

## **The Bail Reform Act and Release from Criminal and Immigration Custody for Federal Criminal Defendants<sup>1</sup>**

by Lena Graber and Amy Schnitzer<sup>2</sup>  
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.<sup>3</sup> 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.

---

<sup>1</sup> Copyright (c) 2013, National Immigration Project of the National Lawyers Guild. This advisory is not a substitute for independent legal advice and decision-making by a lawyer familiar with a client’s case. Readers are cautioned to check for new legal developments.

<sup>2</sup> 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](mailto:dan@nipnlg.org).

<sup>3</sup> 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.<sup>4</sup> The Bail Reform Act sought to balance community safety with the respect for access to counsel required by the Constitution.<sup>5</sup> The Act retained the constitutional presumption in favor of release, although it imposed substantial presumptions against bail for prior offenders.<sup>6</sup>

Congress created the Bail Reform Act to address “the alarming problem of crimes committed” by persons released on bail.<sup>7</sup> 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).<sup>8</sup>

### *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.<sup>9</sup>

- Section 3142(a) lays out four options: release on recognizance, release on conditions, temporary detention to permit deportation, and detention.<sup>10</sup>
- 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.<sup>11</sup>

---

<sup>4</sup> 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”).

<sup>5</sup> See *United States v. Salerno*, 481 U.S. 739, 742 (1987).

<sup>6</sup> See 18 U.S.C. § 3142(e).

<sup>7</sup> *United States v. Salerno*, 481 U.S. 739, 742 (1987) quoting *S.Rep. No. 98-225, p. 3* (1983).

<sup>8</sup> See 18 U.S.C. § 3142(d); *United States v. Adomako*, 150 F. Supp. 2d 1302, 1304 (M.D. Fla. 2001).

<sup>9</sup> *United States v. Perez-Franco*, 839 F.2d 867, 870 (1st Cir. 1988).

<sup>10</sup> 18 U.S.C. § 3142(a).

<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> This rule is logical in light of permanent residents’ acknowledged ties to the United States and vested liberty rights.<sup>14</sup>

For noncitizens who fall under § 3142(d), the judge shall direct the prosecutor to notify the appropriate ICE official of the ten day deadline.<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup>

### *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

---

*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”).

<sup>12</sup> 18 U.S.C. § 3142(d).

<sup>13</sup> 18 U.S.C. § 3142(c).

<sup>14</sup> 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).

<sup>15</sup> 18 U.S.C. § 3142(d)(2).

<sup>16</sup> *Id.*

<sup>17</sup> *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.<sup>18</sup> However, courts and prosecutors frequently assume that the detainer means ICE will take custody and likely deport anyone released on bail.<sup>19</sup>

Because of a detainer, or because the case was referred by DHS,<sup>20</sup> federal courts often skip the ten day temporary detention period and go straight to a bail hearing.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

---

<sup>18</sup> 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](http://nationalimmigrationproject.org/community/Detainer_Guidance_Plus_Addendums.pdf).

<sup>19</sup> 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).

<sup>20</sup> 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.

<sup>21</sup> See *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001); *United States v. Martinez-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).

<sup>22</sup> *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.")

<sup>23</sup> *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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> Although alienage is not listed as a factor or criterion for release,<sup>27</sup> courts regularly consider immigration status in the determination of risk of flight.<sup>28</sup> Nonetheless, most courts have found that an

---

<sup>24</sup> 18 U.S.C. § 3142(f).

<sup>25</sup> 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).

<sup>26</sup> 18 U.S.C. § 3142(g).

<sup>27</sup> 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).

<sup>28</sup> *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.<sup>29</sup> 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.”<sup>30</sup> Other than this, the BRA places no special restrictions or conditions on defendants who are non-citizens.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> A detainer, or even a prior removal order, does

---

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).

<sup>29</sup> 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. Albanna*, 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.

<sup>30</sup> 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”).

<sup>31</sup> *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1174 (D. Or. 2012).

<sup>32</sup> *Adomako*, 140 F. Supp. 2d at 1307.

<sup>33</sup> *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.<sup>34</sup> 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.<sup>35</sup>

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."<sup>36</sup> The court in *Barrera-Omana* ordered the defendant to be released from custody in spite of the detainer.<sup>37</sup>

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.<sup>38</sup> 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

---

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*));

<sup>34</sup> 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*).

<sup>35</sup> 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").

<sup>36</sup> *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009).

<sup>37</sup> *Id.*

<sup>38</sup> See *United States v. Albanaa*, 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.<sup>39</sup>

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).<sup>40</sup> 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.<sup>41</sup> Several other courts have agreed that risk of flight only encompassed the risk that defendant will flee, not that defendant might be forcefully removed.<sup>42</sup> 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.<sup>43</sup>

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,<sup>44</sup> and thus there was a substantial risk of non-appearance under § 3142(e)(1).<sup>45</sup> In *United States v. Ong*, the Northern District of Georgia considered the *Montoya-Vasquez* and *Barrera-Omana* decisions, but agreed with *Lozano*.<sup>46</sup> 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.<sup>47</sup>

---

<sup>39</sup> *Montoya-Vasquez*, 2009 WL 103596 at 5.

<sup>40</sup> *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009).

<sup>41</sup> *Id.*

<sup>42</sup> *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.

<sup>43</sup> *Barrera-Omana*, 638 F. Supp. 2d at 1112.

<sup>44</sup> Either the Court misunderstood what an immigration detainer is, or the detainer form itself indicated that the subject had a prior removal order.

<sup>45</sup> *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).

<sup>46</sup> *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).

<sup>47</sup> *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.<sup>48</sup> 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.<sup>49</sup>

*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,<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> Most circuits agree that an ICE detainer is not custody.<sup>53</sup> A detainer in lieu of ICE appearance cannot supplant the Bail Reform Act statutory scheme.<sup>54</sup> To the contrary, defenders should argue that a detainer issued during temporary detention only serves to notify

---

<sup>48</sup> 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).

<sup>49</sup> *United States v. Marinez-Patino*, 2011 WL 902466, 5 (N.D. Ill. Mar. 14, 2011).

<sup>50</sup> 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.

<sup>51</sup> *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).

<sup>52</sup> 18 U.S.C. § 3142(d).

<sup>53</sup> 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).

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> 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.

---

<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> Similarly, ICE's Tool Kit for Prosecutors provides administrative options to release individuals whose presence is needed at criminal proceedings in the United States.<sup>60</sup>

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.<sup>61</sup> 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."<sup>62</sup> 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.<sup>63</sup>

*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.<sup>64</sup> 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.<sup>65</sup>

---

<sup>58</sup> See Bureau of Justice Statistics, Department of Justice, Compendium of Federal Justice Statistics, 2004 40 (2006).

<sup>59</sup> See *id.*

<sup>60</sup> See Immigration and Customs Enforcement, Department of Homeland Security, Tool Kit for Prosecutors, 4-10 (April 2011).

<sup>61</sup> *United States v. Adomako*, 150 F. Supp. 1302, 1308 (M.D. Fla. 2001).

<sup>62</sup> *Adomako*, 150 F. Supp. 2d at 1307.

<sup>63</sup> *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."

<sup>64</sup> *Trujillo-Alvarez*, 900 F. Supp. 2d at 1176.

<sup>65</sup> *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.<sup>66</sup> 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.<sup>67</sup> The court in *Luna-Gurrola* also rejected ICE’s argument that Luna-Gurrola was detained because he subject to mandatory detention.<sup>68</sup>

Other courts have supported this idea less directly. In *Marinez-Patino*, the court rejected the idea that the INA could require ICE to detain and deport a defendant who awaited trial.<sup>69</sup> 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.”<sup>70</sup>

Unfortunately, for many years the dominant practice was to submit to ICE whenever they took custody of noncitizen criminal defendants.<sup>71</sup> For example, in *United States v. Todd*, the Middle District of Alabama granted ICE two bites at the apple.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.”<sup>75</sup> 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*.

---

<sup>66</sup> *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.)

<sup>67</sup> *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.)

<sup>68</sup> *Luna-Gurrola*, No. 2:07-mj-01755 at 7-8.

<sup>69</sup> *United States v. Marinez-Patino*, 2011 WL 902466, 8 (N.D. Ill. Mar. 14, 2011).

<sup>70</sup> *Id.*

<sup>71</sup> See generally Lasch, Christopher “*Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*,” 35 Wm. Mitchell L.Rev. 164 (2008).

<sup>72</sup> *United States v. Todd*, 2009 WL 174957, 2 (M.D. Ala. Jan. 23 2009).

<sup>73</sup> *Id.* at 1.

<sup>74</sup> *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).

<sup>75</sup> *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.<sup>76</sup> 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.”<sup>77</sup> 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.”<sup>78</sup> 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.”<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> In *Luna-Gurrola*, the Central District of California ordered a

---

<sup>76</sup> 18 U.S.C. § 3142(d).

<sup>77</sup> 8 C.F.R. § 215.3(g).

<sup>78</sup> 8 C.F.R. § 215.2(a).

<sup>79</sup> 8 C.F.R. § 215.3(g).

<sup>80</sup> 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”).

<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup>

#### **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."<sup>87</sup> In determining release or conditions under 3142(f), the detainer does not prevent an order of release.<sup>88</sup> The detainer arguably is too indeterminate to be a custody factor at all.<sup>89</sup>

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.

---

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

<sup>82</sup> *Luna-Gurrola*, No. 2:07-mj-01755 at 8-9.

<sup>83</sup> *Id.* at 8.

<sup>84</sup> *Id.* at 15.

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

<sup>86</sup> If an immigration bond is available and affordable, that is probably a simpler and faster choice.

<sup>87</sup> *Adomako*, 150 F. Supp. 2d at 1307.

<sup>88</sup> *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).

<sup>89</sup> *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. Martinez-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.<sup>90</sup> In particular, ICE cannot civilly detain a defendant while awaiting criminal trial, if that defendant was ordered released under § 3142.<sup>91</sup> 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.<sup>92</sup>

A defendant apprehended by ICE could apply for an ex parte hearing regarding the bail order.<sup>93</sup> 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.<sup>94</sup> 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.

---

<sup>90</sup> *United States v. Adomako*, 150 F. Supp. 2d 1302, 1308 (M.D. Fla. 2001).

<sup>91</sup> *United States v. Luna-Gurrola*, No. 2:07-mj-01755, Dkt. 24, 15 (C.D. Cal. Nov. 20, 2007).

<sup>92</sup> See generally *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (due process limits immigration detention to purpose of carrying out removal).

<sup>93</sup> 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.

<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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...”<sup>97</sup> Further, the court reasoned, an immigration detainer cannot divest the federal courts of jurisdiction over the release for a criminal defendant.<sup>98</sup>

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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

---

<sup>95</sup> *United States v. Ong*, 762 F. Supp. 2d 1353, 1359 (N.D. Ga. 2010).

<sup>96</sup> *United States v. Luna-Gurrola*, No. 2:07-mj-01755, Dkt 24, 15 (C.D. Cal. Nov. 20, 2007).

<sup>97</sup> *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001).

<sup>98</sup> *Id.*

<sup>99</sup> 8 U.S.C. § 1231(a)(1).

<sup>100</sup> *Luna-Gurrola*, No. 2:07-mj-01755 at 16; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>101</sup> *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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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

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

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

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

21 On November 9, 2007, the government filed its Opposition. On November 13, 2007,  
22 defendant filed his Reply to the government's Opposition ("Reply"). On the same day, defendant  
23 also filed the Second Ex Parte Application. On November 14, 2007, the government filed an  
24 Application to the Criminal Duty Judge for Review of the Magistrate Judge's Bail Order  
25 ("Application for Review") and a Memorandum of Points and Authorities in Support of the Motion  
26 for Review. On the same day, the court heard oral argument from the parties regarding  
27  
28

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

## 5 DISCUSSION

### 6 I. THE BAIL REFORM ACT.

7 Under the Bail Reform Act, 18 U.S.C. § 3142(b), Congress has mandated that a judicial  
8 officer shall order the pretrial release of the person "unless the judicial officer determines that such  
9 release will not reasonably assure the appearance of the person as required or will endanger the  
10 safety of any other person or the community." 18 U.S.C. § 3142(b). The Act "requires the release  
11 of a person facing trial under the least restrictive condition or combination of conditions that will  
12 reasonably assure the appearance of the person as required and the safety of the community."  
13 United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (per curiam) (citing 18 U.S.C. §  
14 3142(c)(2)); see also United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). According  
15 to the Gebro court:

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

22 948 F.2d at 1121 (internal citation omitted). "[T]he statute neither requires nor permits a pretrial  
23 determination of guilt." Id. (citing United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986) (per  
24 curiam) and Motamedi, 767 F.2d at 1408).

---

25  
26 <sup>1</sup> The court also heard argument relating to the government's Application for Review of this  
27 court's bail decision. However, the court believes that the government's Application for Review  
28 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).

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

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

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

## 20 II. DEFENDANT’S EX PARTE APPLICATION.

21 Defendant asserts that, although there is a final order of removal entered against him, his  
22 removal has been “prevented by the [USAO] . . . so that it may pursue the instant [criminal]  
23 prosecution.”<sup>2</sup> (Reply at 2). Defendant argues that his detention by ICE is “solely for purposes  
24

---

25 <sup>2</sup> Defendant concedes that because he was released to ICE’s custody within 24 hours of  
26 being released by the USM, his request that he be released from the USM’s custody if not  
27 released within 48 hours of satisfying the conditions of his release is moot. (See First Ex Parte  
28 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).

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

6 Defendant relies on Adomako, which held that 18 U.S.C. § 3142(d) directs a district court  
7 “to disregard the laws governing release in [Immigration and Naturalization Service (“INS”)]<sup>3</sup>  
8 deportation proceedings when it determines the propriety of release or detention of a deportable  
9 alien pending trial[.]” 150 F.Supp.2d at 1307. The Adomako court ordered the USAO to file and  
10 serve notice as to whether the INS intended to take the defendant into custody pursuant to  
11 § 3142(d)’s ten-day deadline “to permit deportation, and whether the INS intends to deport [the  
12 defendant] before trial[.]” Id. at 1308. The Adomako court further ordered that if the INS did not  
13 take custody within the deadline, the USM could detain the defendant only until he met the court’s  
14 previously set release conditions. Id. Finally, the court ordered that if the defendant were to meet  
15 the release conditions, “the Attorney General (in his capacity as head of both the United States  
16 Marshals Service and the INS) shall release the defendant so that he may comply with the  
17 conditions set for his release pending trial[.]” Id.

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

23  
24  
25  
26  
27 <sup>3</sup> The INS was abolished on March 3, 2003, and its functions were transferred to the  
28 Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §  
471, 116 Stat. 2135, 2205 (2002).

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

13 Additionally, the government asserted at oral argument that because there is a final order  
14 of removal entered against defendant, ICE can detain him for up to 90 days to effectuate his  
15 removal pursuant to 8 U.S.C. § 1231(a)(1). (See Transcript of Hearing Re Defendant's Ex Parte  
16 Application ("Hearing Trans.") at 17-18 & 21-22). The government also asserts that ICE has the  
17 authority to prevent defendant's departure from the United States and that defendant cannot  
18 challenge the Departure Order because he has failed to exhaust his administrative remedies  
19 pursuant to 8 C.F.R. § 215.4. (See Govt.'s Supp. Opposition at 4-7). Finally, the government  
20 maintains that, "[w]hile the Bail Reform Act grants the [c]ourt authority to determine whether a  
21 defendant awaiting trial in a criminal case shall be released or detained, it does not authorize the  
22 [c]ourt to release him notwithstanding a lawfully-issued immigration detainer." (Id. at 7). The  
23 government states that, "[t]aking into consideration the reinstatement of defendant's prior order  
24 of deportation, coupled with the fact that he is subject to mandatory detention, it is axiomatic that  
25  
26

---

27  
28 <sup>4</sup> The government's initial Opposition did not mention or discuss the Adomako or the Banuelos decisions. (See, generally, Opposition at 1-9).

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

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

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

17 (Def.’s Supp. Brief., Exh. G<sup>5</sup> (“Govt.’s Banuelos Opposition”) at 47); (see also Govt.’s Supp.  
18 Opposition at 7) (“ICE detention . . . is an administrative tool used to facilitate civil proceedings  
19 which determine the eligibility of aliens to remain in the United States. It is not to punish the crime  
20 of unlawful entry.”). In Banuelos, the government also conceded that if defendant is released to  
21 ICE custody to effect his removal, it will not be able to proceed with the instant prosecution:  
22 “Because [defendant] will likely be removed from this country based on the charges of  
23 removability, defendant will be rendered unable to attend further criminal proceedings.” (Govt.’s  
24 Banuelos Opposition at 48); (see also id.) (“[I]f defendant is released to ICE custody, ICE must be  
25  
26

---

27  
28 <sup>5</sup> 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.



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

3 After determining that the government’s position had not changed from the position it took  
4 in Banuelos, the court asked government counsel to explain on what ground ICE was detaining  
5 defendant. (Hearing Trans. at 23). Counsel alternated between refusing to take a position and  
6 claiming that defendant was being detained pursuant to 8 U.S.C. § 1231(a)(1), which allows ICE  
7 to detain a person for up to 90 days to effectuate his removal. (Compare id. at 18 & 21-22 with  
8 id. at 23-25 & 33-34). Apparently realizing the inconsistency in its position relating to defendant’s  
9 removal and what it would mean with respect to his criminal prosecution, the government now  
10 takes the position that “defendant is currently detained in ICE custody with a departure control  
11 order[.]” (Govt.’s Supp. Opposition at 5). However, that position is contrary to the position taken  
12 by government counsel during oral argument where counsel stated that the regulations that give  
13 ICE authority to issue departure control orders, 8 C.F.R. §§ 215.2 & 215.3(g), are not detention  
14 statutes, i.e., ICE cannot rely on those regulations to detain an alien. (See Hearing Trans. at 18  
15 & 27).

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



1 the country[]” as well as “the statutes governing ICE’s operation.” (Govt.’s Banuelos Opposition  
2 at 47).

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

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

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

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

18 Nevertheless, it is clear that § 1231(a)(1) cannot be the basis of defendant’s detention. If  
19 it were, defendant should have already been removed. Also, the Departure Order states that  
20 defendant will not be removed pending the criminal prosecution. (*See* Departure Order). Under  
21 such circumstances, it appears that defendant is no longer in removal and therefore cannot be  
22 detained for the 90-day removal period. *See, e.g., Tijani v. Willis*, 430 F.3d 1241, 1243-50 & n.  
23 7 (9th Cir. 2005) (Tashima, Judge, concurring) (noting that petitioner was detained under 8 U.S.C.  
24 § 1226 because “this court has stayed his removal pending its review of the BIA’s decision[ ]” and  
25 therefore the petitioner “has not entered his 90-day removal period under 8 U.S.C. § 1231(a)”);  
26 *Kothandaraghipathy v. Dep’t of Homeland Sec.*, 396 F.Supp.2d 1104, 1107 (D. Ariz. 2005)  
27 (holding that because the Ninth Circuit had granted petitioner a stay of removal, his “current  
28 detention is pursuant to the pre-removal order detention statute, 8 U.S.C. § 1226, rather than the

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

3 More importantly, the reason defendant cannot be in ICE custody on the basis of  
4 § 1231(a)(1) is because, as the government acknowledged in Banuelos and reaffirmed in the  
5 instant case, "if [a] defendant is released to ICE custody to effect his removal, [the government]  
6 will not be able to proceed with the instant prosecution[.]" Banuelos, No. 06-0547M, at 5; (see also  
7 Govt.'s Banuelos Opposition at 47-48). The government's position is difficult to reconcile. On the  
8 one hand, the government claims that defendant can be detained for 90 days for removal  
9 purposes under § 1231(a)(1) and, on the other hand, it claims that defendant cannot be criminally  
10 prosecuted if defendant is being detained in ICE custody for removal purposes.

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

1 315 F.3d 538, 540 (5th Cir. 2003) (per curiam) (“[P]risoners are not ‘in custody’ for [habeas]  
2 purposes . . . merely because the INS has lodged a detainer against them.”); Orozco v. I.N.S., 911  
3 F.2d 539, 541 (11th Cir. 1990) (per curiam) (filing of detainer, standing alone, did not cause the  
4 prisoner to come within INS custody); Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989)  
5 (filing of an INS detainer with prison officials does not constitute the requisite “technical custody”  
6 for purposes of habeas jurisdiction). Thus, absent an independent detention statute under the  
7 INA, the “immigration detainer” is insufficient to justify the detention of defendant.

8         Second, the government’s assertion that defendant cannot challenge the Departure Order  
9 because he has failed to exhaust his administrative remedies, (see Govt.’s Supp. Opposition at  
10 5-6), is without merit because defendant is not challenging the Departure Order in this action.  
11 Rather, he is only challenging his pre-trial detention for the purposes of the instant criminal  
12 proceedings. Moreover, as indicated above and as the government conceded at oral argument,  
13 (see Hearing Trans. at 18 & 27), 8 C.F.R. § 215.3(g) does not provide a basis for ICE detention.  
14 Rather, it is simply an Order preventing defendant’s departure from the United States during the  
15 pendency of the instant criminal proceedings and, in this way, is actually consistent with the terms  
16 provided for defendant’s pre-trial release in the Court’s Order of October 23, 2007. (See Court’s  
17 Order of October 23, 2007) (providing that one condition of defendant’s pre-trial release is the  
18 surrender of his passport).

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

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

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

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

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

1 No. 06-0547M, at 5-6. In any event, that the functions of the INS have been transferred to ICE,  
2 which is subsumed under the DHS, rather than the Department of Justice, does not alter this  
3 court's authority to order a criminal defendant released pending trial pursuant to the Bail Reform  
4 Act. To the extent the government claims it has custody over defendant pursuant to the removal  
5 statute, 8 U.S.C. § 1231(a)(1), the law is clear that it is the Attorney General that has responsibility  
6 for defendant's detention. 8 U.S.C. § 1231(a)(2). ("During the removal period, the Attorney  
7 General shall detain the alien."). Indeed, despite the change in the organizational location of ICE  
8 within the federal government, federal statutes continue to vest in the Attorney General the  
9 statutory power to detain aliens. See, e.g., 8 U.S.C. § 1182(d)(5)(A) (Attorney General may parole  
10 an individual alien or return him "to the custody from which he was paroled"); id. at § 1226(c)  
11 (Attorney General is required to detain and has the power to release certain aliens); id. at §  
12 1231(a)(6) (Attorney General may determine whether to detain removable and inadmissible  
13 aliens); id. at § 1252(b)(3)(A) (designating Attorney General as respondent in petitions for review  
14 brought by aliens) & id. at § 1103(a)(1) (stating that "determination and ruling by the Attorney  
15 General with respect to all questions of law shall be controlling[]").

16 Further, while it is true that the court does not ordinarily have the authority to order ICE to  
17 release an alien who is in removal proceedings, (see Govt.'s Banuelos Opposition at 48: "if  
18 defendant is released to ICE custody, ICE must be permitted to deport him to Mexico, even if the  
19 deportation puts the defendant beyond the reach of the district court[]"), here, it is clear that ICE  
20 is detaining defendant solely for the purposes of the criminal prosecution. See supra at 8. In  
21 other words, defendant is in custody pending trial, which is governed by the Bail Reform Act. See  
22 18 U.S.C. § 3142(b).

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

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

### 7 CONCLUSION

8 In Banuelos, the government stated that:

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

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

22 This decision is not intended for publication.

23 Based on the foregoing, IT IS ORDERED THAT:

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

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







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

---

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

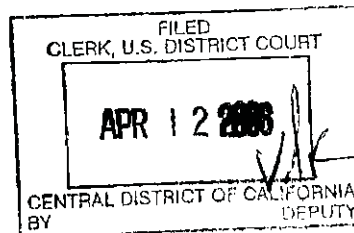
Michael Tan\* *admitted in NY*  
*Counsel of Record*  
Cecillia Wang  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
Immigrants' Rights Project  
39 Drumm Street  
San Francisco, CA 94111  
(415) 343-0779  
mtan@aclu.org  
cwang@aclu.org

**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.

1 DATE April 13, 2006  
2 Vanessa deAlto  
3 DEPUTY CLERK



Priority \_\_\_\_\_  
Send \_\_\_\_\_  
Enter \_\_\_\_\_  
Closed \_\_\_\_\_  
JS-5/JS-6 \_\_\_\_\_  
JS-2/JS-3 \_\_\_\_\_  
Scan Only

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,  
12 Plaintiff,  
13 v.  
14 ABDON MARTINEZ E ANUELOS,  
15 Defendant.  
16

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"**

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

**BACKGROUND**

23 Defendant is charged with illegal re-entry after deportation, in violation of 8 U.S.C. §  
24 1326(a) & (b)(2). Defendant made his first appearance before the court on March 23, 2006.  
25 During that proceeding, the court appointed counsel for defendant who requested that the hearing  
26 on the government's request for detention be continued to March 27, 2006. On March 23, 2006,  
27 the United States Immigration and Customs Enforcement ("ICE") placed an immigration detainer  
28 (Form I-247) on defendant pursuant to 8 C.F.R. § 287.7(a). (Government's Opposition to

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

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

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

#### 14 DISCUSSION

##### 15 I. THE BAIL REFORM ACT.

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

20 The Act "requires the release of a person facing trial under the least restrictive condition  
21 or combination of conditions that will reasonably assure the appearance of the person as required  
22 and the safety of the community." United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991)  
23 (citing 18 U.S.C. § 3142(c)(2)); see also United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir.  
24 1985). According to the Gebro court:

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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)

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

9 Defendant’s Motion relies on Adomako, which held that 18 U.S.C. § 3142(d) directs a  
10 district court “to disregard the laws governing release in INS deportation proceedings when it  
11 determines the propriety of release or detention of a deportable alien pending trial[.]” 150  
12 F.Supp.2d at 1307. The Adomako court ordered the USAO to file and serve notice as to whether  
13 the INS intended to take the defendant into custody pursuant to § 3142(d)’s ten-day deadline “to  
14 permit deportation, and whether the INS intends to deport [the defendant] before trial[.]” *Id.* at  
15 1308. The Adomako court further ordered that if the INS did not take custody within the deadline,  
16 the USM could only detain the defendant until he met the court’s previously set release conditions.  
17 *Id.* Finally, the court ordered that if the defendant were to meet the release conditions, “the  
18 Attorney General (in his capacity as head of both the United States Marshals Service and the INS)  
19 shall release the defendant so that he may comply with the conditions set for his release pending  
20 trial[.]” *Id.*

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

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

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

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

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

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

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

23 Based on the foregoing, IT IS ORDERED THAT:

24 1. Defendant's Motion to Order United States Marshals to Immediately Release Defendant  
 25 Pursuant to this Court's Bail Order Notwithstanding the "Immigration Detainer" (**Document No.**  
 26 **9**) is **granted and denied in part.**

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




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

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

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

16 Dated this 12 day of April, 2006.

17  
18   
19 \_\_\_\_\_  
20 Fernando M. Olguin  
21 United States Magistrate Judge  
22  
23  
24  
25  
26  
27  
28



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

002/002  
Priority \_\_\_\_\_  
Send \_\_\_\_\_  
Enter \_\_\_\_\_  
Closed \_\_\_\_\_  
JS-5/JS-6 \_\_\_\_\_  
JS-2/JS-3 \_\_\_\_\_  
Scan Only

CIVIL MINUTES - GENERAL

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