 3142(d), a federal judge or magistrate shall detain "for a period of not more than ten days, excluding Saturdays, Sundays, and holidays" an individual who is not a U.S. citizen or lawful permanent resident (LPR) *and* who "may flee or pose a danger to any other person or the community."[12] This would be an affirmative motion of the prosecutor under section (d), to allow time to decide if the defendant should be transferred to Immigration and Customs Enforcement (ICE) for removal proceedings.

This temporary detention provision does not apply to lawful permanent residents. If an LPR defendant is not eligible for immediate release on recognizance under § 3142(b), he or she is entitled to a full custody hearing to determine what conditions, if any, would reasonably assure the safety of the community and the appearance of the defendant at trial.[13] This rule is logical in light of permanent residents' acknowledged ties to the United States and vested liberty rights.[14]

For noncitizens who fall under § 3142(d), the judge shall direct the prosecutor to notify the appropriate ICE official of the ten day deadline.[15] If the ICE official fails or declines to take the individual into ICE custody during the ten day period, the individual "shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings."[16] After the ten days, the court must give the individual a full custody determination hearing pursuant to 18 U.S.C. § 3142(f). The plain language of § 3142(d) limits a noncitizen's temporary detention in federal criminal custody based on immigration status to a maximum of ten days.

Section 3142(d) provides ICE with two benefits: first, notice that a noncitizen, non-lawful permanent resident, is in federal custody; and second, the opportunity to decide whether to take custody for the purposes of pursuing removal proceedings prior to prosecution. However, where ICE fails to pick up the person within ten days of her bail hearing, the criminal court must afford the defendant a bail determination without regard to immigration status. If the determination results in the defendant posting bail, the defendant must be released, notwithstanding any ICE detainers.[17]

Detainers and Federal Defendants

In practice, ICE routinely issues an immigration detainer (Form I-247) almost immediately upon learning of a noncitizen's placement in criminal custody. The detainer requests the custodial facility to continue to detain the person for an extra 48 hours beyond the time of

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Baltimore & Ohio R. Co., 331 U.S. 519, 528-529, (1947). *See also INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("In other contexts, we have stated that the title of a statute or section can aid in resolving an ambiguity in the legislation's text").

[12] 18 U.S.C. § 3142(d).

[13] 18 U.S.C. § 3142(c).

[14] *See e.g. Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963); *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285-86 (1966); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

[15] 18 U.S.C. § 3142(d)(2).

[16] *Id.*

[17] *Id.*

release, so that ICE can pick him or her up. An immigration detainer is neither evidence of immigration status, nor a declaration that ICE will definitely take custody.[18] However, courts and prosecutors frequently assume that the detainer means ICE will take custody and likely deport anyone released on bail.[19]

Because of a detainer, or because the case was referred by DHS,[20] federal courts often skip the ten day temporary detention period and go straight to a bail hearing.[21] Then, if there is an immigration detainer, the federal judge may deny bail on that basis or the defendant may not even seek it, for fear of direct transfer to ICE custody and loss of both the bail money and the defense of the case.

This advisory lays out release arguments available for noncitizen defendants in different situations, whether or not the judge ordered temporary detention to permit deportation under § 3142(d). Many courts have agreed that an immigration detainer should not limit a federal defendant's access to bail under the Bail Reform Act. Recent cases analyzing the BRA support the claim that once ICE has forgone its opportunity to seek the removal of the defendant in lieu of prosecution, it has no justification for detaining a defendant until after criminal proceedings are finished.[22] Even if there was no ten day detention ordered under § 3142(d), a defendant should be released pursuant to the conditions of any pre-trial release order, just like a citizen would be.[23]

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[18] *See United States v. Xulam*, 84 F.3d 441, 441 n. 1 (D.C. Cir. 1996) (The fact that a detainer has been lodged does not mean appellant necessarily will be taken into custody by the INS if released by this Court."). *See* Appendix A for a copy of Form I-247. Most commonly checked is the box saying that ICE has "initiated an investigation to determine whether this person is subject to removal from the United States." Even if the form says that removal proceedings have begun, this does not necessarily mean the person will be deported. Unlike criminal arrest warrants, immigration detainers do not have standard of proof, and are issued by the prosecuting agency itself, rather than a neutral magistrate. *See* 8 C.F.R. §§ 287.7 (failing to establish any probable cause requirement); 287.7(a) (any immigration officer can issue a detainer, including local law enforcement officers deputized under INA 287(g)). A new detainer form issued in December 2012 asserts that ICE has reason to believe the subject of the detainer is deportable, but the reasons indicated on the detainer are not bases for removability under immigration law. *See* National Immigration Project, *Revised 2012 ICE Detainer Guidance: Who It Covers, Who It Does Not, and the Problems That Remain*, (June 2013), *available at* http://nationalimmigrationproject.org/community/Detainer_Guidance_Plus_Addendums.pdf.

[19] *See e.g., United States v. Campos*, 2010 WL 454903, *1 (M.D. Ala. 2010); *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009).

[20] More than half of federal criminal prosecutions are referred by ICE or U.S. Customs and Border Protection (CBP), both of which are component agencies of DHS and are jointly responsible for deportations. *See* Transactional Records Access Clearinghouse, *DHS Referred Most Federal Criminal Prosecutions in October 2011*, (Jan. 26, 2012), *available at*: http://trac.syr.edu/immigration/reports/271/. In that situation, ICE or CBP already decided against deportation in lieu of prosecution, and so the prosecutor is unlikely to move for temporary detention under § 3142(d). Federal criminal courts process many of these prosecutions in a few days or even a few hours, but for the few defendants who fight their cases, all the arguments of this advisory should apply.

[21] *See United States. v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001); *United States v. Marinez-Patino*, 2011 WL 902466, 3 (N.D. Ill. Mar. 14, 2011); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 856 (N.D. Iowa 2010).

[22] *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1178 (D. Or. 2012) ("[N]othing permits ICE (or any other part of the Executive Branch) to disregard the congressionally-mandated provisions of the BRA by keeping a person in detention for the purpose of delivering him to trial when the BRA itself does not authorize such pretrial detention.")

[23] *Id.* at 1174. ("[N]othing else in the BRA [] places any special or additional conditions on persons who are not citizens.")

III. Arguments for Release Based on the Custody Status of Defendant

The following section details the legal arguments available to noncitizens based on various custody scenarios. Section A describes arguments available to defendants who are provided a full bail hearing but must overcome arguments that they are a flight risk because of their immigration status or the presence of an immigration detainer. Section B describes arguments available to a defendant who has won bail, but is trying to avoid ICE custody. Section C discusses departure control orders.

A. Arguments for Bail for a Noncitizen Defendant Subject to an Immigration Detainer

Section 3142(f) requires the criminal court to conduct a full hearing to determine what conditions of release, if any, are necessary to secure the defendant's appearance at future hearings and protect the public from harm.[24] Sometimes prosecutors argue that a defendant is a flight risk or may fail to appear because of his or her immigration status, or because of the filing of an immigration detainer.[25] As a result, courts have considered both immigration status as well as the presence of an immigration detainer in custody determinations, but many have ultimately discounted immigration detainers in the bail calculus.

The presence of an ICE detainer should not be a factor on the merits of bail. Additionally, because the Bail Reform Act fully provides for the possibility of prosecution or deportation, a detainer should not hold a federal detainee for an extra 48 hours.

ICE detainers are not a factor for consideration in a bail determination hearing.

Section 3142(g) lists the factors to be considered in determining conditions of release adequate to ensure the defendant's appearance and the safety of the community.[26] Although alienage is not listed as a factor or criterion for release,[27] courts regularly consider immigration status in the determination of risk of flight.[28] Nonetheless, most courts have found that an

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[24] 18 U.S.C. § 3142(f).

[25] Prosecutors and judges have mistaken detainers for deportation orders, *see United States v. Lozano*, 2009 WL 3834081, *2 (M.D. Ala. Nov. 16, 2009), and for notices of deportation proceedings, *see State v. Xiaojuan Hu*, 2005 Conn. Super. LEXIS 3283 (Conn. Super. Ct. 2005), as well as for evidence that the subject of the detainer is a deportable alien and a flight risk. However, at least until 2012, the detainer form in most instances merely notified the recipient that ICE had "initiated an investigation" into whether the person was removable, and provided no evidence of alienage whatsoever. *See* Department of Homeland Security Form I-247 12/11. In December, 2012, ICE revised the detainer form to state that ICE had reason to believe the individual was an alien subject to removal. *See* Department of Homeland Security Form I-247 12/12. The revised detainer form is still not a charging document, deportation order, or actual evidence of alienage of the subject. *State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009).

[26] 18 U.S.C. § 3142(g).

[27] 18 U.S.C. § 3142(g); *United States v. Montoya-Vasquez,* 2009 WL 103596, 4 (D. Neb. Jan. 13, 2009); *U.S. v. Trujillo-Alvarez*, 900 F.Supp.2d 1167, 1174 (D. Or. 2012).

[28] *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (finding that a defendant's noncitizen status may be taken into account, but that does not by itself "tip the balance either for or against detention"); *United States v. Salas-Urenas*, 430 F. App'x 721, 723 (10th Cir. 2011) (unpublished) (holding that immigration status was relevant to a custody decision as part of the history and characteristics of the defendant); *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001) (finding that Adomako's status did not bar his release, but that his immigration history was a factor in risk of flight); *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 964 n.3 (E.D.

immigration detainer is not relevant to assessing flight risk. Federal courts in Iowa, Illinois, Nebraska, Florida, Kansas, New York, Washington D.C., and Oregon have concurred that detainers are not an appropriate consideration, for various reasons discussed below.[29] Defenders should consider using all of these arguments for release.

First, the Bail Reform Act provides that if ICE has not taken custody, the noncitizen defendant must be treated like any other defendant. Section 3142(d) makes clear that ICE detainers are not relevant to bail determinations by stating that if ICE does not take custody of the person, "such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings."[30] Other than this, the BRA places no special restrictions or conditions on defendants who are non-citizens.[31] Whether the court ordered defendant temporarily detained under § 3142(d) does not change this; the court in *United States v. Adomako* found that § 3142(d) compelled treatment of Adomako like any other defendant even though he had not been subject to the ten day waiting period.[32]

Second, a detainer is speculative, and the possible risk of deportation is not a factor for consideration under § 3142(g). A detainer does not necessarily mean that defendant will be removed, or even that ICE will take custody.[33] A detainer, or even a prior removal order, does

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Wis. 2008) ("I do not suggest that courts should not consider a defendant's immigration status in evaluating whether he is a flight risk."); *United States v. Dozal*, 2009 WL 873011, 3 (D. Kan. 2009) ("Defendant is a deportable alien. This factor alone does not mandate detention, but it weighs heavily in the risk of flight analysis."); *United States v. Rembao-Renteria*, 2007 WL 2908137, 2 (D. Minn. 2007) ("[I]mmigration status is not excluded as one of the factors that may be appropriately taken into account in deciding whether a defendant is likely to flee. The determination is an individual one as to each defendant."); *United States v. Neves*, 11 Fed. Appx. 6, 8 (1st Cir. 2001) (unpublished) (noting that the existence of a deportation order is relevant to the issue of flight).

[29] *See United States v. Montoya-Vasquez,* 2009 WL 103596, 4 (D. Neb. Jan. 13, 2009); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 858 (N.D. Iowa 2010) (holding that pending immigration proceedings are too speculative to evidence of non-appearance (citing *Montoya Vasquez*)); *United States v. Marinez-Patino*, 2011 WL 902466, 6 (N.D. Ill. Mar. 14, 2011) (rejecting the use of an ICE detainer as part of the risk of flight analysis because it did not create a risk of defendant fleeing, and deportation is not among the statutory factors for bail in § 3142(g)); *United States v. Lucas*, 2008 WL 5392121, 3 (D. Neb. Dec. 19, 2008) (ordering detention for reasons other than the detainer, but specifically rejecting the detainer as a basis for pre-trial detention); *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001); *United States v. Perez*, 2008 WL 4950992 (D. Kan. 2008) (ordering release in spite of detainer); *United States v. Albannaa*, 2012 WL 2602665, 3 (W.D.N.Y. Jul. 5, 2012) (rejecting detainer as basis for detention, but ordering detention on other grounds); *United States v. Castro-Inunza*, 2012 WL 1697401, 7-8 (D. Ore. May 14, 2012), *rev'd United States v. Castro-Inunza*, No. 12-30205, slip op. at 2 (9th Cir. July 23, 2012); *U.S. v. Trujillo-Alvarez*, 900 F.Supp.2d 1167, 1180 (D. Or. Oct. 29, 2012) (ordering release in spite of both an immigration detainer and a reinstatement of removal order). *See also United States v. Xulam*, 84 F.3d 441, 444 (D.C. Cir. 1996) (ruling that because the government had never moved for temporary detention under § 3142(d), they could not then later argue for detention because of possible deportation). In *Xulam*, the court also noted in a footnote that the government had argued in its brief that it: "has no representations to make to the Court about whether the INS intends to take appellant into custody. The fact that a detainer has been lodged does not mean appellant necessarily will be taken into custody by the INS if released by this Court." *Xulam*, 84 F.3d at 441 n. 1.

[30] *See Adomako*, 140 F. Supp. 2d at 1307 (the Bail Reform Act "expressly instructs this Court to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial").

[31] *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1174 (D. Or. 2012).

[32] *Adomako*, 140 F. Supp. 2d at 1307.

[33] *United States v. Xulam*, 84 F.3d 441, 441 n.1 (D.C. Cir. 1996) ("The fact that a detainer has been lodged does not mean appellant necessarily will be taken into custody by the INS if released by this Court."); *see also United States*

not necessarily mean that the court cannot secure defendant's presence at trial without detention.[34] Many courts have assumed that a detainer did mean ICE would take custody, but nonetheless refused to take the detainer into account, finding that the risk of involuntary removal indicated by a detainer is not a factor for consideration in a custody determination permitted by the Bail Reform Act.[35]

Third, courts opposed the idea that ICE could control pre-trial release of all noncitizen defendants just by issuing a detainer. In *United States v. Barrera-Omana*, the court rejected the prosecutor's assertion that the ICE detainer meant defendant must be detained because ICE would deport him if released. "If the Court accepted the government's argument, Congress' carefully crafted detention plan, set forth in 18 U.S.C. § 3142, would simply be overruled by an ICE detainer."[36] The court in *Barrera-Omana* ordered the defendant to be released from custody in spite of the detainer.[37]

Other courts have similarly rejected a detainer as evidence supporting pre-trial detention because that would amount to a *per se* rule against release for anyone subject to an ICE detainer.[38] In *United States v. Montoya-Vasquez*, the District Court of Nebraska combined these concerns about the speculative nature of deportation proceedings and the impropriety of a *per se* rule against bail for defendants with an ICE detainer:

> 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. Such a harsh result is nowhere expressed or even implied in the Bail Reform Act . . . If Congress wanted to bar

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v. Villanueva-Martinez, 707 F. Supp. 2d 855, 858 (N.D. Iowa 2010) (refusing to "speculate on the possible results of pending immigration proceedings" as evidence of non-appearance (citing *Montoya Vasquez*));

[34] *See United States v. Castro-Inunza*, No. 12-30205, Dkt. 9, 2012 U.S. App. LEXIS 26746, 2-3 (9th Cir. July 23, 2012) (unpublished) ("The government also has failed to meet its burden to show that the district court may not assure defendant's appearance at trial by, for example, requiring the surrender of his passport and any other travel documents ; enjoining him from obtaining any new travel documents; or enjoining the government from interfering with his ability to appear at trial. Additionally, the government has not shown that it lacks the ability to stay or defer defendant's removal through a stay or departure control order..."); *see also United States v. Trujillo-Alvarez*, 900 F.Supp.2d 1167, 1178 (D. Or. 2012) (quoting *Castro-Inunza*).

[35] *See United States v. Montoya-Vasquez*, 2009 WL 103596, 5 (D. Neb. Jan. 13, 2009); *United States v. Lucas*, 2008 WL 5392121, 3 (D. Neb. Dec. 19, 2008) (ordering detention for reasons other than the detainer, but specifically rejecting the detainer as a basis for pre-trial detention because deportation is not a factor under the Bail Reform Act); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 858 (N.D. Iowa 2010) (finding that a detainer or risk of deportation is not a factor for consideration (citing *Montoya Vasquez*)); *United States v. Marinez-Patino*, 2011 WL 902466, 6 (N.D. Ill. Mar. 14, 2011) (deportation is not among the statutory factors for bail in § 3142(g)); *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009) (because a detainer is not in the factors that Congress enumerated, "it must be excluded from the detention analytic").

[36] *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009).

[37] *Id.*

[38] *See United States v. Albannaa*, 2012 WL 2602665, 3 (W.D.N.Y. Jul. 5, 2012) (rejecting detainer as basis for detention because there that would create a *per se* category of persons who must be detained); *United States v. Marinez-Patino*, 2011 WL 902466, 5 (N.D. Ill. Mar. 14, 2011) ("The BRA itself creates no *per se* category of persons who must be detained, absent an individualized inquiry into that person's risk of flight or danger to the community.")

> aliens with immigration detainers from eligibility for release, it could readily have said so, but did not.
>
> Further, had Congress barred aliens against whom immigration detainers are filed from eligibility for release on conditions, such action would raise serious Constitutional issues, not the least of which would be claims of excessive bail, violation of equal protection of the laws, and violation of the separation of powers.[39]

Finally, the risk of flight itself implies an element of volition, not deportation by another agency of the government itself. In *Barrera-Omana*, the court ordered the defendant detained temporarily under § 3142(d).[40] ICE did not take custody of the defendant during the temporary detention, but did issue a detainer. The court reasoned that the detainer was "an externality not under defendant's control" and, therefore, it could not be taken into consideration in the custody hearing.[41] Several other courts have agreed that risk of flight only encompassed the risk that defendant will flee, not that defendant might be forcefully removed.[42] Furthermore, the court in *Barrera-Omana* refused to "resolve Executive Branch turf battles" between one agency that wished to prosecute the defendant and another that wished to deport him.[43]

Unfortunately, the relative lack of familiarity with immigration concepts has led a few courts to reach the opposite conclusion regarding immigration detainers. The District Court of Alabama in *United States v. Lozano* found that the ICE detainer indicated that defendant had been ordered removed,[44] and thus there was a substantial risk of non-appearance under § 3142(e)(1).[45] In *United States v. Ong*, the Northern District of Georgia considered the *Montoya-Vasquez* and *Barrera-Omana* decisions, but agreed with *Lozano*.[46] In *United States v. Campos*, the court found that no combination of conditions would assure the defendant's appearance because of the serious risk that he would flee or that ICE would apprehend and deport him.[47]

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[39] *Montoya-Vasquez*, 2009 WL 103596 at 5.
[40] *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009).
[41] *Id.*
[42] *United States v. Marinez-Patino*, 2011 WL 902466, 5 (N.D. Ill. Mar. 14, 2011) ("An immigration removal order does not create a serious risk that a defendant will *flee*") (emphasis added); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 857 (N.D. Iowa 2010) (holding that if the government prevents a defendant from appearing, that is not a situation where the defendant has "failed" to appear); *United States v. Trujillo-Alvarez*, 900 F.Supp.2d 1167, 1176-77 (D. Or. 2012) (citing *Barrera-Omana* and *Montoya-Vasquez*); *United States v. Montoya-Vasquez*, 2009 WL 103596, 5 (D. Neb. Jan. 13, 2009) (holding that "failure to appear" as in the Bail Reform Act is limited to risk of absconding, not factors beyond the defendant's control). *Montoya Vasquez* also noted that 18 U.S.C. § 3146 describes penalties for those who fail to appear, and lists circumstances beyond the person's control [e.g. ICE detention or deportation] as an affirmative defense. *Id.* at 4-5.
[43] *Barrera-Omana*, 638 F. Supp. 2d at 1112.
[44] Either the Court misunderstood what an immigration detainer is, or the detainer form itself indicated that the subject had a prior removal order.
[45] *United States v. Lozano*, 2009 WL 3834081, *2 (M.D. Ala. Nov. 16, 2009) (observing that a detention order was hardly restricting defendant's liberty where he would have been detained by ICE if ordered released).
[46] *United States v. Ong*, 762 F. Supp. 2d 1353, 1363 (N.D. Ga. 2010); *See also United States v. Campos*, 2010 WL 454903, fn. 4 (M.D. Ala. Feb. 10, 2010) (noting the detainer and the fact that ICE would take custody if defendant were ordered released, but finding that defendant didn't merit release anyway).
[47] *United States v. Campos*, 2010 WL 454903, 5 (M.D. Ala. Feb. 10, 2010).

However, the majority of courts that have ruled on this issue agree either that risk of flight requires volition on the part of the defendant, or that a detainer is not a proper factor in custody decisions. Practitioners should not confuse this with the courts' willingness to acknowledge immigration status in the bail determination. Many courts agree that immigration status as a whole may be relevant to the evaluation of flight risk, but is not a dispositive factor.[48] Courts have distinguished the risk of deportation from both immigration status and flight risk, concluding that while noncitizen status might be relevant to flight, the risk of deportation by the government itself is a separate question.[49]

The Bail Reform Act fully replaces any authority of ICE detainers for pre-trial federal defendants under § 3142(d).

Defenders can argue that an immigration detainer does not provide authority to hold a federal defendant for an extra 48 hours after he or she has met any prescribed conditions for release, notwithstanding the regulations in 8 C.F.R. § 287.7. If ICE has already been given ten days to make its decision prior to the full bail hearing, then holding the defendant an additional 48 hours simply wouldn't make any sense. While courts have not ruled on this additional 48-hour question exactly,[50] they have ordered defendants released once they met bail conditions. In *United States v. Adomako*, the Middle District of Florida ordered that if ICE was not going to take custody of Adomako in order to deport him in lieu of prosecution, Adomako must be released as soon as he met the imposed conditions.[51]

Furthermore, the plain language of § 3142(d) does not offer ICE the option to issue a detainer to request additional time. The statute directs ICE to take custody during the 10 days or lose the opportunity to do so.[52] Most circuits agree that an ICE detainer is not custody.[53] A detainer in lieu of ICE appearance cannot supplant the Bail Reform Act statutory scheme.[54] To the contrary, defenders should argue that a detainer issued during temporary detention only serves to notify

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[48] *See* fn. 35. *See also Adomako*, 140 F. Supp. 2d at 1304 (finding that Congress, through its enactment of § 3142, intended normal release and detention rules to apply to deportable aliens and that immigration status is but one factor that could be weighed in the flight risk analysis); *see also United States v. Lechuga*, 2011 WL 6318731, 4 (N.D. Ill. Dec. 16, 2011) (weighing the strongest arguments of flight risk which included immigration status but explicitly excluded an ICE detainer).

[49] *United States v. Marinez-Patino*, 2011 WL 902466, 5 (N.D. Ill. Mar. 14, 2011).

[50] This may be because the U.S. Marshals will transfer defendants directly to ICE detention themselves, with no waiting period, so the issue rarely presents itself.

[51] *United States v. Adomako,* 150 F. Supp. 2d 1302, 1308 (M.D. Fla. 2001); *see also United States v. Banuelos*, No. 06-0547M, slip op. at 5 (C.D. Cal. Apr. 12, 2006) (citing *Adomako*). Also, in *United States v. Barrera-Omana*, the court held that an ICE detainer does not change the bail calculus, and ordered the defendant released pending trial, arguably overruling the detainer. 638 F. Supp. 2d 1108, 1112 (D. Minn. 2009).

[52] 18 U.S.C. § 3142(d).

[53] *See Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538 (5th Cir. 2003); *Prieto v. Gluch*, 913 F.2d 1159, 1162 (6th Cir. 1990); *Orozco v. INS*, 911 F.2d 539, 541 (11th Cir. 1990); *Garcia v. Taylor*, 40 F.3d 299 (9th Cir. 2004); *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); *Henriquez v. Ashcroft*, 269 F. Supp. 2d. 106, 108-9 (E.D.N.Y. 2003); *Kendall v. INS*, 261 F. Supp. 2d. 296, 300-03 (S.D.N.Y. 2003). *See also Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990), citing *Moody v. Daggett*, 429 U.S. 78, 80 n. 2 (1976).

[54] *See United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009); *United States v. Montoya-Vasquez*, 2009 WL 103596, 5 (D. Neb. Jan. 13, 2009); *United States v. Marinez-Patino*, 2011 WL 902466, 5 (N.D. Ill. Mar. 14, 2011).

the prosecutor or U.S. Marshals that ICE has elected *not* to deport the defendant in lieu of prosecution, because ICE is aware of the defendant but has chosen not to take custody.[55] The criminal case should proceed, and if the court orders release, the defendant should be freed.

B. Arguments to Prevent ICE Detention after Defendant Successfully Wins Bail

Once a defendant is ordered released after a criminal court custody hearing, he or she can argue that ICE may not take custody via a detainer or pursuant to the mandatory detention provision of § 236 or § 241 of the Immigration and Nationality Act (INA). There are two ways to argue this: first, if the defendant was subject to temporary detention under § 3142(d), ICE has already had its chance to take custody, and second, even if there was no temporary detention, the BRA prevents ICE from detaining criminal defendants for purposes of delivering them to trial.

If the defendant is subject to temporary detention under § 3142(d), that should limit ICE's authority to take custody.

Following the scheme of § 3142(d), by the time a defendant is released pursuant to a bail hearing, ICE should have already made a decision to apprehend the person for deportation or to wait until after trial. Support for this position is found in the plain language of the statute, the over-arching purpose of the Bail Reform Act, and Department of Justice (DOJ) policy as well.[56]

Allowing ICE to take custody after the § 3142 custody determination would be inconsistent with the structure of § 3142. The plain language of the statute mandates that the defendant will be afforded a regular custody determination hearing "notwithstanding" other applicable law, if ICE fails to assume custody within the ten-day temporary detention period.[57] If ICE were able to assume custody *after* the ten-day period expired, the temporary detention and the custody determination would be meaningless. By preventing a transfer to ICE custody, a court is simply enforcing the order of release issued under the guidelines mandated by the Bail Reform Act.

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[55] *Cf. United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 964 (E.D. Wis. 2008) (distinguishing a detainer from ICE action to take actual physical custody, and holding that because ICE failed to assume custody, the court must treat the defendant "like any other offender under the Bail Reform Act," regardless of the detainer). However, a footnote in this decision notes the court's belief that it cannot prevent ICE from later detaining the defendant pursuant to their power under the INA.

[56] Courts do not always order temporary detention under § 3142(d), and often make custody determinations at an initial appearance. *See e.g. United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 964 (E.D. Wis. 2008). In those circumstances, it may be harder to argue that ICE has already had its chance to deport according to § 3142(d). However, in both *Chavez-Rivas* and *Adomako*, the courts held that because ICE had already issued an immigration detainer, this constituted sufficient notice, and that the defendants must be treated like all other offenders under the Bail Reform Act. *Chavez-Rivas*, 536 F. Supp. 2d at 964; *Adomako*, 140 F. Supp. 2d at 1307. Furthermore, a defendant who is determined not to be a flight risk or pose any danger to the community is not subject to temporary detention under § 3142(d), regardless of immigration status. 18 U.S.C. § 3142(b) and (d). As the court reasoned in *Adomako*, "[A] determination as to whether the alien may flee is essential even to a decision to impose temporary detention." *Adomako*, 150 F. Supp. 2d at 1307. This conclusion follows directly from the language of § 3142(d), which says that temporary detention shall be imposed if both subsections (1) and (2) are applicable. 18 U.S.C. § 3142(d). *But see United States v. Lozano*, where the court found that Lozano was neither a flight risk nor a danger to the community, but that the ICE detainer presented an unreasonable risk of nonappearance under § 3142(b), not risk of flight under § 3142(d), and thus ordered detention pending trial, not temporary detention to allow ICE to take custody.

[57] 18 U.S.C. § 3142(d).

The Department of Justice's stated policy also points to this interpretation. The Pre-Trial Release flow chart issued by the DOJ shows only one opportunity for "Deportation/Departure," and that is from temporary detention.[58] Following the chart, once ICE passes on the opportunity to take custody in the temporary detention period, the individual is entitled to a regular custody determination hearing and release from custody during the criminal proceedings.[59] Similarly, ICE's Tool Kit for Prosecutors provides administrative options to release individuals whose presence is needed at criminal proceedings in the United States.[60]

Federal courts can prevent a defendant from ending up in immigration detention after release on bail. In *Adomako*, the Middle District of Florida prevented a transfer to immigration custody prospectively, ordering the Attorney General, regardless of whether s/he was acting as head of the Marshal Service or head of INS, to release the defendant once the conditions for release had been met.[61] The court emphasized that the Bail Reform Act "expressly instructs this Court to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial."[62] The court found that the fact that ICE had lodged a detainer rendered the ten day temporary period unnecessary, and that the release order fully governed Adomako's custody status.[63]

If ICE takes custody after a defendant is released, it can only be for removal purposes.

ICE does not have authority to detain a federal criminal defendant who has been ordered released pending trial, except for removal purposes. In *United States v. Trujillo-Alvarez*, the court found that although ICE had the power to take custody of a defendant released on bail for the purpose of removing him, ICE had no authority to detain him pending prosecution in violation of the release order granted pursuant to the BRA.[64] The court gave the executive branch a week to decide if the defendant would be removed, in which case the criminal charges would be dismissed with prejudice. Otherwise, the court ordered ICE to promptly return the defendant to the district of Oregon to be released in accordance with the pre-trial release order.[65]

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[58] *See* Bureau of Justice Statistics, Department of Justice, Compendium of Federal Justice Statistics, 2004 40 (2006).
[59] *See id.*
[60] *See* Immigration and Customs Enforcement, Department of Homeland Security, Tool Kit for Prosecutors, 4-10 (April 2011).
[61] *United States v. Adomako*, 150 F. Supp. 1302, 1308 (M.D. Fla. 2001).
[62] *Adomako*, 150 F. Supp. 2d at 1307.
[63] *Id.* Like the *Luna-Gurrola, Banuelos, and Trujillo-Alvarez* cases discussed below, *Adomako* found that INS had the authority to take a defendant into custody for the purpose of deportation before trial. However, in the pre-DHS context where the Attorney General was in charge of both prosecution and deportation, *Adomako* ordered that: "if ... the defendant has posted bond and/or complied with all other conditions for release, the Attorney General (in his capacity as head of both the United States Marshals Service and the INS) shall release the defendant so that he may comply with the conditions set for his release pending trial."
[64] *Trujillo-Alvarez*, 900 F. Supp. 2d at 1176.
[65] *Id.* at 1180-81. The court also refused to issue a writ of habeas corpus *ad prosequendum*, as the government suggested, because although that would result in delivery of the defendant for trial, it would not remedy the violation of the defendant's right to pre-trial release under the BRA, which ICE was violating.

The *Trujillo-Alvarez* decision could support the argument that if ICE takes custody of a federal defendant who has been released on bail, the federal court should dismiss criminal charges, as the District of Oregon threatened, and ultimately did. The defendant could move to dismiss in federal court, arguing that, if ICE can only take custody of a federal defendant for removal purposes, then by taking custody, ICE has chosen to remove the defendant in lieu of prosecution under 8 U.S.C. § 3142(d). Therefore the prosecution must be dismissed.

There is no logical purpose to ICE detaining a defendant prior to trial if they have decided not to pursue removal proceedings until after the criminal matter is concluded. Only if ICE is interested in getting the criminal proceedings dropped and deporting the defendant quickly is there a justification for ICE custody. The ten-day window in § 3142(d) provides that opportunity. The Central District of California agreed with this reasoning in *United States v. Saul Luna-Gurrola*, rejecting ICE's arguments that the defendant must be detained by ICE pursuant to 8 U.S.C. § 1231(a)(1) while awaiting trial, and ordering ICE to submit a statement of intent to remove the defendant or release him.[66] The court referred to a previous case, *United States v. Banuelos*, where the government had conceded that ICE detention for the purpose of returning a defendant to trial, or for any purpose other than removal, would be improper.[67] The court in *Luna-Gurrola* also rejected ICE's argument that Luna-Gurrola was detained because he subject to mandatory detention.[68]

Other courts have supported this idea less directly. In M*arinez-Patino*, the court rejected the idea that the INA could require ICE to detain and deport a defendant who awaited trial.[69] Notwithstanding its lack of jurisdiction over ICE detention and removal, the court stated: "We expect that upon defendant's pre-trial release, ICE and the United States Attorney's Office will continue to work cooperatively so that defendant's prosecution may be brought to completion."[70]

Unfortunately, for many years the dominant practice was to submit to ICE whenever they took custody of noncitizen criminal defendants.[71] For example, in *United States v. Todd,* the Middle District of Alabama granted ICE two bites at the apple.[72] The defendant was temporarily detained under § 3142(d). After ten days expired without ICE having taken custody, the magistrate ordered the defendant's release on conditions and issued a separate order providing that ICE may not take custody of the defendant without further order from the court.[73] However, the district court vacated that order, finding that the Bail Reform Act did not provide that the ten-day window was a limit on ICE's ability to assume custody of a defendant.[74] Instead, the court interpreted the "notwithstanding" language as an "admonition to courts not to use the immigration status of defendants against them or as the sole basis of a detention determination."[75] Nonetheless, we encourage defenders to argue that ICE cannot apprehend and detain a defendant ordered released pending federal prosecution, following the above arguments and the decisions in *Adomako*, *Trujillo-Alvarez*, *Banuelos*, and *Luna-Gurrola*.

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[66] *United States v. Luna-Gurrola*, No. 2:07-mj-01755, Dkt. 24, 15 (C.D. Cal. Nov. 20, 2007). The court found jurisdiction over ICE custody exactly because ICE was detaining Mr. Luna-Gurrola for purposes of delivering him to criminal trial, and also because ICE had consented to jurisdiction. (The decision is attached as Appendix 1.)

[67] *United States v. Banuelos*, No.2:06-mj-00547, Dkt. 7, 4 (C.D. Cal. Apr. 12, 2006) ("The government appears to agree with defendant that detention by ICE for any purpose other than removal proceedings is improper.") (The decision is attached as Appendix 2.)

[68] *Luna-Gurrola*, No. 2:07-mj-01755 at 7-8.

[69] *United States v. Marinez-Patino*, 2011 WL 902466, 8 (N.D. Ill. Mar. 14, 2011).

[70] *Id.*

[71] *See generally* Lasch, Christopher "*Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm. Mitchell L.Rev. 164 (2008).

[72] *United States v. Todd*, 2009 WL 174957, 2 (M.D. Ala. Jan. 23 2009).

[73] *Id.* at 1.

[74] *Id.* at 2. *See also Villanueva-Martinez v. United States,* 707 F. Supp. 2d 855, 856-7 (N.D. Iowa 2010) (ordering defendant released in spite of ICE detainer, but assuming that ICE would then take custody).

[75] *Todd*, 2009 WL 174957 at n 2.

C. The Power of Departure Control Orders

The Bail Reform Act permits ICE to take custody of a defendant in order to deport them, in lieu of federal prosecution.[76] For a noncitizen who potentially faces a significant criminal sentence, this outcome may be preferable to prosecution. However, for those who wish to stay and fight their case, defense attorneys still may be able to help them seek release from both federal and ICE detention.

Deportation in lieu of prosecution sometimes may conflict with the interests of federal prosecutors, who may wish to retain the defendant inside the United States as a witness or to face charges. Federal regulations provide for "departure control orders" to deal with such circumstances. A departure control order is a mechanism to prevent a noncitizen whose presence is essential to ongoing criminal proceedings from leaving the country.

Departure control orders are governed by federal regulations in 8 C.F.R. § 215 and 22 C.F.R. § 46. The regulations state that deportation of a noncitizen who is party to a criminal case pending in a court in the United States shall be "deemed prejudicial to the interests of the United States."[77] The regulations further instruct ICE *not to remove* such a defendant: "the departure control officer [ICE deportation officer] . . . shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order."[78] Under this regulatory framework, ICE may effectuate a noncitizen defendant's removal only upon the consent of the prosecuting authority: "...[A]ny alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part."[79] A departure control order is potentially more powerful than a stay of removal because it is the prosecutor's authority, not the respondent's request.[80]

With a departure control order preventing removal, the subsequent question is how to procure release from ICE custody. Federal courts have found that ICE cannot detain a defendant who has been ordered released but who has a departure control order or whom ICE otherwise does not intend to deport until after trial.[81] In *Luna-Gurrola*, the Central District of California ordered a

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[76] 18 U.S.C. § 3142(d).
[77] 8 C.F.R. § 215.3(g).
[78] 8 C.F.R. § 215.2(a).
[79] 8 C.F.R. § 215.3(g).
[80] *See United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1178 (D. Ore. 2012) (stating that the departure control regulations demonstrate the Executive Branch's determination that a criminal proceeding takes priority over deportation). *But see United States v. Amador et al.*, No. 11-CR-20132-JWL , ECF 135-1 (D. Kan, filed Dec. 21, 2011) (letter from ICE Chicago field office arguing that "the authority under § 215 is directed at preventing departure of aliens who are free to depart, not preventing deportation or removal of aliens in the United States in violation of law").
[81] *See United States v. Luna-Gurrola*, No. 2:07-mj-01755, Dkt. 24, 14-15 (C.D. Cal. Nov. 20, 2007) (finding that ICE had issued a departure control order to defendant and would not deport him until termination of the criminal proceedings; therefore ICE was not detaining him for purposes of removal but in violation of the court's order of

criminal defendant released from ICE custody when ICE demonstrated intent not to remove the person in lieu of prosecution.[82] The court reasoned that if ICE has determined not to remove the defendant before trial, then ICE was using its civil detention authority to hold defendant purely for purposes of criminal prosecution, in violation of the court's release order.[83] Following *United States v. Adomako*, the court ordered ICE to file a statement as to whether ICE intended to pursue removal proceedings, and if not, the U.S. Marshals were to release defendant once he complied with conditions of release.[84]

The logic of these cases is simple: ICE cannot detain a criminal defendant pending trial under its civil detention authority, only for purposes of removal.[85] If ICE has taken custody of a federal defendant but has agreed to a departure control order, then ongoing immigration detention is a violation of both its civil detention authority and the federal court's release order. Therefore, for federal defendants who wish to fight their criminal and deportation cases, a departure control order may enable them to do both, and possibly avoid paying a second bond to get out of ICE detention.[86]

IV. Possible Remedies for Clients Subject to Detainers to Win Release

A. Seeking Bail for a Federal Defendant Subject to an ICE Detainer

At the end of the temporary detention period, the defendant must be "treated in accordance with the other provisions of [§ 3142], notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings."[87] In determining release or conditions under 3142(f), the detainer does not prevent an order of release.[88] The detainer arguably is too indeterminate to be a custody factor at all.[89]

Actions:
1. Demand a full custody hearing from the court
2. Argue against the detainer and possible deportation as indicators of flight risk
3. Argue against any additional time on the detainer after an order of release, even the regulatory 48 hours, which is subsumed by the statutory framework of § 3142.

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release); *United States v. Banuelos*, No.2:06-mj-00547, Dkt. 15, 1 (C.D. Cal. Apr. 12, 2006) (order clarifying previous order).

[82] *Luna-Gurrola*, No. 2:07-mj-01755 at 8-9.

[83] *Id.* at 8.

[84] *Id.* at 15.

[85] *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (due process limits immigration detention to purpose of carrying out removal).

[86] If an immigration bond is available and affordable, that is probably a simpler and faster choice.

[87] *Adomako*, 150 F. Supp. 2d at 1307.

[88] *United States v. Adomako*, 150 F. Supp. 2d 1302, 1306-7 (M.D. Fla. 2001); *United States v. Montoya-Vasquez*, 2009 WL 103596, 5 (D. Neb. Jan. 13, 2009); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 857-8 (N.D. Iowa 2010); *United States v. Xulam*, 84 F.3d 441, 443–44 (D.C. Cir. 1996) (suggesting that a detainer and the potential of deportation are relevant to assessing flight risk but holding that the INS's lodging of a detainer did not by itself justify detention).

[89] *United States v. Montoya-Vasquez*, 2009 WL 103596, 5 (D. Neb. Jan. 13, 2009); *United States v. Villanueva-Martinez*, 707 F.Supp.2d 855, 858 (N.D. Iowa 2010); *United States v. Marinez-Patino*, 2011 WL 902466, 4 (N.D. Ill. Mar. 14, 2011).

B. Seeking Release from ICE Custody for a Federal Defendant who Won Release on Bail from the Federal Courts

If a judge releases the noncitizen defendant and ICE's ten-day window to act has expired, ICE should not be permitted to apprehend the defendant until after her criminal case has been fully concluded. *Adomako* supports the conclusion that a release order prevents ICE from later taking custody, because the court ordered the INS to file a notice of whether it intended to deport Adomako prior to trial, and if not that he was to be released.[90] In particular, ICE cannot civilly detain a defendant while awaiting criminal trial, if that defendant was ordered released under § 3142.[91] Logically, after the ten day period, ICE should have no authority to detain because ICE obviously has no intention of carrying out removal until the criminal case is resolved.[92]

A defendant apprehended by ICE could apply for an ex parte hearing regarding the bail order.[93] Filing a habeas petition might be appropriate. An ex parte application for a new hearing on the bail order complaining that ICE did not respect the order of release might be fruitful, or a motion to enforce the release order might be a helpful vehicle.[94] Additionally, counsel could possibly seek a remedy in immigration court, with an argument that ICE does not have authority to hold the defendant while the order of release is in effect. Cite *Adomako, Trujillo-Alvarez*, *Luna-Gurrola*, and *Banuelos* for authority that ICE cannot detain a federal criminal defendant for the purpose of delivering him to trial.

Actions:
1. Ex parte application for hearing re bail order
2. Motion to enforce the federal release order
3. Habeas petition for release from ICE custody

Countering Government Arguments

Three common arguments arise from the government in federal custody hearings for noncitizens.

First, the government argues that an ICE detainer or the defendant's immigration status increases flight risk or risk of non-appearance. As cited above, many courts have rejected these arguments. At the very least, unauthorized status or an ICE detainer does not prevent release.

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[90] *United States v. Adomako*, 150 F. Supp. 2d 1302, 1308 (M.D. Fla. 2001).
[91] *United States v. Luna-Gurrola*, No. 2:07-mj-01755, Dkt. 24, 15 (C.D. Cal. Nov. 20, 2007).
[92] *See generally Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (due process limits immigration detention to purpose of carrying out removal).
[93] *See Luna-Gurrola*, No. 2:07-mj-01755 at 1. However, in *Trujillo-Alvarez*, the court did not grant Mr. Trujillo-Alvarez's motion to order ICE to return him to federal district court. The court did, however, rule that if the executive branch decided to prosecute Mr. Trujillo-Alvarez, that then he must be promptly returned to the District of Oregon and released pending trial as previously imposed.
[94] *See United States v. Banuelos*, No.2:06-mj-00547, Order Re: Defendant's Motion to Order United States Marshals To Immediately Release Defendant Pursuant To This Court's Bail Order Notwithstanding The "Immigration Detainer." (Court's Order of April 12, 2006).

Second, when ICE has taken custody of the defendant, the government has argued that federal district courts have no authority to order ICE to release him or her. The *Ong* decision agreed with this, because district courts have no jurisdiction to review removal orders or parole decisions.[95] But the courts in *Adomako*, *Luna-Gurrola*, *Trujillo-Alvarez* and *Banuelos* rejected this argument. In *Luna-Gurrola*, the court found that because ICE was detaining the defendant solely for purposes of criminal prosecution, the court still had jurisdiction under the Bail Reform Act.[96] In *Adomako*, the court also held that it has jurisdiction over Adomako's motion for release pursuant to its statutory role in § 3142(d): "Congress expressly instructs this court to disregard the laws governing release in INS proceedings when it determines the propriety of release or detention of a deportable alien pending trial…"[97] Further, the court reasoned, an immigration detainer cannot divest the federal courts of jurisdiction over the release for a criminal defendant.[98]

Third, where the defendant already has a removal order, the government may argue that the defendant is being held in ICE detention because he is being held pursuant to a final order of removal.[99] However, where ICE has issued a departure control order or a stay of removal and will not deport the defendant prior to trial, ICE should have no authority to detain the person in violation of a court's release order as it may only detain noncitizens for the purpose of effectuating their removal.[100] The courts in *Luna-Gurrola* and *Banuelos* found that ICE had no authority to detain pending trial a criminal defendant who had been ordered released, where ICE was holding him solely for criminal prosecution–and not for removal.[101]

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[95] *United States v. Ong*, 762 F. Supp. 2d 1353, 1359 (N.D. Ga. 2010).
[96] *United States v. Luna-Gurrola*, No. 2:07-mj-01755, Dkt 24, 15 (C.D. Cal. Nov. 20, 2007).
[97] *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001).
[98] *Id.*
[99] 8 U.S.C. § 1231(a)(1).
[100] *Luna-Gurrola*, No. 2:07-mj-01755 at 16; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).
[101] *Luna-Gurrola*, No. 2:07-mj-01755 at 10 (finding jurisdiction over ICE where ICE was detaining pending criminal trial); *United States v. Banuelos*, No.2:06-mj-00547, Dkt. 7, 4-5 (C.D. Cal. Apr. 12, 2006).

Appendix 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL LUNA-GURROLA,

Defendant.

NO. 07-1755M

ORDER Re: DEFENDANT'S EX PARTE APPLICATION FOR HEARING RE BAIL ORDER OF OCTOBER 23, 2007

Having reviewed and considered all the briefing and oral argument presented to the court with respect to defendant's Ex Parte Application for Hearing Re Bail Order of October 23, 2007 ("First Ex Parte Application") and defendant's Ex Parte Application to Exonerate Bond and Return Defendant into Federal Custody ("Second Ex Parte Application"), the court concludes as follows.

BACKGROUND

Defendant is charged with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) & (b)(2). On October 23, 2007, the United States Immigration and Customs Enforcement ("ICE") placed an immigration detainer (Form I-247) on defendant pursuant to 8 C.F.R. § 287.7(a). (Government's Opposition to defendant's First Ex Parte Application ("Opposition") at 4 & Exh. A). On the same day, defendant made his first appearance before the court. After a full hearing pursuant to 18 U.S.C. § 3142(f), the court appointed counsel for defendant and denied the

government's motion to detain defendant pending trial. The court found that there was a combination of conditions that would reasonably assure the appearance of defendant. Specifically, the court set bail for defendant in the amount of $160,000, with a justified affidavit of surety for $150,000, to be secured by the deeding of property, and $10,000 to be secured by cash. The court also ordered that defendant be subject to pre-trial supervision, electronic monitoring and surrender his passport. Finally, the court ordered the United States Marshal ("USM") to hold defendant in custody until notified by the court's clerk that defendant has complied with all the conditions for release.

On October 31, 2007, defendant complied with the final requirements of his bail conditions. On the same day, defendant filed the First Ex Parte Application. On November 1, 2007, the duty Magistrate Judge approved defendant's release to pre-trial services on bond. Due to the immigration detainer, however, defendant was released to the custody of ICE, where he presently remains.

On November 7, 2007, defendant received a Departure Control Order from ICE that his departure would be temporarily prevented pursuant to 8 C.F.R. § 215.3(g), because the United States Attorney's Office ("USAO") filed criminal charges against him and his presence is required in the United States until the criminal case is concluded. (See Government's Supplemental Opposition ("Govt.'s Supp. Opposition"), Exh. A ("Departure Order")). Thus, defendant was ordered not to depart the United States until he received notice from ICE revoking the Departure Order. (See id.).

On November 9, 2007, the government filed its Opposition. On November 13, 2007, defendant filed his Reply to the government's Opposition ("Reply"). On the same day, defendant also filed the Second Ex Parte Application. On November 14, 2007, the government filed an Application to the Criminal Duty Judge for Review of the Magistrate Judge's Bail Order ("Application for Review") and a Memorandum of Points and Authorities in Support of the Motion for Review. On the same day, the court heard oral argument from the parties regarding

defendant's Ex Parte Applications.[1] In light of the number and complexity of issues raised by the parties, the court gave the parties an opportunity to file a supplemental brief addressing all the issues that were raised in the papers or during the oral argument. On November 16, 2007, both parties filed their supplemental briefs.

DISCUSSION

I. THE BAIL REFORM ACT.

Under the Bail Reform Act, 18 U.S.C. § 3142(b), Congress has mandated that a judicial officer shall order the pretrial release of the person "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). The Act "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (per curiam) (citing 18 U.S.C. § 3142(c)(2)); see also United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). According to the Gebro court:

> Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor. On a motion for pretrial detention, the government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk, and by clear and convincing evidence that the defendant poses a danger to the community.

948 F.2d at 1121 (internal citation omitted). "[T]he statute neither requires nor permits a pretrial determination of guilt." Id. (citing United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986) (per curiam) and Motamedi, 767 F.2d at 1408).

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[1] The court also heard argument relating to the government's Application for Review of this court's bail decision. However, the court believes that the government's Application for Review is not properly before this court and, therefore, this decision will not address the merits of the Application for Review. See 18 U.S.C. § 3145(a).

If the judicial officer determines that a person is not a citizen of the United States or lawfully admitted for permanent residence and that he may flee or pose a danger to the community, the judicial officer shall order temporary detention for not more than ten days and direct the attorney for the government to notify the appropriate immigration official. 18 U.S.C. § 3142(d). If the judicial officer determines that the individual may flee or pose a danger and the immigration official does not take custody within ten days, the statute directs the court to apply the normal release and detention rules to deportable aliens without regard to the laws governing release in ICE deportation proceedings:

> If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.

Id. Thus, Congress has directed the courts to apply the normal release and detention rules to a deportable alien (i.e., "[S]uch person shall be treated in accordance with the other provisions of this section."). Id.; see also United States v. Xulam, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (deportable alien not a flight risk where conditions could be imposed to ensure return to court); United States v. Adomako, 150 F.Supp.2d 1302, 1307 (M.D. Fla. 2001) (defendant "is not barred from release because he is a deportable alien[;]" immigration status is one factor that the court weighs in the flight risk analysis).

II. DEFENDANT'S EX PARTE APPLICATION.

Defendant asserts that, although there is a final order of removal entered against him, his removal has been "prevented by the [USAO] . . . so that it may pursue the instant [criminal] prosecution."[2] (Reply at 2). Defendant argues that his detention by ICE is "solely for purposes

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[2] Defendant concedes that because he was released to ICE's custody within 24 hours of being released by the USM, his request that he be released from the USM's custody if not released within 48 hours of satisfying the conditions of his release is moot. (See First Ex Parte Application at 8-9 & Defendant's Supplemental Briefing Pursuant to Court Order of November 14, 2007 ("Def.'s Supp. Brief.") at 13). Defendant has also withdrawn his request to exonerate his bond. (See Def.'s Supp. Brief. at 21).

of the instant [criminal] prosecution – despite the fact that this [c]ourt has ordered him free on bond . . . [and that t]he government's actions violate basic notions of Due Process and the Bail Reform Act." (Id.). Accordingly, defendant seeks modification of the Court's Order of October 23, 2007, to order his pre-trial release from either the USM's or ICE's custody. (See Defendant's Supplemental Briefing (Def.'s Supp. Brief.") at 22).

Defendant relies on Adomako, which held that 18 U.S.C. § 3142(d) directs a district court "to disregard the laws governing release in [Immigration and Naturalization Service ("INS")][3] deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial[.]" 150 F.Supp.2d at 1307. The Adomako court ordered the USAO to file and serve notice as to whether the INS intended to take the defendant into custody pursuant to § 3142(d)'s ten-day deadline "to permit deportation, and whether the INS intends to deport [the defendant] before trial[.]" Id. at 1308. The Adomako court further ordered that if the INS did not take custody within the deadline, the USM could detain the defendant only until he met the court's previously set release conditions. Id. Finally, the court ordered that if the defendant were to meet the release conditions, "the Attorney General (in his capacity as head of both the United States Marshals Service and the INS) shall release the defendant so that he may comply with the conditions set for his release pending trial[.]" Id.

Defendant further relies on this court's holding in United States v. Abdon Martinez Banuelos, No. 06-0547M, filed April 12, 2006. In Banuelos, the court relied on Adomako to order the USM to release Banuelos, a pre-trial detainee, notwithstanding any immigration detainer, if the government did not provide the court with notice of its intention to remove the defendant before trial. See id. at 4-6.

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[3] The INS was abolished on March 3, 2003, and its functions were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (2002).

The government disagrees with the holdings in Adomako and Banuelos.[4] (See Govt.'s Supp. Opposition at 8-9). The government argues that the instant case is distinguishable from Adomako and Banuelos because in both of those cases the defendants were in the USM's custody at the time of the decision, whereas in the instant matter, defendant is in the custody of ICE. (See id. at 9). The government maintains that the court in Adomako was "clearly endeavoring to afford the defendant reasonable opportunity to consult with his attorney and translator in preparation for his criminal trial . . . [and here,] it does not appear that defendant has had any such issues while in ICE custody." (Id.). Further, the government argues that because the INS's functions have been subsumed within the Department of Homeland Security ("DHS") since the Adomako decision, any order directing the Attorney General, both in his capacity as head of the USAO and the INS, to release the defendant "would fall short of mandating DHS or ICE's course of action." (Id. at 9-10).

Additionally, the government asserted at oral argument that because there is a final order of removal entered against defendant, ICE can detain him for up to 90 days to effectuate his removal pursuant to 8 U.S.C. § 1231(a)(1). (See Transcript of Hearing Re Defendant's Ex Parte Application ("Hearing Trans.") at 17-18 & 21-22). The government also asserts that ICE has the authority to prevent defendant's departure from the United States and that defendant cannot challenge the Departure Order because he has failed to exhaust his administrative remedies pursuant to 8 C.F.R. § 215.4. (See Govt.'s Supp. Opposition at 4-7). Finally, the government maintains that, "[w]hile the Bail Reform Act grants the [c]ourt authority to determine whether a defendant awaiting trial in a criminal case shall be released or detained, it does not authorize the [c]ourt to release him notwithstanding a lawfully-issued immigration detainer." (Id. att 7). The government states that, "[t]aking into consideration the reinstatement of defendant's prior order of deportation, coupled with the fact that he is subject to mandatory detention, it is axiomatic that

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[4] The government's initial Opposition did not mention or discuss the Adomako or the Banuelos decisions. (See, generally, Opposition at 1-9).

ICE would have not only placed a detainer on defendant, but also detain him in their custody after his release from USM[]." (Id. at 7-8) (footnote omitted).

None of the government's arguments are persuasive. Indeed, some of the its arguments are seemingly inconsistent and difficult to reconcile on any logical or principled basis. For example, during oral argument, counsel for the government stated that the government's position in this case has not changed from the position it took in Banuelos. (See Hearing Trans. at 17). In other words, the government's position, as advanced in Banuelos, is that the government:

> has not sought, nor does it intend, to detain defendant for []his criminal prosecution through the civil detention mechanism available to ICE. . . . Continued detention by ICE would contravene ICE's statutorily-prescribed mission of removal of criminal aliens from the country. It would also contravene the statutes governing ICE's operation. ICE is directed to effect the physical removal of individuals ordered removed within the statutorily specified 90-day "removal period." 8 U.S.C. § 1231(a)(1)(A). Moreover, ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated.

(Def.'s Supp. Brief., Exh. G[5] ("Govt.'s Banuelos Opposition") at 47); (see also Govt.'s Supp. Opposition at 7) ("ICE detention . . . is an administrative tool used to facilitate civil proceedings which determine the eligibility of aliens to remain in the United States. It is not to punish the crime of unlawful entry."). In Banuelos, the government also conceded that if defendant is released to ICE custody to effect his removal, it will not be able to proceed with the instant prosecution: "Because [defendant] will likely be removed from this country based on the charges of removability, defendant will be rendered unable to attend further criminal proceedings." (Govt.'s Banuelos Opposition at 48); (see also id.) ("[I]f defendant is released to ICE custody, ICE must be

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[5] Exhibit G of Def.'s Supp. Brief is an excerpt of the brief the government filed in Banuelos. In addition, the Banuelos decision quotes extensively from the government's brief.

permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court.").

After determining that the government's position had not changed from the position it took in Banuelos, the court asked government counsel to explain on what ground ICE was detaining defendant. (Hearing Trans. at 23). Counsel alternated between refusing to take a position and claiming that defendant was being detained pursuant to 8 U.S.C. § 1231(a)(1), which allows ICE to detain a person for up to 90 days to effectuate his removal. (Compare id. at 18 & 21-22 with id. at 23-25 & 33-34). Apparently realizing the inconsistency in its position relating to defendant's removal and what it would mean with respect to his criminal prosecution, the government now takes the position that "defendant is currently detained in ICE custody with a departure control order[.]" (Govt.'s Supp. Opposition at 5). However, that position is contrary to the position taken by government counsel during oral argument where counsel stated that the regulations that give ICE authority to issue departure control orders, 8 C.F.R. §§ 215.2 & 215.3(g), are not detention statutes, i.e., ICE cannot rely on those regulations to detain an alien. (See Hearing Trans. at 18 & 27).

In any event, the record, as it stands now, leaves little, if any, doubt that petitioner's detention by ICE is solely for the purposes of the instant criminal prosecution. There is no dispute that a final removal order has been entered against defendant and that defendant does not contest the order. (See Def.'s Supp. Brief, Exh. C at 33). Despite the final order of removal and defendant's waiver of any challenge to the order, ICE issued a Departure Order to defendant, explaining that it is not going to remove him until the termination of the instant criminal proceedings. (See Departure Order). The Departure Order "is based upon the United States Attorney's Office filing a criminal charge against [defendant] and [defendant's] presence is required in the United States until []his [criminal prosecution] has concluded." (Id.). Given the government's admission that "defendant is currently detained in ICE custody with a departure control order[,]" (Govt.'s Supp. Opposition at 5), and that the basis of such an order is the instant criminal prosecution, it is clear that defendant's detention by ICE for purposes of a criminal prosecution "contravene[s] ICE's statutorily-prescribed mission of removal of criminal aliens from

the country[]" as well as "the statutes governing ICE's operation." (Govt.'s Banuelos Opposition at 47).

The government's remaining arguments also are unpersuasive and illustrate further the inconsistent nature of its positions. First, the government contends that "whether an alien is in or out of custody is irrelevant to ICE's ability to issue a departure control order, provided that the alien falls within one of the enumerated provisions of Section 215.3. Thus, ICE's authority to detain defendant, or rather defendant's attempt to bypass a lawfully-issued immigration detainer, is a separate issue and should be analyzed independently." (Govt.'s Supp. Opposition at 5). This assertion simply begs the question of whether defendant is being held in ICE custody for purposes of the criminal prosecution or as "an administrative tool used to facilitate civil proceedings which determine the eligibility of [defendant] to remain in the United States." (Id. at 7). Further, as the government stated at oral argument, (see Hearing Trans. at 18 & 27), the regulations governing departure orders do not provide a basis for detention. In other words, while it is true that "whether an alien is in or out of custody is irrelevant to ICE's ability to issue a departure control order," (Govt.'s Supp. Opposition at 5), it is also true that a departure control order cannot be used to detain an alien, i.e., ICE must have an independent basis upon which to detain defendant. As government counsel stated, a Departure Order "only . . . requests that the alien also not depart the United States voluntarily." (Hearing Trans. at 18).

However, none of the grounds put forth by the government to justify defendant's detention are sufficient. For example, the government asserted at oral argument that because there is a final order of removal entered against defendant, ICE can detain him for up to 90 days to effectuate his removal pursuant to 8 U.S.C. § 1231(a)(1). (See Hearing Trans. at 17-18 & 21-22). As an initial matter, it appears the government has abandoned this argument, as it did not address it in its most recent 11 page supplemental memorandum, even though the court gave each party 25 pages to address all the arguments and issues that were discussed during the oral argument. (See, generally, Govt.'s Supp. Opposition at 1-11). In any event, § 1231(a) states that except as otherwise provided in that section, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as

the 'removal period'). . . . [¶] During the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). An alien who has been ordered removed, and who has been determined by the Attorney General to be "unlikely to comply with the order of removal," may be detained beyond the removal period. Id. at § 1231(a)(6). If, however, "the removal period is judicially reviewed and if a court orders a stay of the removal of the alien," the removal period begins on "the date of the court's final order." Id. at § 1231(a)(1)(B)(ii).

The purpose of § 1231 is to remove a person who has been issued a final order of removal, and to permit ICE to detain such a person while the government takes the necessary steps to effectuate removal. See 8 U.S.C. § 1231(a)(1)(A); Zadvydas v. Davis, 533 U.S. 678, 699, 121 S.Ct. 2491, 2504 (2001) (explaining that "basic purpose" of § 1231(a) is to assure "the alien's presence at the moment of removal[]"). Nothing in § 1231 permits detention of an alien for the entire 90-day "removal period," regardless of the circumstances. As the government stated in Banuelos, "ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated." (Govt.'s Banuelos Opposition at 47). Here, given that defendant is not contesting his removal and that removal to Mexico should be relatively easy and straightforward, it is likely that the removal could have and should have been accomplished within less than 90 days.

Nevertheless, it is clear that § 1231(a)(1) cannot be the basis of defendant's detention. If it were, defendant should have already been removed. Also, the Departure Order states that defendant will not be removed pending the criminal prosecution. (See Departure Order). Under such circumstances, it appears that defendant is no longer in removal and therefore cannot be detained for the 90-day removal period. See, e.g., Tijani v. Willis, 430 F.3d 1241, 1243-50 & n. 7 (9th Cir. 2005) (Tashima, Judge, concurring) (noting that petitioner was detained under 8 U.S.C. § 1226 because "this court has stayed his removal pending its review of the BIA's decision[]" and therefore the petitioner "has not entered his 90-day removal period under 8 U.S.C. § 1231(a)"); Kothandaraghipathy v. Dep't of Homeland Sec., 396 F.Supp.2d 1104, 1107 (D. Ariz. 2005) (holding that because the Ninth Circuit had granted petitioner a stay of removal, his "current detention is pursuant to the pre-removal order detention statute, 8 U.S.C. § 1226, rather than the

post-removal order detention statute, 8 U.S.C. § 1231[]"); 8 U.S.C. § 1231(a)(1)(B)(ii) (providing circumstances when removal period will not begin to run).

More importantly, the reason defendant cannot be in ICE custody on the basis of § 1231(a)(1) is because, as the government acknowledged in Banuelos and reaffirmed in the instant case, "if [a] defendant is released to ICE custody to effect his removal, [the government] will not be able to proceed with the instant prosecution[.]" Banuelos, No. 06-0547M, at 5; (see also Govt.'s Banuelos Opposition at 47-48). The government's position is difficult to reconcile. On the one hand, the government claims that defendant can be detained for 90 days for removal purposes under § 1231(a)(1) and, on the other hand, it claims that defendant cannot be criminally prosecuted if defendant is being detained in ICE custody for removal purposes.

The government also appears to argue that it can detain defendant on the basis of an "immigration detainer." (See Govt.'s Supp. Opposition at 10) ("[E]ven if defendant were released via the USM[] custody, the [c]ourt lacks the authority to prohibit ICE from again detaining defendant pursuant to a newly-issued immigration detainer."). However, the government provides no authority for its assertion that this court lacks the power to order defendant's pre-trial release, notwithstanding any "immigration detainer." (See id. at 7-8). An "immigration detainer" merely "serves to advise another law enforcement agency that the [DHS] 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 [DHS], prior to release of the alien, in order for the [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7(a). That a detainer has been lodged does not require that the alien be taken into custody by the immigration authorities when released. Xulam, 84 F.3d at 442 n. 1 (citing a brief by the United States government conceding the fact that a detainer has been lodged does not mean that the government has decided a defendant will in fact be transferred into immigration custody). Indeed, in the habeas context, it is well-settled that an immigration detainer, without more, is insufficient to render the alien in the custody of ICE. See, e.g., Campos v. I.N.S., 62 F.3d 311, 314 (9th Cir.1995) (detainer letter alone does not sufficiently place an alien in INS custody for habeas purposes); Zolicoffer v. U.S. Dep't of Justice,

315 F.3d 538, 540 (5th Cir. 2003) (per curiam) ("[P]risoners are not 'in custody' for [habeas] purposes . . . merely because the INS has lodged a detainer against them."); Orozco v. I.N.S., 911 F.2d 539, 541 (11th Cir. 1990) (per curiam) (filing of detainer, standing alone, did not cause the prisoner to come within INS custody); Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989) (filing of an INS detainer with prison officials does not constitute the requisite "technical custody" for purposes of habeas jurisdiction). Thus, absent an independent detention statute under the INA, the "immigration detainer" is insufficient to justify the detention of defendant.

Second, the government's assertion that defendant cannot challenge the Departure Order because he has failed to exhaust his administrative remedies, (see Govt.'s Supp. Opposition at 5-6), is without merit because defendant is not challenging the Departure Order in this action. Rather, he is only challenging his pre-trial detention for the purposes of the instant criminal proceedings. Moreover, as indicated above and as the government conceded at oral argument, (see Hearing Trans. at 18 & 27), 8 C.F.R. § 215.3(g) does not provide a basis for ICE detention. Rather, it is simply an Order preventing defendant's departure from the United States during the pendency of the instant criminal proceedings and, in this way, is actually consistent with the terms provided for defendant's pre-trial release in the Court's Order of October 23, 2007. (See Court's Order of October 23, 2007) (providing that one condition of defendant's pre-trial release is the surrender of his passport).

Third, the government's argument that the Adomako and Banuelos decisions are distinguishable from the instant case, (see Govt.'s Supp. Opposition at 8-10), is unpersuasive. As an initial matter, the government fails to explain why the fact that the defendants in Adomako and Banuelos were in the USM's custody (as opposed to ICE's custody) at the time of the decision makes any difference. In addition, contrary to the government's assertion, (see Govt.'s Supp. Opposition at 9), there is nothing in the Adomako decision indicating that its holding was premised solely on ensuring defendant pre-trial access to his attorney. In any event, it is clear from both decisions that the dispositive issue was whether defendant was being detained for removal purposes or for purposes of a criminal prosecution. See Adomako, 150 F.Supp.2d at 1307-08; Banuelos, No. 06-0547, at 4-6. If a defendant is in detention for purposes of a criminal

prosecution, both decisions provide that upon the completion of the terms of his bail conditions, a defendant is to be released pending trial. See id.

In some respects, this case is more compelling than Banuelos. Banuelos, unlike defendant here, challenged whether he could be transferred into ICE's custody because he had not been formally served with a Notice to Appear, although one had been drafted. (See Def.'s Supp. Brief. at 15 & Govt.'s Banuelos Opposition at 47-48). Because no Notice to Appear had been served on Banuelos, there was no basis to detain him and the court ordered the government to respond as to what ICE intended to do with respect to Banuelos. Banuelos, No. 06-0547 at 5-6. The government acknowledged that "if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court." (Govt.'s Banuelos Opposition at 48) (emphasis added).

Here, unlike Banuelos, there is a final order of removal which is not contested by defendant. However, ICE has stated that it will not execute the removal order, but will nevertheless maintain custody over defendant for purposes of the criminal prosecution. (See Departure Order & Declaration of Samuel Saxon in Support of the Govt.'s Supp. Opposition ("Saxon Decl.") at ¶ 7). To the extent defendant is not in removal proceedings, see supra at 9-10, defendant's position is no different from that in Banuelos. Whereas in Banuelos, ICE had the ability to serve the Notice of Detainer and obtain proper custody over Banuelos, here – because there was a final order of removal – ICE had the authority to detain defendant for removal purposes, but has chosen not to exercise its removal authority, apparently recognizing that if it takes custody of defendant for removal purposes, "ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court." (Govt.'s Banuelos Opposition at 48).

Finally, the government argues that "in the advent of ICE being subsumed into the [DHS] since the Adomako decision, any Court order directed to the Attorney General would fall short of mandating DHS or ICE's course of action." (Govt.'s Supp. Opposition at 9-10). As an initial matter, the government did not raise this argument during the Banuelos case, even though ICE was in existence at the time and the court issued an order, directing the government to state whether ICE intends to take defendant Banuelos into custody for removal purposes. Banuelos,

No. 06-0547M, at 5-6. In any event, that the functions of the INS have been transferred to ICE, which is subsumed under the DHS, rather than the Department of Justice, does not alter this court's authority to order a criminal defendant released pending trial pursuant to the Bail Reform Act. To the extent the government claims it has custody over defendant pursuant to the removal statute, 8 U.S.C. § 1231(a)(1), the law is clear that it is the Attorney General that has responsibility for defendant's detention. 8 U.S.C. § 1231(a)(2). ("During the removal period, the Attorney General shall detain the alien."). Indeed, despite the change in the organizational location of ICE within the federal government, federal statutes continue to vest in the Attorney General the statutory power to detain aliens. See, e.g., 8 U.S.C. § 1182(d)(5)(A) (Attorney General may parole an individual alien or return him "to the custody from which he was paroled"); id. at § 1226(c) (Attorney General is required to detain and has the power to release certain aliens); id. at § 1231(a)(6) (Attorney General may determine whether to detain removable and inadmissable aliens); id. at § 1252(b)(3)(A) (designating Attorney General as respondent in petitions for review brought by aliens) & id. at § 1103(a)(1) (stating that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling[]").

Further, while it is true that the court does not ordinarily have the authority to order ICE to release an alien who is in removal proceedings, (see Govt.'s Banuelos Opposition at 48: "if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts the defendant beyond the reach of the district court[]"), here, it is clear that ICE is detaining defendant solely for the purposes of the criminal prosecution. See supra at 8. In other words, defendant is in custody pending trial, which is governed by the Bail Reform Act. See 18 U.S.C. § 3142(b).

Taking the government's argument to its logical extreme would mean that, although defendant is being held by ICE solely to be criminally prosecuted, the court would have no authority to order ICE to bring defendant to court, even though he has a constitutional right to be present at all court proceedings. Of course, the government has not taken such an extreme position. Indeed, ICE complied with the Court's Order of November 2, 2007, by bringing defendant to court for the oral argument. More importantly, ICE has stated that it "will maintain custody of

[defendant] during his court appearances as well as transport him during the pendency of his present criminal proceedings." (Saxon Decl. at ¶ 7). To the extent defendant is being held by ICE solely for purposes of the criminal prosecution, the court clearly has jurisdiction over ICE under the Bail Reform Act. However, even assuming, arguendo, that was not the case, ICE has, under the circumstances here, consented to this court's jurisdiction for purposes of the instant criminal case.

CONCLUSION

In Banuelos, the government stated that:

> neither the United States Attorney's Office nor the district court may ask or instruct ICE to detain defendant for purposes of assuring his appearance before the court in this criminal matter. Indeed, if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court.

(Govt.'s Banuelos Opposition at 48). The court agrees with the government's statement, but the record before it establishes that "ICE [is] detain[ing] defendant for purposes of assuring his appearance before the court in this criminal matter." (Id.). Under such circumstances, the court clearly has authority to order defendant's release; indeed, the court has already ordered that defendant be released pending trial in the instant matter. Nevertheless, as set forth below, the court will give the government one last opportunity to state its position with respect to whether it is detaining defendant for removal proceedings or for the "pendency of his present criminal proceedings." (Saxon Decl. at ¶ 7).

This decision is not intended for publication.

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Ex Parte Application for Hearing Re Bail Order of October 23, 2007 **(Document No. 9)** is **granted in part and denied in part**.

2. No later than **November 30, 2007,** the government shall file and serve a Notice Re: Removal Proceedings Against Defendant Luna-Gurrola ("Notice"), stating, at a minimum: (i) whether and when the Attorney General intends to effectuate defendant's removal; (2) if the

Attorney General does not intend to remove defendant, then the Attorney General shall set forth the detention statute upon which it relies in detaining defendant in its custody.[6] The Notice shall be accompanied by a declaration from the Attorney General's office and/or an ICE official providing all relevant information pertaining to the commencement and completion of the removal proceedings.

3. If the Attorney General does not intend to remove defendant before trial and the government has not timely filed the Notice and declaration required by paragraph two above, the Attorney General shall ensure that defendant is released forthwith, as defendant has already complied with the conditions set for release pending trial.

Dated this 20th day of November, 2007.

/s/
Fernando M. Olguin
United States Magistrate Judge

[6] As noted above, it is the Attorney General that is responsible for defendant's detention. See, e.g., 8 U.S.C. § 1231(a)(2). ("During the removal period, the Attorney General shall detain the alien."); id. at § 1182(d)(5)(A) (Attorney General may parole an individual alien or return him "to the custody from which he was paroled"); id. at § 1226(c) (Attorney General is required to detain and has the power to release certain aliens); id. at § 1231(a)(6) (Attorney General may determine whether to detain removable and inadmissable aliens); id. at § 1252(b)(3)(A) (designating Attorney General as respondent in petitions for review brought by aliens)) & id. at § 1103(a)(1) (stating that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling[]").

Appendix 2

No. 12-30205

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EZEQUIEL CASTRO-INZUNZA,
Defendant-Appellant.

Appeal under FRAP 9(a) and Circuit Rule 9-1.1 from the United States District Court for the District of Oregon

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ADDENDUM TO BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF OREGON IN SUPPORT OF APPELLANT

Kevin Diaz
AMERICAN CIVIL LIBERTIES
UNION OF OREGON
P.O. Box 40585
Portland, OR 97240
(503) 227-6928
KDiaz@aclu-or.org

Michael Tan* *admitted in NY*
Counsel of Record
Cecillia Wang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0779
mtan@aclu.org
cwang@aclu.org

ADDENDUM

1. *United States v. Banuelos*, No. 06-0547M (C.D. Cal. Apr. 12, 2006)

   (Order Re: Def. Mot. for Release)

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FAX DELIVERY ON PLAINTIFF/DEFENDANT (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD IN THIS ACTION ON THIS DATE.

DATE April 13, 2006

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ABDON MARTINEZ MANUELOS,

Defendant.

NO. 06-0547M (FMO)

ORDER Re: DEFENDANT'S MOTION TO ORDER UNITED STATES MARSHALS TO IMMEDIATELY RELEASE DEFENDANT PURSUANT TO THIS COURT'S BAIL ORDER NOTWITHSTANDING THE "IMMIGRATION DETAINER"

Having reviewed and considered all the briefing and oral argument presented to the court with respect to defendant's Motion to Order United States Marshals to Immediately Release Defendant Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" ("Motion"), the court concludes as follows.

BACKGROUND

Defendant is charged with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) & (b)(2). Defendant made his first appearance before the court on March 23, 2006. During that proceeding, the court appointed counsel for defendant who requested that the hearing on the government's request for detention be continued to March 27, 2006. On March 23, 2006, the United States Immigration and Customs Enforcement ("ICE") placed an immigration detainer (Form I-247) on defendant pursuant to 8 C.F.R. § 287.7(a). (Government's Opposition to

Defendant's Motion to Order United States Marshals to Immediately Release Defendant Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" ("Opposition") at 4 & Exh. I).

On March 27, 2006, after a full hearing pursuant to 18 U.S.C. § 3142(f), the court denied the government's motion to detain defendant. The court found that there was a combination of conditions that would reasonably assure the appearance of defendant. Among other conditions, the court set bail for defendant in the amount of $490,000 with a justified affidavit of surety by defendant's wife for $300,000 and $190,000 from defendant, with the deeding of their respective properties. The court ordered the United States Marshal ("USM") to hold defendant in custody until notified by the court's clerk that defendant has complied with all the conditions for release, including the deeding of the property.

On March 29, 2006, defendant filed the instant Motion. The government filed its Opposition on April 7, 2006, and defendant filed his Reply on April 11, 2006.

DISCUSSION

I. THE BAIL REFORM ACT.

Under the Bail Reform Act, 18 U.S.C. § 3142(b), Congress has mandated that a judicial officer shall order the pretrial release of the person "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b).

The Act "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (citing 18 U.S.C. § 3142(c)(2)); see also United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). According to the Gebro court:

> Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor. On a motion for pretrial detention, the government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk, and

by clear and convincing evidence that the defendant poses a danger to the community.

Gebro, 948 F.2d at 1121 (internal citations omitted). "[T]he statute neither requires nor permits a pretrial determination of guilt." Id. (citing United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986) (per curiam) and Motamedi, 767 F.2d at 1408).

If the judicial officer determines that a person is not a citizen of the United States or lawfully admitted for permanent residence and that he may flee or pose a danger to the community, the judicial officer shall order temporary detention for not more than ten days and direct the attorney for the government to notify the appropriate immigration official. 18 U.S.C. § 3142(d)(1)(B).

If the judicial officer determines that the individual may flee or pose a danger and the immigration official does not take custody within ten days, the statute directs the Court to apply the normal release and detention rules to deportable aliens without regard to the laws governing release in ICE deportation proceedings:

> If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.

18 U.S.C. § 3142(d). Thus, Congress has directed the courts to apply the normal release and detention rules to a deportable alien (i.e., "[S]uch person shall be treated in accordance with the other provisions of this section."). Id.; see also United States v. Xulam, 84 F.3d 441, 442-43 (D.C. Cir. 1996) (per curiam) (deportable alien not a flight risk where conditions could be imposed to ensure return to court); United States v. Adomako, 150 F.Supp.2d 1302, 1306-07 (M.D. Fla. 2001) (defendant "is not barred from release because he is a deportable alien;" immigration status is one factor that the court weighs in the flight risk analysis).

II. DEFENDANT'S MOTION.

Defendant asserts that the "government's continued attempt to detain [him], by attempting to transfer him to immigration custody, violates . . . the Bail Reform Act." (Motion at 6). Defendant argues that detention by ICE is only proper for purposes of a removal proceeding. (Id. at 13)

("where any transfer would not be for purposes of removal, the detainer cannot justify continued detention"). According to defendant, because the United States Attorney's Office ("USAO") has instituted a criminal prosecution against him, "it is clear that if transferred to ICE custody, the government would not truly be holding [defendant] for purposes of removal proceedings, but in actual fact would be detaining him, pretextually and contrary to this Court's bail order, for purposes of a criminal prosecution." (Id.); (see also id. at 2) (ICE "may not lawfully detain [defendant] when it has no intention of effecting his removal expeditiously, but instead would only delay removal proceedings pending the instant criminal prosecution").

Defendant's Motion relies on Adomako, which held that 18 U.S.C. § 3142(d) directs a district court "to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial[.]" 150 F.Supp.2d at 1307. The Adomako court ordered the USAO to file and serve notice as to whether the INS intended to take the defendant into custody pursuant to § 3142(d)'s ten-day deadline "to permit deportation, and whether the INS intends to deport [the defendant] before trial[.]" Id. at 1308. The Adomako court further ordered that if the INS did not take custody within the deadline, the USM could only detain the defendant until he met the court's previously set release conditions. Id. Finally, the court ordered that if the defendant were to meet the release conditions, "the Attorney General (in his capacity as head of both the United States Marshals Service and the INS) shall release the defendant so that he may comply with the conditions set for his release pending trial[.]" Id.

The government's Opposition did not mention or discuss the Adomako decision. (See, generally, Opposition at 1-12). However, the government appears to agree with defendant that detention by ICE for any purpose other than removal proceedings is improper. Specifically, the government states that it:

> has not sought, nor does it intend, to detain defendant for []his criminal prosecution through the civil detention mechanism available to ICE. Rather, the government has asked defendant be detained by the USMS. Continued detention by ICE would contravene ICE's statutorily-prescribed mission of

> removal of criminal aliens from the country. It would also contravene the statutes governing ICE's operation. ICE is directed to effect the physical removal of individuals ordered removed within the statutorily specified 90-day "removal period." 8 U.S.C. § 1231(a)(1)(A). Moreover, ICE is only permitted to detain aliens for a reasonable time after the propriety of their removal has been adjudicated.

(Id. at 8). The government acknowledges that if defendant is released to ICE custody to effect his removal, it will not be able to proceed with the instant prosecution:

> Because [defendant] will likely be removed from this country based on the charges of removability, defendant will be rendered unable to attend further criminal proceedings.

(Id. at 9) (see also id.) ("if defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the deportation puts defendant beyond the reach of the district court").

In light of the government's position that it does not intend to detain defendant for his pending criminal proceedings through ICE and its acknowledgment that it will likely not be able to prosecute defendant once removal proceedings have commenced, the court believes that the orders (with the modifications noted below) entered by the Adomako court are sufficient to address the parties' concerns. In other words, the court will give the USAO ten days to state whether ICE has taken defendant into custody and initiated removal proceedings. If the USAO does not state that ICE taken defendant into custody and initiated removal proceedings within the ten-day period, then the USM shall release defendant once he has satisfied all the conditions of release.

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Motion to Order United States Marshals to Immediately Release Defendant Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" **(Document No. 9)** is **granted and denied in part**.

2. No later than **April 17, 2006**, the government shall file and serve a Notice Re: Removal Proceedings Against Defendant Banuelos ("Notice") stating whether and when ICE intends to take

defendant into custody to commence removal proceedings. The Notice shall be accompanied by a declaration from an ICE official providing all relevant information pertaining to the commencement and completion of the removal proceedings.

3. If ICE has not taken defendant into custody and the government has not timely filed the Notice and declaration required by paragraph two above, the United States Marshal shall otherwise keep defendant in custody until notified by the court that defendant has posted bond and/or complied with all other conditions for release. Once the United States Marshal is notified by the court that defendant has posted bond and/or complied with all other conditions of release, the United States Marshal shall release defendant so that he may comply with the conditions set for release pending trial.

4. In the event that: (i) ICE takes custody of defendant for purposes of his removal proceedings; and (ii) the United States Marshal then obtains custody again of defendant for any matters relating to the instant criminal prosecution; and (iii) defendant has satisfied the bond conditions set by this court, the United States Marshal shall release defendant immediately, notwithstanding any "immigration detainer."

Dated this 12 day of April, 2006.

Fernando M. Olguin
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 06-0547 M (FMO) DATE: April 14, 2006

TITLE: UNITED STATES OF AMERICA v. ABDON MARTINEZ BANUELOS

DOCKET ENTRY:

PRESENT:

Hon. Fernando M. Olguin, United States Magistrate Judge

Vanessa Del Rio — ---
Deputy Clerk — Court Reporter / Tape No.

COUNSEL PRESENT FOR PLAINTIFF(S):	COUNSEL PRESENT FOR DEFENDANT(S):
Not present	Not present

PROCEEDINGS: **Order Clarifying the Court's Order Re: Defendant's Motion To Order United States Marshals To Immediately Release Defendant Pursuant To This Court's Bail Order Notwithstanding The "Immigration Detainer."**

The court hereby clarifies its Order Re: Defendant's Motion To Order United States Marshals To Immediately Release Defendant Pursuant To This Court's Bail Order Notwithstanding The "Immigration Detainer" ("Order") filed on April 12, 2006. Specifically, page 5, lines 18-21 are hereby amended to state, "In other words, the court will give the USAO until **April 17, 2006,** to state whether ICE intends to take defendant into custody and initiate removal proceedings. If the USAO does not state that ICE intends to take defendant into custody and initiate removal proceedings by the deadline set forth below, then the USM shall release defendant once he has satisfied all the conditions of release." Such amendment comports with paragraph 2 of the Order. (See Court's Order of April 12, 2006, at 5, ¶ 2).

In addition, page 6, line 4 is hereby amended to state, "If ICE does not intend to take defendant into custody and the government has not timely filed the Notice and declaration required by paragraph two above, the United States Marshal shall otherwise keep defendant in custody until notified by the court that defendant has posted bond and/or complied with all other conditions for release."

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FAX DELIVERY ON PLAINTIFF/DEFENDANT (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD IN THIS ACTION ON THIS DATE.

DATE: 4/14/06

Vanessa Del Rio
DEPUTY CLERK

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 6, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Michael K.T. Tan
Michael K.T. Tan

United States v. Castro-Inzunza

Memorandum In Support of Appeal From Order Revoking Release

No. 12-30205

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EZEQUIEL CASTRO-INZUNZA,

Defendant-Appellant.

Appeal under FRAP 9 (a) and Circuit Rule 9-1.1 from the United States District Court for the District of Oregon

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MEMORANDUM IN SUPPORT OF APPEAL FROM ORDER REVOKING RELEASE

Francesca Freccero
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Defendant-Appellant

Ezequiel Castro-Inzunza appeals to this Court under Rule 9 (a) and Circuit Rule 9-1.1 from a pretrial order of the district court revoking the magistrate judge's order of release pending trial. Mr. Castro-Inzunza seeks an order from this Court reinstating his pretrial release order.

Mr. Castro-Inzunza is charged with unlawfully re-entering the United States after deportation. After a hearing on May 14, 2012, the Honorable John V. Acosta, United States Magistrate Judge, found that Mr. Castro-Inzunza did not pose a danger to the community or a serious risk of flight and ordered his release from custody. Upon the government's motion under 18 U.S.C. § 3145 (a)(1), the Honorable Malcolm F. Marsh, Senior United States District Judge, revoked the release order and detained Mr. Castro-Inzunza pending trial.

Where the defendant is denied pretrial release, the "Fifth and Eighth Amendments' prohibitions of deprivation of liberty without due process and of excessive bail require careful review" of the detention order "to ensure that the statutory mandate has been respected." *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985). In his opinion dated May 30, 2012, Judge Marsh concluded that Mr. Castro-Inzunza was not a danger and did not pose a risk of flight, but that the risk of nonappearance created by an immigration detainer and reinstated order of removal warranted detention under 18 U.S.C. § 3142. Because

both the magistrate judge and Judge Marsh found that Mr. Castro-Inzunza does not pose a danger or a serious risk of flight, the Bail Reform Act does not permit pretrial detention. The risk of nonappearance created by the chance that the government may decline to use its discretion to postpone Mr. Castro-Inzunza's removal proceedings is a matter wholly within the government's control and not a statutorily authorized reason for detention.

STATEMENT OF FACTS

Mr. Castro-Inzunza is a 44-year-old Mexican national. He has been married for twenty years and is the father of three children. His wife, mother, sisters, and children are all citizens of the United States. Their home is Las Vegas, Nevada, where his wife has run a hair salon for approximately ten years. Mr. Castro-Inzunza has worked in the autobody business and as a minister in the Las Vegas area. The Pretrial Services Office and the district court received and reviewed a large number of letters supporting Mr. Castro-Inzunza in connection with his release hearings. Mr. Castro-Inzunza has a single criminal conviction, possession with intent to sell heroin, resulting from an arrest in 1989.[1]

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[1] The facts concerning Mr. Castro-Inzunza's characteristics and history are not in dispute. *See* Govt Motion to Revoke, CR 28, p. 1. All assertions offered in this Memorandum were established in the district court, by means of the report by the Pretrial Services Office and material submitted by both parties in support of pleadings.

In September 2012, Mr. Castro-Inzunza traveled to eastern Oregon with his son. While working for an agricultural concern there, he was arrested for trespassing. Upon that arrest and while Mr. Castro-Inzunza was in the Umatilla County Jail, immigration officials detained him because he had been deported from the United States in 1994. On September 28, 2011, Immigration and Customs Enforcement (ICE) agent Joshua Tobias interviewed Mr. Castro-Inzunza concerning his alienage and other matters. *See* Govt Motion to Revoke, CR 28, Ex C. Agent Tobias also notified Mr. Castro-Inzunza of the government's intention to reinstate the prior removal order of January 1994. ICE reinstated that order on the same day. *Id.*

Thereafter, ICE referred Mr. Castro-Inzunza to the United States Attorney for criminal prosecution. On October 18, 2011, the federal grand jury in the District of Oregon returned an Indictment charging Mr. Castro-Inzunza with a violation of 8 U.S.C. § 1326 (a), unlawful re-entry after deportation.

Mr. Castro-Inzunza originally had lawful temporary residency in the United States under the Special Agricultural Worker (SAW) program of the late 1980's. Temporary residents under that program adjusted to lawful permanent residency automatically on of December 1, 1990. Mr. Castro-Inzunza's arrest for the heroin offense occurred in 1989, and, on January 20, 1990, on the advice of his attorney,

Mr. Castro-Inzunza pleaded guilty to the charge. Neither the attorney nor the court advised Mr. Castro-Inzunza that his guilty plea would result in his deportation from the United States.

Mr. Castro-Inzunza received an Order to Show Cause from the immigration service in March 1993. Immigration authorities sought to deport Mr. Castro-Inzunza on the grounds that he was a lawful permanent resident who had been convicted of an aggravated felony. Those proceedings were dismissed in June 1993 for lack of jurisdiction, however, because Mr. Castro-Inzunza had suffered his aggravated felony conviction before his status was adjusted. Later that year, during a routine visit to the immigration office, Mr. Castro-Inzunza learned that the immigration service had rescinded his green card because of the conviction of an aggravated felony before his status adjusted. Immigration authorities took him into custody, placed him in deportation proceedings, and deported him on January 19, 1994.

The United States Supreme Court held in 2010 that counsel renders ineffective assistance in violation of the Sixth Amendment when counsel fails to advise the criminal defendant that deportation is a potential consequence of a guilty plea. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010). With separate counsel, Mr. Castro-Inzunza initiated post-conviction proceedings in Nevada in

December 2011. He moved to withdraw his guilty plea on *Padilla* grounds. That motion was denied by the Nevada trial court on March 28, 2012, on the grounds that the rule of *Padilla* could not be applied retroactively to Mr. Castro-Inzunza's conviction. Mr. Castro-Inzunza appealed the denial of his motion to withdraw his guilty plea. That appeal is pending before the Nevada Supreme Court.[2]

There is a split among the federal circuit courts of appeal concerning the retroactivity of the *Padilla* rule on collateral review. *Compare United States v. Orocio*, 645 F.3d 630, 641 (3rd Cir. 2011) (*Padilla* retroactive), *with Chaidez v. United States*, 655 F.3d 684, 694 (7th Cir. 2011) (*Padilla* not retroactive), *cert. granted,* 132 S. Ct. 2101 (April 30, 2012). In his request for release from detention, Mr. Castro-Inzunza advised the district court that he sought the opportunity to litigate his post-conviction motion in Nevada before proceeding to trial on the Indictment in this case. *See Contreras v. Schiltgen*, 122 F.3d 30, 33 (9th Cir. 1997) (petitioner challenging deportation on grounds of invalidity of underlying criminal conviction first should attack conviction in jurisdiction where conviction was suffered). If Mr. Castro-Inzunza succeeds in that litigation, then it

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[2] *Castro v. State*, Nevada Supreme Court case no. 60800. According to that court's website, the next due date for briefing is July 23, 2012, when appellant's statement and appendix are due. *See* http://caseinfo.nvsupremecourt.us/public.

is likely that he will once again have lawful status in the United States. *See, e.g., Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990) (when conviction that formed basis of previous deportation is vacated, deportation is rendered illegal and alien has right to re-open).

The government did not argue that Mr. Castro-Inzunza posed a danger, but it argued that he should be held as a flight risk. Magistrate Judge Acosta granted Mr. Castro-Inzunza's request for release, issuing a 12-page opinion on May 14, 2012, concluding that the ICE detainer was not dispositive and that Mr. Castro-Inzunza should be released because he did not pose a serious risk of flight. Transcripts and Opinions Concerning Defendant's Release and Detention (TO), 51-62.

The government moved under 18 U.S.C. § 3145 (a)(1) to revoke the order releasing Mr. Castro-Inzunza. After briefing by the parties, Judge Marsh held a hearing on May 22, 2012. At that hearing, the government conceded that, but for the ICE detainer and the removal order, release on conditions would be appropriate. TO__ 18, 37-38.

Judge Marsh stated that he did not want to postpone the criminal case while the Nevada courts decided Mr. Castro-Inzunza's post-conviction litigation. TO__ 44. He referred to the August 14, 2012, jury-trial date as firm. *Id.* He

advised Mr. Castro-Inzunza that, if he were adjudged guilty, it was unlikely he would serve more time in custody. TO__ 42. He also indicated that, if the Nevada courts later vacated Mr. Castro-Inzunza's 1990 conviction, he would entertain a motion to vacate the § 1326 conviction under 28 U.S.C. § 2255. TO__ 43. The court noted that it was concerned that, if Mr. Castro-Inzunza were released, he would be deported and then necessarily fail to appear for trial. TO__40. Judge Marsh commended Mr. Castro-Inzunza, stating that he had no doubt that he would have released him were it not for the immigration detainer. TO__ 46.

The court issued its written opinion on May 30. Mr. Castro-Inzunza immediately filed for reconsideration. After the government's response, the district court denied the motion to reconsider on June 11, 2012.

ARGUMENT

THE BAIL REFORM ACT REQUIRES MR. CASTRO-INZUNZA'S PRETRIAL RELEASE, BECAUSE THE COURT FOUND THAT HE IS NEITHER A DANGER NOR A SERIOUS FLIGHT RISK, AND BECAUSE THE POSSIBILITY THAT THE GOVERNMENT WILL EXERCISE ITS DISCRETION TO IMMEDIATELY REMOVE MR. CASTRO-INZUNZA FROM THE UNITED STATES IF HE IS RELEASED DOES NOT JUSTIFY DETENTION.

Mr. Castro-Inzunza poses no danger to the public, has deep ties to his community, and presents no serious risk that he intentionally would evade prosecution or fail to appear of his own volition. Under these circumstances, the

Bail Reform Act requires his release pending trial, despite a risk of nonappearance created by an immigration detainer and reinstated order of removal. The risk of involuntary nonappearance is not grounds for detention under the Act. Further, any such risk can be eliminated by the government in the exercise of its own discretion.

A. The Bail Reform Act Favors Release of Defendants Pending Trial, Authorizing Detention Only When the Defendant Is Dangerous or Presents a Serious Risk of Flight and No Conditions or Combination of Conditions Will Ensure His Reappearance for Trial and the Safety of the Community.

Non-capital defendants normally should be released pending trial.

Motamedi, 767 F.2d at 1405. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Bail Reform Act codifies the norm of pretrial release for persons charged with a federal offense:

> [T]he judicial officer shall issue an order that, pending trial, the person be–
> (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
> (2) released on a condition or combination of conditions under subsection (c) of this section;
> (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
> (4) detained under subsection (e) of this section.

18 U.S.C. § 3142 (a). Detention, therefore, is only authorized as described under

subsection (e), which, in turn, provides for a hearing as described under subsection (f). Only after that hearing is detention authorized, 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 and the community." 18 U.S.C. § 3142 (e).

Subsection (f) sets out the rules for the detention hearing, including who may request one and under what circumstances. The attorney for the government may move for a detention hearing in a case that involves a crime of violence or a controlled substances offense punishable by a maximum of more than 10 years, a crime with life imprisonment exposure, a crime that is a felony with certain predicates or involving a minor or dangerous weapon or involving a failure to register as a sex offender. 18 U.S.C. § 3142 (f)(1). The attorney for the government, or the court of its own motion, may also hold a detention 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.

18 U.S.C. § 3142 (f)(2). "Therefore, as stated in the legislative history [of the Bail Reform Act of 1984], the requisite circumstances for invoking a detention hearing

in effect serve to limit the types of cases in which detention may be ordered prior to trial." *United States v. Himler,* 797 F.2d 156, 160 (3rd Cir.1986).

According to the plain language of the statute, where the defendant is not charged with an offense described under § 3142 (f)(1), and where there is no risk that the defendant will obstruct justice or intimidate a witness or juror, the threshold requirement for pretrial detention is that the case must involve "a serious risk that [the] person will flee." 18 U.S.C. § 3142 (f)(2); *Himler*, 797 F.2d at 160. The burden is on the government to prove a serious risk of flight by a clear preponderance of the evidence. *Motamedi*, 767 F.2d at 1406-07.

The plain language of the statute also means that the risk is one of *flight*, or a volitional act to evade the judicial process. That is consistent with traditional notions of the purpose of "bail," which is not forfeited when the person's nonappearance is caused by forces beyond his control. *See Taylor v. Taintor,* 83 U.S. 366, 369 (1872) ("It is the settled law... that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law").

If there is a serious risk of flight, then the judicial officer must "determine whether any condition or combination of conditions ... will reasonably assure the appearance of such person as required and the safety of any other person and the

community." 18 U.S.C. § 3142 (f). Without the threshold determination of the serious risk of flight, however, the judicial officer need not address what conditions will assure defendant's appearance at trial, because the only risks of nonappearance that are not risks of flight are those that are not in the defendant's control. Just as the judicial officer cannot detain in order to prevent accidental nonappearance, such as from accident or injury, so, too, the judicial officer cannot detain because there is a concern that some other law enforcement agency will take the defendant away.

B. The Record Establishes That Mr. Castro-Inzunza must Be Released Pending Trial, Because He Does Not Present a Danger or a Serious Risk of Flight.

Mr. Castro-Inzunza does not present a danger to anyone. The only question was whether he presented a "serious risk of flight." The record before the district court establishes that he does not.

The district court noted that it had received and reviewed more information concerning Mr. Castro-Inzunza's background than it usually has at a sentencing in other unlawful re-entry cases. TO__ 42. Based on that information, it was clear to the district court that, if Mr. Castro-Inzunza were adjudicated guilty, "that would bring about an extremely short sentence, if any further at all." *Id.* Accordingly, although the statutory maximum penalty for the offense in the indictment is 20

years, Mr. Castro-Inzunza is not facing much further imprisonment, if any, if he is convicted of the crime. Therefore, the penalties threatened against Mr. Castro-Inzunza do not provide him any incentive to flee if he were released from custody.

Despite the absence of any reason for Mr. Castro-Inzunza to fear additional incarceration, the district court heavily relied on *United States v. Lozano*, 1:09-CR-158-WKW (M.D. Ala. 2009) (2009 WL 3834081), an opinion animated by the fact that the defendant, also accused of a violation of 8 U.S.C. § 1326, had a substantial criminal history and sought his release on the criminal case in the hope that he would be removed or deported instead of facing further incarceration. *Id.* (opinion of magistrate judge, 2009 WL 3052279,*1). Although that defendant, too, did not present a "serious risk of flight" within the meaning of the Bail Reform Act, he had demonstrated an obvious desire to avoid prosecution by being deported. Mr. Castro-Inzunza, by contrast, knows that he likely will be released at the time of sentencing, and has amply demonstrated his desire to remain in the United States to pursue his post-conviction litigation and the possibility of once again having lawful status in the United States.

In its opinion, the district court found that Mr. Castro-Inzunza had only a single previous criminal conviction from 1990 and he had "strong ties" to the Las Vegas area, where his wife and his immediate family reside. TO__ 11, 18. The

court cited the Pretrial Services report's statement that Mr. Castro-Inzunza's wife had owned and operated a small business in Las Vegas for the previous ten years. TO__ 18. The court also had noted that it had received a notebook full of letters of support for Mr. Castro-Inzunza. TO__ 42. Were it not for the fact of the immigration detainer and the removal order, the district court would have affirmed the magistrate judge's order releasing Mr. Castro-Inzunza. TO__ 46.

Based on the facts found by the district court, the Bail Reform Act does not authorize the detention of Mr. Castro-Inzunza, and this Court should reverse the order of the district court revoking the previous release order.

C. The District Court Erred When it Concluded That a Risk of Nonappearance Caused by Factors out of Mr. Castro-Inzunza's Control Warrant Detention.

The district court in this case rejected the plain reading of the statute and held instead that it must evaluate the risk of nonappearance regardless of whether there has been a threshold determination of dangerousness or serious flight risk. TO__ 45-46. The district court's erroneous interpretation would read out of the Bail Reform Act Congress's careful description of the specific circumstances under which detention is authorized. Furthermore, the district court's interpretation would create a *per se* rule that defendants subject to removal or deportation orders must be detained, but the statute does not offer or authorize *per*

se rules of detention. Although it provides a presumption of detention in certain cases, even those defendants charged with violent and far more serious crimes than unlawful re-entry have the opportunity to rebut that presumption if they can show that they are neither dangerous nor pose a serious risk of flight. 18 U.S.C. § 3142 (e)(2). The Bail Reform Act requires an evaluation of all the circumstances presented, and a *per se* rule like that invoked by Judge Marsh prevents any meaningful exercise of judicial discretion. *See United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) ("[w]hen a court establishes a broad policy based on events unrelated to the individual case before it, no discretion has been exercised.")

The district court's reasoning also incorrectly suggests that Congress must not have anticipated the situation presented here, where a criminal defendant also is subject to removal from the United States by immigration authorities. But that conclusion is at odds with the plain language of the statute, which has a specific provision aimed at the person who is both charged with a federal offense and deportable: 18 U.S.C. § 3142 (d).

Under § 3142 (d), the judicial officer may temporarily detain a person charged with a federal offense if the person

(1) is not a citizen of the United States or lawfully admitted for

> permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and
> (2) such person may flee or pose a danger to any other person or the community.

The judicial officer is directed to detain that person for not more than ten days, and to

> direct the attorney for the Government to notify ... the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.

18 U.S.C. § 3142 (d).

Through paragraph (d), the Bail Reform Act directs the judicial officer to give the immigration authorities the opportunity to take into their custody the deportable person charged with a federal criminal offense. The Act dictates the manner in which the government should resolve the problem presented in cases such as Mr. Castro-Inzunza's. The government may choose whether to relinquish criminal custody of the accused in favor of immigration proceedings, or the immigration authorities may take custody of the individual after the criminal proceedings are completed. However, if the government chooses not to have the defendant go into immigration custody, then he must be treated like every other

criminal defendant under the Bail Reform Act, "*notwithstanding the applicability of other provisions of law governing.... deportation proceedings*." The district court did not have to engage in the struggle it identified to harmonize the Bail Reform Act with 8 U.S.C. § 1231 (a)(5), because Congress already addressed that interplay in 18 U.S.C. § 3142 (d). *See United States v. Xulam*, 84 F.3d 441, 444 (D.C. Cir. 1996) (if immigration authorities declined to take defendant into custody during 10-day period of § 3142 (d), then defendant is subject to ordinary provisions of Bail Reform Act); *see also Himler*, 797 F.2d at 161 (temporary detention under § 3142 (d) is appropriate to allow other authorities to act on warrants and detainers).

When the government does not move for temporary detention under § 3142 (d), it should not be permitted to later invoke "the specter of deportation through the back door as the principal reason for detention." *Xulam*, 84 F.3d at 444. That "back door" should particularly be closed in a case such as this one, where immigration officials are both the criminal investigating agents and the deportation agents. An immigration agent encountered Mr. Castro-Inzunza, interviewed him, advised him of ICE's intention to reinstate his 1994 removal order, reinstated the order, and only *then* presented his case to the United States Attorney for prosecution. Reinstated Removal Order, Ex C to Govt Motion to

Revoke, CR 28. ICE could have chosen simply to reinstate the removal order and remove Mr. Castro-Inzunza from the United States. When it was immigration officials who chose to prioritize criminal prosecution over removal, the government should not be permitted to invoke later the defendant's deportability as a reason to treat him differently from any other person covered by the Bail Reform Act or by the Fifth and Eighth Amendments of the Constitution. If the Executive chooses criminal prosecution, then it must come with all of the constitutional and statutory rights accorded any criminal defendant in the United States.

D. If Mr. Castro-Inzunza Is Released from Criminal Custody, it Is Within the Government's Discretion to Lift the Immigration Detainer or to Stay the Removal Proceedings, So the Government Has the Power to Eliminate the Perceived Risk of Mr. Castro-Inzunza's Nonappearance for Trial.

Finally, the district court's decision was based on the erroneous conclusion that the government could not control the timing of Mr. Castro-Inzunza's departure from the United States if he were released from custody. The court assumed that Mr. Castro-Inzunza's immediate removal was a foregone conclusion. TO__5, 19. The court noted that, under 8 U.S.C. § 1231 (a)(5), ICE "shall" remove the alien within 90 days of being detained in ICE custody. TO__19. However, that directive language is not "mandatory" in the sense understood by

the district court. Indeed, if it were, then ICE never would be able to produce for prosecution individuals against whom it had reinstated a removal order, as it did in this case. *See Bartholomew v. United States,* 740 F.2d 526, 531 (7th Cir.1984) (legislature's use of "shall" or "must," rather than "may," in directing discharge of specified duty does not require that statute be construed as mandatory rather than directory).

Moreover, ICE has extremely broad prosecutorial discretion that it can use to stay or not enforce a removal order. 8 C.F.R. § 241.6(a) (agency "may grant a stay of removal or deportation" to noncitizen with final removal order "for such time and under such conditions as . . . deem[ed] appropriate"); *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) ("the Executive has discretion to abandon" immigration cases at any stage of litigation, including "execut[ing] removal orders"). The agency repeatedly has asserted its power to exercise prosecutorial discretion to, among other duties, decline to arrest certain people, lift detainers, release persons on bond, and stay or fail to execute removal orders. *See, e.g.,* Memorandum from John Morton, Director, U.S. Immigration Customs and Enforcement, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," at 3 (June 17,

2011).[3]

Regulations and agency guidance also specifically contemplate the use of stays to allow noncitizens to testify in pending criminal proceedings. *See* 8 C.F.R. § 241.6 (a) (incorporating by reference need for alien to testify in pending criminal proceeding as reason to grant stay); *see also* Memorandum from John Morton, Director, U.S. Immigration Customs and Enforcement, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," at 2 (June 17, 2011).[4] If stays can be used to permit the testimony of an undocumented witness, then clearly they can be used to permit prosecution of the defendant. ICE also has the option to seek a "departure control order" under 8 C.F. R. §§ 215.1-215.7. Among the reasons to delay the non-citizen's departure by means of a departure control order is if the

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[3] The Memorandum is available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf, and provides in pertinent part: "Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise 'prosecutorial discretion' if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing the law to decide to what degree to enforce the law against a particular individual....In the civil immigration enforcement context, the term 'prosecutorial discretion' applies to a broad range of discretionary enforcement decisions, including but not limited to....deciding to issue or cancel a notice of detainer....staying a final order of removal... executing a removal order."

[4] Available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

non-citizen is a witness or party in any criminal case. 8 C.F.R. §§ 215.3 (g), (h).

Although a specific Assistant U.S. Attorney or even the United States Attorney herself may not have the power to *force* ICE to stay a removal proceeding, that is a dispute within the Executive Branch that should have no bearing on the judicial officer's detention decision. Because ICE cooperated with the U.S. Attorney to bring the prosecution in the first instance, surely it would cooperate again if the need arose. To act otherwise would be irrational, and cannot be a basis for the detention of someone who otherwise is eligible for release pending trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court revoking Mr. Castro-Inzunza's release, and remand with instructions to reinstate the May 14, 2012, order of the magistrate judge releasing Mr. Castro-Inzunza.

DATED: June 29, 2012

/s/ Francesca Freccero
Francesca Freccero
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 29, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jill Inglis
Jill Inglis