"THE FEDERAL CORNER"

DHS v. DOJ v. Our Clients

Buck Files

The Department of Homeland Security and the Department of Justice are competing *against* each other in a turf battle *and* playing tug of war with our clients. DHS is tugging on one arm, seeking deportation. The Department of Justice is on the other arm, seeking prosecution. This is a fact situation which we have seen recently in two cases: *United States v. Boutin*, ___F.Supp.3d___, 2017 WL 6611569 (E.D.N.Y. December 20, 2017) [Memorandum and Order, Chief United States District Judge Dora L. Irizarry] and *United States v. Ailon-Ailon*, 875 F.3d 1334 (10th Cir. 2017) *Per Curiam* [Panel: Circuit Judges Lucero, O'Brien and Phillips].

This presents a problem for our clients, for us and for the courts. Recently, in *Boutin*, Judge Irizarry expressed her frustration with this as she wrote,

> *Both the United States Department of Homeland Security ('DHS') and the United States Department of Justice ('DOJ') are part of the same Executive Branch of the federal government. The instant case, like Ventura, reflects a failure of coordination between the two agencies that jeopardizes the ability of DOJ to protect the interests of the government and of the people of the United States in prosecuting federal crimes. 'The Executive, in the person of the Attorney General, wishes to prosecute defendant. The same Executive, in the person of the Assistant Secretary of Homeland Security for ICE, may want to deport him.' United States v. Barrera-Omana, 638 F. Supp.2d 1108, 1111-12 (D. Minn. 2009).* Case law, statutes, and DHS's own regulations provide a resolution to this conflict, yet DHS, under the auspices of ICE, apparently will deport an alien regardless of the resulting prejudice to criminal prosecutions. In doing so, DHS also purposefully contravenes the Bail Reform Act, which, in part, exists to protect a defendant's constitutional rights. *The Court is gravely concerned by this apparent willingness to prejudice the interests of the people of the United States and the constitutional rights of the accused, with resulting waste of DOJ, court, and defense resources. Nonetheless, '[i]t is not appropriate for an Article III judge to resolve Executive Branch turf battles.' United States v. Barrera-Omana, 638 F. Supp.2d 1108, 1111-12 (D. Minn. 2009).* ICE can choose to delay a deportation when a criminal prosecution is pending. See *Ailon-Ailon*, 875 F.3d at 1339. Should ICE be unwilling to do so, 'it is a matter for the Executive Branch to resolve internally.' *The Court's duty is 'to treat defendant like any other alleged offender under the Bail Reform Act…[which] is not dependent upon the way in which ICE decides to act.' United States v. Marinez-Patino, No. 11-cr-064 (SIS), 2011 WL 902466, at (N.D. Ill. Mar. 14, 2011). It may not allow the Executive Branch to have it all ways. Accordingly, 'the Executive Branch should decide where its priorities lie: either with a prosecution in federal district court or with removal of the deportable alien.' Ventura, 2017 WL 5129012.*

In *Ailon-Ailon*, the United States Court of Appeals for the Tenth Circuit held that, as a matter of first impression, the risk of a defendant's involuntary removal by immigration officials did not establish a serious risk that he would flee, as would support pre-trial detention. The *per curiam* opinion of the Court reads, in part, as follows:

[An Overview of the Case]

> We expedited consideration of this bail appeal to consider Mario Ailon-Ailon's argument that the government has misinterpreted the word 'flee' as it appears in 18 U.S.C. § 3142(f)(2), resulting in his illegal pre-trial detention. He argues that involuntary removal by the Bureau of Immigration and Customs Enforcement ('ICE') does not constitute flight of the sort that would justify detention. On initial consideration, a magistrate judge agreed and determined that Ailon-Ailon should not be detained before trial. On review of the magistrate judge, the district court reversed, ordering that he be detained. We conclude that the plain meaning of 'flee' refers to a volitional act rather than involuntary removal, and that the structure of the Bail Reform Act supports this plain-text reading. Exercising jurisdiction under 18 U.S.C. § 3145(c), we reverse and remand for further proceedings.

[The Background of the Case]

> Ailon-Ailon, a citizen of Guatemala, has lived in Dodge City, Kansas, for at least seven years. In July 2017, he was arrested by ICE agents, who determined that he had reentered the United States illegally after he was ordered removed in 2001. Rather than immediately removing him again, ICE referred the matter for criminal prosecution. Ailon-Ailon was charged with one count of illegal reentry in violation of 8 U.S.C. § 1326(a), as enhanced by § 1326(b)(1). He is subject to a reinstated removal order, and ICE has lodged a detainer with the United States Marshals Service, requesting custody of Ailon-Ailon if he is released from the Marshals' custody.

[The Government's Motion to Detain Before a Hearing]

> The government moved to detain Ailon-Ailon prior to trial on the ground that, if he was released, he would be removed from the country by ICE before trial. It argued that because he is subject to a reinstated order of removal, ICE would be obligated to remove him within ninety days. He would therefore not be present for trial. A magistrate judge denied the government's motion, concluding that Ailon-Ailon was not a flight risk because 'the risk of flight that the [Bail Reform Act] is concerned with is not a flight paid for by the U.S. Government, and if the Government can't decide whether to keep him and prosecute him or deport him, that's on them.' The magistrate judge ordered that Ailon-Ailon be released subject to a ten-thousand dollar bond and certain conditions.

[The District Court's Reversal of the Magistrate Judge's Order]

On appeal of the magistrate's decision to the district court, the government reasserted its definition of 'flee.' By written order, the district court reversed, but specifically concluded in doing so that Ailon-Ailon was not a voluntary flight risk, and acknowledged that '[a]s a policy matter, ... if the United States government, through the Department of Justice, wanted [Ailon-Ailon] present for prosecution, it should not ... complain [about his] non-appearance due solely to the actions of the United States government, through the Department of Homeland Security.' However, the district court found by a preponderance of the evidence that ICE would remove him before trial and that such removal qualified as flight. It ordered that Ailon-Ailon be detained. This appeal followed.

[The Bail Reform Act]

'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Bail Reform Act sets forth one such exception. Under that Act, individuals charged with a crime are generally 'released on personal recognizance or upon execution of an unsecured appearance bond,' 18 U.S.C. § 3142(a)(1), or they may be 'released on a condition or combination of conditions' that will reasonably ensure their appearance in court and the safety of the community. § 3142(a)(2), (c)(1).

[The Two-Step Process]

The Act establishes a two-step process for detaining an individual before trial. § 3142(f). First, the government may move for pre-trial detention if the defendant has been charged with certain enumerated offenses or 'in a case that involves ... a serious risk that such person will flee; or ... a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.' If the court determines that there is such a risk, the government must prove at the second step of the process that there 'is no condition or combination of conditions' that 'will reasonably assure the [defendant's] appearance ... as required [as well as] the safety of any other person and the community.' The district court is directed to consider various factors in making this determination, including 'the nature and circumstances of the offense charged,' 'the weight of the evidence against the person,' 'the history and characteristics of the person,' and 'the nature and seriousness of the danger to any person or the community that would be posed by the person's release.' § 3142(g).

[The Government's Burden]

In this case, the government did not allege that Ailon-Ailon represented a danger to the community; it relied solely on the risk that Ailon-Ailon would flee in urging pre-trial detention. The government bears the burden of proving a

defendant is a flight risk by a preponderance of the evidence. *United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003). 'We apply de novo review to mixed questions of law and fact concerning the detention or release decision, but we accept the district court's findings of historical fact which support that decision unless they are clearly erroneous.'

[Ailon-Ailon's Position]

Ailon-Ailon argues that the word 'flee' as it appears in § 3142(f)(2) does not encompass involuntary removal. He contends the risk that he would be removed from the United States by ICE does not constitute a risk that he will flee prior to trial. This is an issue of first impression in this circuit.

[The Court's Conclusion]

District courts considering this argument have reached varying conclusions.

* * *

We agree with the latter set of courts that a risk of involuntary removal does not establish a 'serious risk that [the defendant] will flee' upon which pre-trial detention may be based. § 3142(f)(2)(A). Having failed to make the threshold showing required by § 3142(f), the government's detention motion fails at the first step of our analysis.

[The Statutory Interpretation]

In interpreting a statute, 'we look initially to the plain language of the provision at issue. If the words of the statute have a plain and ordinary meaning, we apply the text as written.' *Fruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010) (quotation, citation, and alteration omitted). The ordinary meaning of 'flee' suggests volitional conduct. For example, Black's Law Dictionary (10th ed. 2014) defines 'flee' as: 'To run away; to hasten off ... To run away or escape from danger, pursuit, or unpleasantness; to try to evade a problem ... To vanish; to cease to be visible ... To abandon or forsake.' Webster's Third New International Dictionary (1976) defines 'flee' as 'to run away from.' As Ailon-Ailon noted at oral argument, one would not describe an individual who has been arrested at a crime scene and involuntarily transported to a police station as having fled the scene.

The structure of the Bail Reform Act supports this plain-language interpretation.

* * *

The Act provides that a removable alien may be temporarily detained for up to ten days to permit ICE to take custody. § 3142(d)(2).2 If ICE declines to do so, 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.' This provision

demonstrates that a defendant 'is not barred from release because he is a deportable alien.'

* * *

Further, although Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list. See § 3142(e)(3). The Bail Reform Act directs courts to consider a number of factors and make pre-trial detention decisions as to removable aliens 'on a case-by-case basis.' *Barrera-Omana*, 638 F.Supp.2d at 1111 (quotation omitted). Yet under the government's construction, the Act's 'carefully crafted detention plan ... would simply be overruled by an ICE detainer,' precluding 'any kind of individualized consideration of a person before the Court.'

Finally, the Bail Reform Act provides an affirmative defense to prosecution for failure to appear if 'uncontrollable circumstances prevented the person from appearing or surrendering, and ... the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender.' § 3146(c). This section implies that the Act is concerned with 'the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions and will.' *Montoya-Vasquez*, 2009 WL 103596.

[The Government's Argument]

Despite the plain meaning of the word and the structure of the Act, the government argues that interpreting 'flee' to include involuntary removal would better effectuate congressional intent. It argues that such an interpretation would reconcile ICE's authority to refer cases for criminal prosecution with its statutory duty to promptly remove individuals who are subject to reinstated removal orders. See 8 U.S.C. § 1231(a)(1)(A) (stating that ICE 'shall remove the alien from the United States within a period of 90 days'). But it is not clear to us that ICE must remove Ailon-Ailon before trial. An illegal reentry prosecution may well be completed prior to the ninety-day deadline. The government also argues that pre-trial detention is justified by the inconvenience to ICE that will be involved if it must take Ailon-Ailon into custody under its detainer. While it would be more convenient and efficient for him to be held by the Marshals up to and during his trial, the government's convenience cannot justify a tortured reading of statutory language.

[This is a Matter for the Executive Branch]

…to the extent any conflict exists, it is a matter for the Executive Branch to resolve internally. 'The problem here is not that defendant will absent himself from the jurisdiction, but that two Article II agencies will not coordinate their respective efforts. ... It is not appropriate for an Article III judge to resolve Executive Branch turf battles.' Barrera-Omana, 638 F.Supp.2d at 1111; see also United States v. Tapia, 924 F.Supp.2d 1093, 1098 (D.S.D. 2013) ('[O]ne arm of the Executive, wishing to prosecute this defendant criminally, is arguing that he is likely to flee based on the possible actions of a different arm of the same

Executive.'); United States v. Trujillo-Alvarez, 900 F.Supp.2d 1167, 1170 (D. Or. 2012) ('If the Executive Branch chooses not to release the Defendant and instead decides to abandon criminal prosecution of the pending charge and proceed directly with Defendant's removal and deportation, the law allows the Executive Branch to do that.').

In light of the plain meaning of 'flee,' the structure of the Bail Reform Act, and the importance of the liberty interests at stake in this case, we decline to resolve the alleged conflict within the Executive Branch. We hold that, in the context of § 3142(f)(2), the risk that a defendant will 'flee' does not include the risk that ICE will involuntarily remove the defendant.

[The Result]

The order of the district court denying Ailon-Ailon pre-trial release is reversed. We remand with instructions to set appropriate conditions for Ailon-Ailon's release pending trial. When the conditions of release have been met, the United States Marshals shall release Ailon-Ailon to ICE custody, pursuant to the detainer. We grant Ailon-Ailon's motion to file a reply brief.

My Thoughts

- I was intrigued with *Ailon-Ailon* but had not seen *Boutin* until Ed Mallett emailed me the opinion. It's not often that we see the Court focus its unhappiness on the Government instead of on us and our clients. Nice.
- I suppose that this is one of the rare instances in which we will cheer for the Department of Homeland Security. After all, being deported beats being prosecuted *and* deported.