Criminal Detention and Immigration Issues in the Wake of Santos-Flores

Presented by the Tucson Chapter of the Federal Bar Association

March 22, 2016

Immigration Judge Thomas O'Leary, Matthew Green & Erica Seger

United States v. Santos-Flores

- 794 F.3d 1088 (9th Cir. 2015)
- Held: It was improper for the District Court to detain an illegal alien defendant solely based on "the possibility of his detention or removal by immigration authorities."
    - While a defendant's alienage could be considered in determining detention, it is not dispositive.
- Pending charge was 8 U.S.C. § 1326
    - Defendant subject to reinstatement of prior removal order
- Held: "Risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition."
- Ninth Circuit ultimately determined that defendant was a voluntary flight risk

Bail Reform Act (applicable to 1326 cases)

- Presumption of detention does not apply (§ 3142(e)(2) & (3)
- 18 U.S.C. § 3142(b) – OR release unless danger or flight risk
- 18 U.S.C. § 3142(c) – release on conditions unless danger or flight risk
- Factors (§ 3142(g))
- Nature and circumstances of the offense
- Weight of the evidence
- History and characteristics of the person
    - Character, physical and mental condition, family ties, employment, community ties, past conduct, criminal history, record of appearance at prior proceedings etc.
- Nature and seriousness of the danger to any person or community

Interpreting the Interplay between Immigration and the Bail Reform Act

United States v. Trujillo-Alvarez, 900 F.Supp.2d 1167 (D. Or. 2012)

- § 1326 defendant was granted pretrial release on the charge, but detained by ICE and removed.
- The District Court entered an order giving the "Executive Branch" one week "to return the Defendant to the District of Oregon and release him subject to the conditions previously determined by the Magistrate Judge. If that does not occur, the criminal charge now pending against the Defendant will be dismissed with prejudice."
- In other words, the government must choose removal or prosecution. If prosecution, then the defendant is released. If removal, then the indictment must be dismissed.

United States v. Lozano, 2009 U.S. Dist. LEXIS 106883 (M.D. Ala. 2009)

- Addressing risk of non-appearance regardless of the cause (government's action or own volition), the court noted that "[t]he 'failure to coordinate' between agencies of the Executive branch (that is, the U. S. Attorney's office and ICE) is hardly the fault of that branch. Congress, not the Executive, decreed that the defendant must be removed within 90 days of his release from confinement, and mandated that the possibility of further imprisonment is not a reason to defer removal.
- The court "reject[ed] defendant's contention that defendant should not be held in custody where the government has created the risk of nonappearance because the statute itself does not recognize the source of or reason for this risk as a material consideration."

United States v. Marinez-Patino, 2011 WL 902466 (N.D. Ill. March 14, 2011)

- But, even in the event that those agencies suddenly reversed course and engaged in a "turf battle[]" over the defendant, see *Barrera-Omana*, 638 F. Supp. 2d at 1112, and ICE were to remove the defendant against the wishes of the United States Attorney, our approach to this issue would remain unchanged. In deciding whether the defendant will be given pretrial release, this Court is governed by the BRA—like the immigration law, an Act of Congress. *See Chavez-Rivas*, 536 F. Supp. 2d at 964 n.3 ("Congress's directive to the executive in [the immigration laws] does not authorize me to disregard its directive to the courts in 18 U.S.C. § 3142(d) [of the Bail Reform Act]"). Our ruling today reaffirms our duty "to treat defendant like any other [alleged] offender under the Bail Reform Act." *Id*. at 964. That duty is not dependent upon the way in which ICE decides to act.

Other Cases

- *United States v. Montoya-Vasquez*, 2009 WL 103596 (D. Neb. January 13, 2009)
- *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855 (ND Iowa 2010)

- *United States v. Jocol-Alfaro*, 840 F. Supp. 2d 1116 (N.D. Iowa 2011)
- *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009)
- *United States v. Ramirez-Hernandez*, 910 F. Supp. 2d 1155 (ND Iowa 2013)
- *United States v. Ong*, 762 F. Supp. 2d 1353 (N.D. Ga. 2010)
- *United States v. Pantaleon-Paez*, 2008 WL 313785 (D. Idaho Feb. 1, 2008)
- *United States v. Sanchez-Valdivia*, 2008 WL 5104688 (D. Minn. Nov. 26, 2008)
- *United States v. Vencomo-Reyes*, 2011 WL 6013546 (D.N.M. Nov. 28, 2011)

Other Pertinent Statutes

- District courts do not have the authority to order the Attorney General to stay or interrupt removal proceedings. *See* 8 U.S.C. § 1252(g) (district courts lack jurisdiction to prevent removals).

Why are some defendants taken into immigration custody on the ICE detainer while others are released?

Inadmissibility (INA § 212) vs. Removability (INA § 237)

When is an alien seeking admission?

- An alien is deemed to be seeking admission when he or she seeks inspection and lawful entry into the United States. This occurs when:
    - The alien presents himself or herself at the border or port of entry and seeks permission from the United States government to come into the country legally.
    - The alien seeks lawful status while physically present in the United States, but is present either without lawful status or pursuant to parole.
    - The alien applies to adjust status to that of a lawful permanent resident.
    - The alien seeks to reenter the United States after a prior departure.

Does the same standard apply to LPR's? Short answer, no.

- An LPR is deemed to be seeking admission upon return to the United States from abroad in certain circumstances, including:
    - The alien has abandoned or relinquished that status.
    - The alien has been absent from the United States for a continuous period in excess of 180 days.

- The alien has engaged in illegal activity after having departed the United States.
- The alien has departed from the United States while under ... removal ... [or] extradition proceedings.
- The alien has committed an offense under INA § 212(a)(2) and since such offense the alien has been granted relief under INA § 212(h) or 240A(a).
- The alien is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

INA § 212 – Inadmissible Aliens

- An alien seeking admission to the United States from abroad must establish that he or she has the proper documentation, i.e., a visa or waiver thereof, and that he or she is ***not inadmissible*** under any of the grounds listed in INA § 212 or has obtained a waiver of inadmissibility.
- An alien who is physically present in the United States but who has not been lawfully admitted must establish either that he or she is ***not inadmissible*** and has a legal right to be admitted to the United States, or that he or she qualifies for a waiver or form of relief that would cure the ground of inadmissibility and enable the alien to adjust status to that of an LPR.

Grounds of Inadmissibility (INA § 212)

- Health-related issues (e.g., communicable diseases, vaccines, drug addict, physical or mental disorder)
- Criminal bars
  - Controlled substance offenses
  - Conviction or commission of crimes involving moral turpitude
- National security concerns (e.g., suspected terrorists, espionage, persons committing genocide)
- Unlawful entry
- Alien smuggling
- Fraud, Money Laundering
- False USC claim
- Economic Grounds

INA § 212(a)(2)(C)

- Any alien, who the consular officer or Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in 21 U.S.C. § 802), is inadmissible.
- An alien is also inadmissible if the consular officer or Attorney General knows or has reason to believe that the alien: (1) is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any controlled or listed substance or chemical; or (2) endeavored to do so.
- A spouse, son, or daughter of an alien covered in 8 U.S.C. § 1182(a)(2)(C)(i) who has, within the previous five years, benefitted from the illicit activity of the alien described in (C)(i), and knew or reasonably should have known that the benefit was illicit, is inadmissible.
- **This charge does not require a conviction**. *See Alarcon-Serrano v INS*, 220 F.3d 1116 (9th Cir. 2000); *see also Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004).
- The only requirement is that an immigration officer "knows or has reason to believe" that the alien is or has been an illicit trafficker in controlled substances, or that the alien knowingly assisted, abetted, conspired with, or colluded with others in such illicit trafficking, or has endeavored to do so. *Alarcon-Serrano*, 220 F.3d at 1119.
    - The information need not have been known to the "inspecting immigration officer" *see Gomez-Granillo v. Holder*, 654 F.3d 826, 832 (9th Cir. 2011)

How is this charge proven?

- "'[R]eason to believe' might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports." *Garces v. United States Attorney General*, 611 F.3d 1337, 1345-46 (11th Cir. 2010)
- "[T]he essence of the standard is that the consular officer must have more than a mere suspicion—there must exist a probability, supported by evidence, that the alien is or has been engaged in trafficking."

Other INA § 212 sections

- § 212(a)(2)(A)(i)(II)) - convicted or who admit to having committed a drug offense
- § 212(a)(2)(I)) – consular officer or AG know or have reason to believe has engaged or seeks to enter to engage in an offense under 18 U.S.C. § 1956 or 1957) money laundering)

- § 212(a)(6)(E)(i) – persons who knowingly encourage, induce, assist and abet, or aid any other alien to try to enter the U.S. in violation of law
- § 212(a)(3)(A)(i)(I)-(ii) Export Control Act violations

INA § 237 – Removable Aliens

- An alien who has been admitted to the United States either as an immigrant or nonimmigrant may be charged with the grounds of removability listed in INA § 237.
- DHS has the burden to prove "by clear and convincing evidence" that the alien is removable under one or more of the grounds in 8 U.S.C. § 1227.
- A decision on removability must be based on "reasonable, substantial, and probative evidence." 8 U.S.C. § 1229a(c)(3)(A)

INA § 237 – Grounds of Removability

- Visa Overstay
- Inadmissible at the time of entry
- Marriage Fraud
- Threat to National Security
- Criminal
    - CIMT (Crime Involving Moral Turpitude)
    - Aggravated Felony
    - Domestic Violence
    - Firearms Offenses
    - Controlled Substance Offense

INA § 236 – Detention of Aliens

- An alien in removal proceedings is generally entitled to release on bond unless subject to mandatory detention or is an "arriving alien."
- § 236(a) – Bond is discretionary.
- § 236(b) – Bond can be revoked at any time.
- § 236(c) – Detention is mandatory for certain aliens.

INA § 236 – Mandatory Detention of Criminal Aliens

- § 236(c) – A.G. **shall** take into custody any alien who:
  - Is inadmissible by reason of having committed any offense under INA § 212(a)(2)
    - criminal and related grounds
  - Is removable under INA § 237 for 2 CIMT's, or an aggravated felony, or a drug offense, or a firearms offense, or other miscellaneous crimes
  - Is removable for a conviction for a CIMT and was sentenced to at least one year
  - Is inadmissible or removable on terrorism grounds

Detention for "Arriving Aliens"

- 8 C.F.R. § 1.1(q) – "arriving alien" means an applicant for admission coming or attempting to come into the U. S. at a port-of-entry…
- Aliens stopped at border and found inadmissible have no constitutional right to release. *Shaughnessy v. U. S. ex rel. Mezei*, 345 U. S. 206, 210 (1953)
- 8 C.F.R. § 1003.19(h) – IJ does not have jurisdiction to grant bond in the case of, among other people, arriving aliens

Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015)

- Applies to aliens who previously applied for bond under INA § 236(a), arriving aliens under INA § 235(b), aliens subject to mandatory detention under INA § 236(c), and aliens who filed a PFR and stay of removal with the U.S. Court of Appeals for the Ninth Circuit.
- "Freedom from prolonged detention is considered an important interest at stake, and is involved when a case has lasted six months and is expected to continue more than minimally beyond six months."

What does *Rodriguez* mean practically?

- The first *Rodriguez* bond hearing for 236(a) aliens occurs either 180 days after the date of their initial bond decision, or at 180 days of detention (if they did not have a prior bond decision).
- The first Rodriguez bond hearing for 235(b) and 236(c) aliens occurs at 180 days of detention.
- The second and all subsequent bond decisions occur at 180 days from the date of the last bond decision.

What happens if the alien is successful at a *Rodriguez* bond hearing?

- If the alien is successful and obtains a bond (and are released from custody), ICE will change venue to a non-detained docket, and their immigration cases will heard by another Immigration Judge.

What if an alien-defendant is removed before the criminal case is resolved?

- Parole
  - 8 U.S.C. § 1182(d)(5)
  - 8 C.F.R. § 212.5(b) – may not be released from custody if flight risk
- Deferred Action - 8 C.F.R. § 274a.12(c)(14)
  - Discretionary pursuant to internal DHS instructions and procedures
- Stay
  - Automatic - 8 C.F.R. § 1003.6(a)
  - Discretionary - 8 C.F.R. § 241.6
  - Judicially Imposed - 8 U.S.C. § 1252(b)(3)(B)