North Carolina Central Law Review

Volume 41 | Number 2 Article 3

2019

Pretrial Release for Undocumented Immigrants in United States v. Flores: The Bail Reform Act Leaves No Room for Debate

Hayley C. Milczakowski

PRETRIAL RELEASE FOR UNDOCUMENTED IMMIGRANTS IN *UNITED STATES V. FLORES*: THE BAIL REFORM ACT LEAVES NO ROOM FOR DEBATE

BY: HAYLEY C. MILCZAKOWSKI

INTRODUCTION

There has been a surge in deportations and arrests of undocumented immigrants under the Trump administration.[1] In February 2017, the Department of Homeland Security (DHS) expanded immigration enforcement guidelines in compliance with an Executive Order issued by President Trump.[2] The policy included a directive to focus on removable aliens who "have been charged with a criminal offense that has not been resolved."[3] In the 2018 fiscal year, Immigration and Customs Enforcement (ICE) reported a thirteen percent increase in deportations, and an eleven percent rise in arrests.[4] The increase in immigration enforcement and shift in specific ICE policies has sparked a national political controversy.

Against this backdrop is a federal district court spilt on an issue that demonstrates the difficulty of reconciling changing immigration law with a prescribed, thirty-year old statute. The issue is whether a defendant who has been charged with unlawful reentry into the United States may be labeled a flight risk under the Bail Reform Act, due to risk of ICE detainment and deportation.[5] Furthermore, whether this risk leaves no alternative but to deny release pending trial.[6] This issue has not yet been considered in the Fourth Circuit, and has been met with conflicting resolution in other federal district courts.[7]

In this note, I will examine the stance taken by the United States District Court in the Western District of Virginia in a case of first impression. In a

1. U.S. Immigration & Customs Enf't, Fiscal Year 2018 ICE Enforcement and Removal Operations Report, https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf.
2. *Id.* at 1.
3. *Id.*
4. *Id.* at 2.
5. *United States v. Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *3 (W.D. Va. Aug. 3, 2018).
6. *Id.*
7. *Id.*

2018 decision, the court concluded that while the question of likely deportation is a relevant consideration in determining whether an individual is a flight risk, it does not follow that detainment is the only condition available to reasonably ensure a defendant's presence at trial.[8] Thus, such an argument is not in compliance with the language and structure of the Bail Reform Act.[9] This decision has implications for a defendant's ability to provide for themselves and their families pending trial, and closes an easy avenue for denying bail.

THE CASE

Angel Orlando Vasquez Flores, a citizen of Mexico, was charged with one count of reentering the United States after deportation in violation of a federal statute.[10] In the first appearance before the magistrate judge, the Government argued Flores should be labeled a flight risk and denied pretrial release.[11] This request was based on a two-fold consideration.[12] First, the likelihood that Flores would be subjected to a reinstated removal order because of his charges.[13] In addition, ICE had lodged a detainer against Flores, which increased the risk of deportation before trial.[14] Because of these risks, the Government argued that the Bail Reform Act supported detention as the only means available to "reasonably assure his appearance at trial in this matter."[15]

Judge Joel C. Hoppe rejected this argument, stating that the Bail Reform Act guidelines generally favor release over detainment.[16] The court found detainment could not be granted, as the Government failed to meet the prescribed preponderance of the evidence standard in proving that "no combination of conditions will reasonably assure the defendant's presence at future court proceedings."[17]

The case centered on the meaning of "risk of flight" in the Bail Reform Statute, particularly the risk the defendant will "flee."[18] The court found that other evidence presented, standing alone, did not create a risk of flight.[19]

8. *Id.*
9. *Id.*
10. *Id.*
11. *United States v. Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *1 (W.D. Va. Aug. 3, 2018).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* (citing *United States v. DeBeir*, 16 F. Supp.2d 592, 593 (D. Md. 1998)).
17. *Id.* at *2 (quoting *United States v. Stewart*, 19 F. App'x 46, 48 (4th Cir. 2001)).
18. *United States v. Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *2 (W.D. Va. Aug. 3, 2018).
19. *Id.* (citing *United States v. Villanueva-Martinez*, 707 F. Supp.2d 855, 857 (N.D. Iowa 2010)).

However, the Government argued this phrase also included the risk of ICE detainment and deportation, and such a risk meant there is no other condition to reasonably assure a defendant's appearance at trial.[20] Flores argued that the term "serious risk" does not contemplate involuntary risk of flight, such as deportation by ICE officials.[21] The court found the plain language interpretation of "flee" contemplates only volitional conduct, and that interpretation was supported by other provisions of the statute.[22] The request for detainment was denied and Flores was released with an agreement to be subjected to GPS monitoring, a promise not to leave the judicial district, and a promise to appear in court.[23]

BACKGROUND

The Bail Reform Act of 1984 is a statutory, instructional guideline federal judges use to determine whether an individual charged with a federal offense will be released or detained prior to trial.[24] When a defendant is granted bail, he or she is released upon some promise to attend future proceedings.[25] The original Bail Reform Act of 1966 was enacted to combat the influence of a defendant's wealth in the determination of release, and the resulting disadvantages associated with detainment.[26] The statute was amended in 1984 to allow detention in limited circumstances.[27]

There are six statutory conditions outlined in the Bail Reform Act, and at least one must be in contention for a detention hearing to be granted.[28] One of these conditions is "a serious risk that such a person will flee."[29] For detainment to be granted, there must be a showing by a preponderance of evidence that "no combination of conditions will reasonably assure the defendant's presence at future court proceedings."[30] Several criteria are to be considered in determining whether such conditions exist including a defendant's "history and characteristics."[31] If this finding is not shown by a preponderance of the evidence, then the defendant is released "subject to the least re-

20. *Id.* (citing *United States v. Ong*, 762 F. Supp. 2d 1353, 1363 (N.D. Ga. 2010)).
21. *Id.*
22. *Id.* at *4.
23. *Id.* at *1.
24. *United States v. Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *1 (W.D. Va. Aug. 3, 2018).
25. Charles Doyle, Cong. Research Serv., R40221, *Bail: An Overview of Federal Criminal Law* 1 (2017).
26. *Id.* at 2—3.
27. Doyle, *Supra* Note 25, at 4.
28. *Flores*, 2018 WL 3715766, at *1.
29. 18 U.S.C. §3142(f)(2)(A) (2008).
30. *Flores*, 2018 WL 3715766, at *2 (quoting *Stewart*, 19 F. App'x at 48)).
31. 18 U.S.C. §3142(g)(3) (2008).

strictive further condition, or combination of conditions that such judicial officer determines will reasonably assure the appearance of the person as required."[32]

There are two key issues that federal district courts have diverged on that will be the subject of our focus. The first is whether involuntary removal, such as by ICE officials, is encompassed in the Bail Reform Act's condition for serious risk of flight, or whether this term contemplates only volitional movement.[33] The second key question is whether this categorization, standing alone, is sufficient to hold that detainment is the only available option, as no conditions of release will reasonably assure defendant's future appearance.[34]

A minority of federal district courts have found that risk of removal by ICE is sufficient to label defendants a flight risk, and to preclude finding of alternate conditions that would reasonably ensure future appearance.[35] In *United States v. Ramirez-Hernandez*, a federal district court in Iowa held in 2012 that such a risk was akin to a "certainty" that defendants would be taken into ICE custody and deported.[36] In that case, the court declined to distinguish whether the source of flight risk was from voluntary or involuntary conduct.[37] Instead, the court emphasized weighing the "certainty of removal" for individual defendants.[38] A defendant's prior criminal history is an important consideration, particularly if the unlawful reentry offense is coupled with a previous removal for a felony conviction.[39] The court noted that the existence of a valid enforcement removal order informs a decision for detention or removal, not an ICE detainer.[40]

In a 2010 case from Georgia, the court pointed to the defendant's likelihood of removal from the country and subsequent bar on reentry as a factor in finding no alternative conditions for release.[41] In *United States v. Ong*, the defendant was indicted with conspiracy to violate and violation of the Arms

32. 18 U.S.C. §3142 (c)(B) (2008).
33. *Flores*, 2018 WL 3715766, at *3.
34. *Id.*
35. *Id.* at *2.
36. *Id.* (citing *United States v. Ramirez-Hernandez*, 910 F. Supp.2d 1155, 1158-59 (N.D. Iowa 2012)).
37. *United States v. Ramirez-Hernandez*, 910 F. Supp.2d 1155, 1160 (N.D. Iowa 2012).
38. *Id.* at 1158—59.
39. *Id.* at 1159 (citing *United States v. Lozano*, CR No. 1:09cr158-WKW, 2009 WL 3052279, at *6 (M.D.Ala. Sept. 21, 2009)).
40. *Id.* (citing *United States v. Castro-Inzunza*, No. 3:11cr00418-MA, 2012 WL 1952652, at *7 (D.Or. May. 20, 2012)).
41. *Flores*, 2018 WL 3715766, at *2 (citing *United States v. Ong*, 762 F. Supp.2d 1353, 1363 (N.D. Ga. 2010)).

Export Control Act, and conspiring to violate money laundering laws.[42] The defendant was initially granted pretrial release, which the Georgia District court revoked.[43] The Government's main argument for revocation of release centered on the defendant's lack of ties to the United States, his extensive ties to the Philippines, and his frequent travel to other countries.[44] The court acknowledged the potential paradox between the language of the Bail Reform Act and efforts of the Executive Branch when considering defendant's ICE detainer, but declined to consider it further.[45] The court revoked release citing the defendant's deportable status as well as other characteristics suggestive of a flight risk.[46]

However, a majority of federal courts have found that a serious risk of flight includes only voluntary movement, and that a risk of involuntary movement, alone, is not sufficient for pretrial detention under the Bail Reform Act.[47] The court in the case at bar also adopted this position, outlining four major points of support.

Statutory interpretation of the Bail Reform Act can shed light on what Congress intended "flee" to entail.[48] The first step is to determine whether the term has a plain and unambiguous meaning.[49] If it does, that definition should be adopted.[50] A term has plain meaning when it "bears only one reasonable interpretation."[51] However, in determining the existence of ambiguity, the term should be interpreted in light of the surrounding text and viewed in the broader context of the statute.[52] Common definitions of "flee" broadly support the concept of running away, or escaping from danger or detection, which are voluntary acts.[53]

Furthermore, Congress could have carved out an exception and listed "removable aliens" as a group excluded from consideration of release.[54] Instead, the statute specifically outlines the procedure in which non-citizens are to be temporarily detained.[55] The judicial offer "shall order the detainment" for no

42. *United States v. Ong*, 762 F. Supp.2d 1353, 1355 (N.D. Ga. 2010).
43. *Id.*
44. *Id.* at 1357.
45. *Id.* at 1360.
46. *Id.* at 1363.
47. *Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *1.
48. *Id.* at *4.
49. *Id.* at *3 (quoting *Laber v. Harvey*, 438 F.3d 404, 418-19 (4th Cir. 2006)).
50. *Id.* (quoting *Raplee v. United States*, 842 F.3d 328, 332 (4th Cir. 2016)).
51. *Id.*
52. *Id.* at *3 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).
53. *United States v. Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *4 (W.D. Va. Aug. 3, 2018) (quoting *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 n.2 (10th Cir. 2017)).
54. *Id.* (quoting *Ailon-Ailon* 875 F.3d at 1338)).
55. *Id.*

more than ten days and the Government's attorney is to be directed to notify the appropriate official.[56] 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."[57] The statute also delineates five separate federal offenses that create a rebuttable presumption that no condition or combination of conditions can reasonably assure the appearance of the person as required.[58] Unlawful reentry is not among the listed offenses.[59]

Finally, the statute instructs that judges shall weigh a series of considerations when determining whether there are "conditions of release that will reasonably assure the appearance of the person as required."[60] Among these are "the history and characteristics of the person, including the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct ... and record concerning appearance at court proceedings."[61] These considerations can be categorized as a defendant's own individual traits.[62] The court in the case at bar also urged consideration of the potential threat of a defendant being involuntarily removed from his family as a factor to evidence a finding that an individual has an incentive to flee and avoid further proceedings.[63] Thus, while these factors are helpful in weighing release conditions, the court argues they are not determinative of a finding of pretrial detainment.[64]

ANALYSIS

This decision correctly applied the Bail Reform Act. Ultimately, the resolution is found in a simple application of the plain language of "flee" and the statute's surrounding context.

56. 18 U.S.C. §3142 (d)(1)(B)(2) (2008)); *But see United States v. Kraper*, 847 F.Supp.2d 350 (D.N.Y. 2011) (explaining that the Adam Walsh Act amendments to the Bail Reform Act as set out in 18 U.S.C. § 3142(c)(1)(B) constitute a facial violation of the Due Process Clause of the Fifth Amendment).

57. *Id.*

58. *Flores*, 2018 WL 3715766, at *4 (quoting 18 U.S.C. §3142(e)(3) (2008)).

59. *Id.* (citing *Ailon-Ailon* 875 F.3d at 1138)).

60. 18 U.S.C. §3142 (g) (2008).

61. 18 U.S.C. §3142 (g)(3)(A) (2008).

62. *Flores*, 2018 WL 3715766, at *5.

63. *Id.* (quoting *States v. Benitez-Elvira,* No. 1:14cr391, 2014 WL 6896142, at *2–4 & n.9 (M.D.N.C. Dec. 5, 2014))).

64. *Id.* (citing *United States v. Santos-Flores,* 794 F.3d 1088, 1091–92 (9th Cir.2015)).

Congress did not distinguish the category of removable aliens as a group excluded from consideration of release.[65] Similarly, Congress failed to list unlawful reentry among a group of offenses that create a rebuttable presumption in favor of detainment.[66] These decisions support the contention that a defendant's offense of unlawful reentry, and status as removable alien do not create an inherent risk of flight.[67] Finally, the statute prompts judges to examine a list of a defendant's individual traits when determining conditions for release.[68] This evidence further supports the contention that Congress intended an individualized analysis for risk of voluntary flight.[69] This issue has not yet been raised in the Fourth Circuit, but I would encourage the adoption of the majority position when it arises.

The minority position, which has led to a split in the federal district courts, fails to adequately examine the structure of the statute or even attempt to uncover the legislative intent behind it. An attempt to weigh the certainty of deportation is an exercise in futility, as it ultimately amounts to nothing more than a guess. Nevertheless, the recently revised and stricter enforcement policies of ICE may lead to an increase in similar cases and an uptick in adoption of the minority position. The Bail Reform Act's thirty-year-old language is arguably at odds with recent policy adoptions, which explicitly direct officials to target removable aliens charged with unresolved criminal offenses. Furthermore, the rhetoric surrounding immigration offenses has turned into a debate about national security. There is an undeniable tension between the branches of government and an uncertain resolution. Congress may choose to revise the Bail Reform Act, which could provide a clearer interpretation and a response to executive branch policies. However, the courts must interpret the law as currently prescribed, and not allow perceived threats or implicit bias to justify an unwarranted deviation from it.

This appears to be a simple decision with a relatively minor legal impact. However, there are real consequences for the affected population. Between 2008 and 2010, 97,635 individuals were charged with a federal immigration offense.[70] Ninety-one percent of these defendants were illegal aliens and only twelve percent were granted pretrial release.[71] This is compared to a thirty-

65. *Id.* at *4.
66. *Id.*
67. *Id. (*citing *Ailon-Ailon* 875 F.3d at 1338)).
68. *Id.* at *5.
69. *United States v. Flores*, No. 5:18-mj-00043, 2018 WL 3715766, at *4 (W.D. Va. Aug. 3, 2018).

70. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, NCJ239243, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008-2010, 3 (2012)).
71. *Id.*

six percent average pretrial release rate for all defendants with cases in federal court in the same time frame.[72] Property offenders enjoyed the highest release rate at seventy-one percent, while defendants charged with violent crime were released thirty percent of the time, just ahead of immigration offenders.[73] The average length of detention for immigration offenders denied pretrial release increased from seventy-two days in 2008, to eighty-two days in 2009, and finally to eighty-six days in 2010.[74] That is an average of nearly three months. Lastly, only ten percent of defendants identified as illegal aliens were granted release, compared to a forty-three percent rate for legal aliens and a fifty-five percent rate for U.S. citizens.[75]

These statistics demonstrate the reality of poor pretrial release rates for undocumented federal offenders, particularly those who face immigration offenses. While it is impossible to know how each determination was made, it is possible that the minority view contributed to these numbers. The Bail Reform Act favors release over detainment, but it allows detainment in limited circumstances for defendants who are flight risks or pose a safety risk. It also creates a rebuttable presumption against release for certain offenses, which do not include immigration offenses. Therefore, it is fair to speculate that at least a portion of those denied release were denied, in whole or part, due to their status as a removable alien.

Striking the balance between the reasonable assurance of a defendant's future court appearance and protecting individual freedom is a difficult task. Yet, denial of pretrial release has major implications on a defendant's ability to work, to access education and to provide for themselves and their families. An average three-month detainment can be catastrophic. Courts should consider the impact of detainment when deciding which approach to adopt on this issue.

Finally, this case note has focused specifically upon the denial of pretrial release for defendants who have been charged with unlawful reentry into the United States. It is worth noting that the same question is being raised in other federal and state cases with undocumented defendants. In 2015, a New Jersey woman facing shoplifting charges was denied admittance into a pretrial intervention program, because her status as an undocumented immigrant meant

72. *Id.*
73. *Id.*
74. *Id.* at 8.
75. *Id.* at 1.

she could not be adequately supervised through a diversion program.[76] The New Jersey Superior Court of Appeals later reversed the finding and allowed the woman to enroll in the program.[77]

CONCLUSION

The court in this case made the right call by applying the language of the Bail Reform Act as written. However, the growing tension between the executive branch's enforcement of immigration and the judiciary's application of an arguably incompatible statute makes this an area of the law to keep an eye on. While immigration is a polarizing topic, the courts should not interpret the Bail Reform Act differently in light of the executive branch's policy of strict immigration enforcement. Undocumented federal offenders already face poor outcomes when it comes to pretrial release, and the minority position provides an easy avenue to deny bail. Detainment should not be taken lightly, as it has serious consequences for defendants and their families. A federal judge should find detainment only after a proper, individualized analysis in accord with the language and structure of the Bail Reform Act.

76. *State v. Gonzalez*, No. A-4068-13T2, 2015 WL 2164807, *1, *1 (N.J. Super. Ct. App. Div. May 11, 2015).

77. *Id.* at *4.