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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 5:18-cr-00040-001
	:	
ILMA ALEXANDRA SORIANO NUNEZ a/k/a "M.D.C.R.R."	:	

OPINION

Defendant's Motion to Dismiss the Indictment, ECF No. 30—Denied

Joseph F. Leeson, Jr.
United States District Judge

May 9, 2018

After Defendant Ilma Alexandra Soriano Nunez was indicted on various charges, this Court held a bail hearing and granted Defendant's request for pretrial release under the Bail Reform Act. However, upon her release from custody, Defendant was detained by the Bureau of Immigration and Customs Enforcement (ICE) on the ground that she is a removable alien. Defendant, still in immigration custody, now moves to dismiss the criminal indictment and argues that the government must make a choice: either to keep Defendant in immigration custody for removal proceedings, in which case the indictment must be dismissed, or to continue the criminal prosecution, in which case Defendant must be released from custody under the Bail Reform Act. Defendant's motion presents this Court with a question of first impression in the Eastern District of Pennsylvania: does a district court's order that a defendant be released on conditions under the Bail Reform Act prohibit ICE from taking custody of the defendant pursuant to a detainer after the defendant's release? This Court concludes that the answer is no and denies Defendant's motion.

I. BACKGROUND

On February 1, 2018, Defendant was indicted and charged with passport fraud under 18 U.S.C. § 1542, falsely representing to be a United States citizen under 11 U.S.C. § 911, Social Security fraud under 42 U.S.C. §408(a)(7)(B), production of a fraudulent identification document under 18 U.S.C. § 1028(a)(1), and aiding and abetting under 18 U.S.C. § 2. The government alleges that Defendant, a citizen of the Dominican Republic, made false statements on United States passport applications over the course of twenty years. Allegedly, Defendant submitted passport applications in 1997, 2007, and 2017 using the name and identifying information of a United States citizen.

On February 7, 2018, United States Magistrate Judge David R. Strawbridge held a detention hearing and ordered Defendant temporarily detained pursuant to 18 U.S.C. § 3142(d) to allow ICE time to take her into custody for removal proceedings. ICE lodged a detainer[1] against Defendant on February 13, but did not take her into custody. On February 20, United States Magistrate Judge Lynne A. Sitarski revisited the issue of pretrial detention and determined that, under the Bail Reform Act, Defendant should be released under various conditions.

The government moved to revoke Magistrate Judge Sitarski's order and for detention of the Defendant. After a hearing on February 28, this Court concluded that pretrial release was warranted under the Bail Reform Act and ordered that Defendant be released subject to the conditions imposed by Magistrate Judge Sitarski. *See* ECF No. 23. However, the following day,

[1] A detainer is a request by ICE to a law enforcement agency detaining an alien to hold the alien for an additional forty-eight hours after release to allow ICE to assume custody and remove the alien. *See Galarza v. Szalczyk*, 745 F.3d 634, 640-41 (3d Cir. 2014). *See also* 8 C.F.R. § 287.7 ("A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.").

ICE issued a warrant for Defendant's arrest and took her into custody pursuant to the detainer. *See* Arrest Warrant, Ex. C to Def's Motion, ECF No. 30-2. ICE served Defendant with a Notice to Appear for a removal hearing, which defense counsel reports was scheduled for May 2, 2018. *See* Notice to Appear, Ex. D to Def.'s Motion, ECF No. 30-2. Defendant is currently being held in ICE custody without bail in York County Prison.

Defendant now moves to dismiss the indictment. She argues that the government must make a choice: it can choose to continue with Defendant's criminal prosecution, in which case it must abide by the Bail Reform Act and release her from ICE custody, or the government can continue to detain her in ICE custody pending removal proceedings and dismiss the criminal indictment. Continued detention in ICE custody, Defendant argues, violates the Bail Reform Act. Defendant asks this Court to order the government to state whether it will continue with her criminal prosecution or continue to detain her in ICE custody.

II. ANALYSIS

The Bail Reform Act (BRA), 18 U.S.C. §§ 3141-3156, governs the pretrial detention of individuals charged with federal criminal offenses. The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101- 1537, governs the detention and removal of aliens who enter the United States without permission. This Court must determine whether the Defendant may be held in custody under the INA after this Court has found that she is entitled to pretrial release with conditions under the BRA.

A. The Bail Reform Act

Under the BRA, Congress has determined that any person charged with an offense under the federal criminal laws *shall* be released pending trial: (a) on personal recognizance; (b) upon

execution of an unsecured appearance bond; or (c) on a condition or combination of conditions, *unless* a "judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1); *see also* 18 U.S.C. § 3142(a), (b). *See generally United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding BRA and noting that it "authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel").

Before proceeding to the question of pretrial release, a judge may order temporary detention if he determines (1) that the defendant is not a citizen of the United States or lawful permanent resident and (2) the defendant may flee or pose a danger to another person or the community. 18 U.S.C. § 3142(d). In that case, the BRA allows for temporary detention for ten days to allow immigration officials to take custody of the defendant for removal:

> [S]uch judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.[2]

Id.

[2] On March 1, 2003, the functions of the Immigration and Naturalization Service (INS) were transferred to the Bureau of Immigration and Customs Enforcement (ICE) and the U.S. Customs and Immigration Service (USCIS) of the United States Department of Homeland Security. *De La Cruz-Jimenez v. Holt*, 262 F. App'x 371, 372 n.1 (3d Cir. 2008).

B. The Immigration and Nationality Act

The Immigration and Nationality Act of 1965, as amended, 8 U.S.C. §§ 1101-1537, contains the basic body of immigration law in the United States. Among other things, the INA charges the U.S. Secretary of Homeland Security with "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, [or] Attorney General . . . ." 8 U.S.C. § 1103(a)(1).

The INA establishes procedures for deciding whether an alien is inadmissible or deportable and thus subject to removal from the United States. 8 U.S.C. § 1229a. The INA permits ICE to take custody of an alien for these removal proceedings, and allows continued detention or an alien's release on bond or conditional parole:

> (a) Arrest, detention, and release
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole . . . .

8 U.S.C. § 1226. By regulation, immigration officers may issue a Form I-247, known as a detainer, to any law enforcement agency in custody of an alien to advise that agency that ICE seeks custody of the alien for purposes of removal proceedings. 8 C.F.R. § 287.7.

C. The BRA does not supersede ICE's authority under the INA to take custody of Defendant for removal proceedings.

This Court followed the procedures outlined in the BRA in this case. Magistrate Judge Strawbridge ordered a temporary detention period under 18 U.S.C. § 3142(d) to allow ICE to take Defendant into custody. Although ICE lodged a detainer, it did not take custody of the Defendant, so Magistrate Judge Sitarski held a bail hearing pursuant to the BRA and found the Defendant entitled to pretrial release. After an appeal to this Court, the Undersigned agreed with Magistrate Judge Sitarski and ordered pretrial release. Defendant does not challenge these findings, nor does she identify any problems with the indictment she moves to dismiss.

Instead, Defendant alleges a tension between the release provisions of the BRA and the Executive Branch's power to detain aliens under the INA and argues that this Court's Order releasing her on conditions under the BRA prevents ICE from exercising its detention authority under the INA. None of the Circuit Courts of Appeals have addressed this question,[3] although it is currently pending before the Second Circuit Court of Appeals. *United States v. Ventura*, No. 17-CR-418 (DLI), 2017 WL 5129012, at *2 (E.D.N.Y. Nov. 3, 2017), *appeal filed* No. 17-3904 (2d Cir. Dec. 4, 2017); *United States v. Boutin*, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017) (recognizing absence of Circuit Court precedent), *appeal withdrawn sub nom. United States of*

[3] A recent decision by the Tenth Circuit Court of Appeals, although it did not address the issue directly, seems to suggest that release under the BRA does not prevent ICE from taking a defendant into custody for removal proceedings. In *United States v. Ailon-Ailon*, the Tenth Circuit Court of Appeals addressed the question of whether the risk that ICE would remove a defendant involuntarily before trial established that the defendant posed a risk of flight that justified pretrial detention under the BRA. 875 F.3d 1334 (10th Cir. 2017). The court found that the risk that ICE will voluntarily remove a defendant does not establish a risk that the defendant will "flee" for BRA purposes. *Id.* at 1339. Although the court recognized the Executive Branch's potentially competing interests in prosecution and removal, it concluded that "to the extent any conflict exists, it is a matter for the Executive Branch to resolve internally." *Id.* The court remanded and ordered the district court to set pretrial release conditions and then to release the defendant to ICE custody pursuant to a detainer. *Id.* at 1340.

Am., Plaintiff - Appellant, v. Salomon Benzadon Boutin, Defendant - Appellee., No. 18-194, 2018 WL 1940385 (2d Cir. Feb. 22, 2018).

However, several District Courts throughout the country have found a tension between the BRA and INA, concluding that the BRA preempts the INA, and granting the relief that Defendant requests in this case. The first court to do so was the United States District Court for the District of Oregon in the 2012 case *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167 (D. Or. 2012). In *Trujillo-Alvarez*, the defendant, an undocumented alien, was indicted for illegal reentry in violation of 8 U.S.C. § 1326(a), and ICE lodged a detainer. *Id.* at 1171. The defendant had a detention hearing and was granted pretrial release with conditions under the BRA. *Id.* at 1172. The government did not appeal the order of release, but instead ICE took the defendant into custody under the detainer. *Id.* The defendant then moved for an order to hold ICE in contempt for violating the court's order of release. *Id.*

The *Trujillo-Alvarez* court concluded, correctly, that the ICE detainer lodged against the defendant and the possibility of removal before trial did not by itself justify denying pretrial release. *Id.* at 1176-77. The court also concluded that the criminal case took priority over the immigration proceedings and that the BRA precluded ICE from detaining the defendant, such that the Executive Branch had to choose between taking the defendant into custody for removal purposes and releasing him to continue the prosecution. *Id.* at 1179. Exercising its "inherent supervisory powers over its processes and those who appear before it," the court gave the government one week to return the defendant to the district and release him on the conditions the court had established—otherwise, the court would dismiss the indictment. *Id.* at 1180-81.

Various district courts have followed *Trujillo-Alvarez* in situations where ICE took custody of a defendant after an order of release under the BRA and have forced the government

to choose between keeping the defendant in ICE custody and proceeding with the criminal prosecution. *See Boutin*, 269 F. Supp. 3d at 29; *Ventura*, 2017 WL 5129012, at *2; *United States v. Clemente-Rojo*, No. CRIM.A. 14-10046-MLB, 2014 WL 1400690, at *3 n.2 (D. Kan. Apr. 10, 2014) (granting release under BRA and holding that "if ICE does execute the detainer, this court will immediately dismiss the indictment, with prejudice. In other words, the executive branch must make an election: prosecution or release to the detainer."); *United States v. Blas*, No. CRIM. 13-0178-WS-C, 2013 WL 5317228, at *8 (S.D. Ala. Sept. 20, 2013) (granting motion to clarify status and effect of release order and requiring government to inform court whether criminal prosecution or deportation will take priority). *See also United States v. Hernandez-Bourdier*, No. 16-222-2, 2017 WL 56033 (W.D. Pa. Jan. 5, 2017) (granting pretrial release with conditions and noting that "[i]f ICE detained defendant, it would violate this court's order of release). Defendant cites these cases and encourages this Court to adopt the reasoning set forth in those decisions.[4]

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[4] Some of the cases Defendant cites do not actually support the relief she seeks. In *United States v. Valadez-Lara*, No. 3:14 CR 204, 2015 WL 1456530 (N.D. Ohio Mar. 30, 2015), the court denied the defendant's request for pretrial release under the Bail Reform Act. The court cited *Trujillo-Alvarez*, but for the limited proposition that ICE may not take custody for the purpose of securing a defendant for trial—the court recognized that ICE could take custody for the purpose of removal. *Id.* at *4 ("If ICE were to take custody of Defendant for the purposes of removal, as statutorily authorized, this Court could not prevent it, however '[w]hat neither ICE nor any other part of the Executive Branch may do, [ ] is hold someone in detention for the purpose of securing appearance at a criminal trial without satisfying the requirements of the BRA.'") (quoting *Trujillo-Alvarez*). In *United States v. Stepanyan*, No. 3:15-CR-00234-CRB, 2015 WL 4498572, at *3 (N.D. Cal. July 23, 2015), the court recognized that immigration consequences are relevant to the BRA analysis only to the extent that they affect the defendant's risk of flight, and remanded the bail decision to the magistrate judge to determine whether conditions of release could mitigate the risk of flight. The *Stepanyan* court referred to *Trujillo-Alvarez*'s prohibition on ICE detention to secure appearance at trial, but specifically left open the question of whether ICE could detain the defendant based on a prior order of removal. *Id.* at *3 n.4 ("The Court does not concern itself here with whether ICE may validly detain Stepanyan based on his pre-existing order of removal from 2001.").

This Court declines to do so. First, it is not bound by the rulings of fellow district courts, and may consider those rulings if they are persuasive. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (stating that a district court decision is not binding precedent in a different district, in the same district, or on the same judge in a different case); *McMullen v. European Adoption Consultants,* 129 F. Supp. 2d 805, 811 n.2 (W.D. Pa. 2001) (noting that where the Court of Appeals has not decided a question, district court opinions are merely persuasive authority). This Court does not find that the reasoning in the *Trujillo-Alvarez* line of cases persuasively establishes the proposition that an order of release under the BRA precludes ICE from taking a defendant into custody on a detainer for purposes of instituting removal proceedings.[5] Because Defendant's arguments track the analysis in *Trujillo-Alvarez*, this Court addresses that case in detail.

The *Trujillo-Alvarez* court found support for its conclusion that the BRA preempted ICE's detention authority under the INA in regulations issued under the INA and in the BRA's temporary detention provision. The court pointed out that ICE regulations state that "[n]o alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States," 8 C.F.R. § 215.2(a), and that the departure from the United States of any alien shall be "deemed prejudicial to the interests of the United States" if, among other reasons, the alien is a party to "any criminal case . . . pending in a court in the United

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[5] Other district courts have accepted, at least tacitly, that ICE can take a defendant into custody for removal proceedings after the defendant has been released under the BRA. *See United States v. Sedano-Garcia*, No. 13-20166, 2013 WL 1395769, at *1 (E.D. Mich. Apr. 5, 2013) (Defendant was granted bond but pursuant to ICE detainer remained in administrative custody pending removal.); *United States v. Lozano*, CR. No. 1:09cr158-WKW, 2009 WL 3052279 at *1 (M.D. Ala. Sept. 21, 2009) ("It is undisputed that, if the court were to release the defendant on conditions pursuant to the Bail Reform Act, he would be transferred to ICE custody by the U.S. Marshal, transported from this district, and placed immediately in removal proceedings.").

States," 8 C.F.R. § 215.3(g). *Trujillo-Alvarez*, 900 F. Supp. 2d at 1178-79. The court concluded that these regulations showed a decision by the Executive Branch to prioritize prosecution over removal. *Id. See also United States v. Valadez-Lara*, No. 3:14 CR 204, 2015 WL 1456530, at *4 (N.D. Ohio Mar. 30, 2015) (following *Trujillo-Alvarez*). Defendant cites the same regulations for the same purpose. Mot. 11. Both the *Trujillo-Alvarez* court and the Defendant overlook the fact that these regulations concern an alien's voluntary departure from the United States, not her removal.[6] Thus they do not apply to cases involving parallel criminal and removal proceedings.

Trujillo-Alvarez further relied on the language of the BRA's temporary detention provision in 18 U.S.C. § 3142(d), which allows a judge to order detention of an alien to allow ICE to take custody for removal proceedings prior to making a determination concerning pretrial release under the BRA:

> If the judicial officer determines that—
>
> (1) [a] person . . .
>
> (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and
>
> (2) such person may flee or pose a danger to any other person or the community;
>
> such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole

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[6] "Departure" and "removal" clearly refer to different things under the INA. *See, e.g.*, 8 U.S.C. § 1101(a)(13)(C) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . (iv) has *departed* from the United States while under legal process seeking *removal* of the alien from the United States, including *removal* proceedings under this chapter and extradition proceedings . . . ." (emphasis added)); 8 U.S.C. § 1229c (The Attorney General may permit an alien *voluntarily to depart* the United States at the alien's own expense under this subsection, *in lieu of being subject to proceedings under section 1229a of this title* [governing "removal proceedings"] or prior to the completion of such proceedings, if the alien is not *deportable* under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title." (emphasis added)).

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

18 U.S.C. § 3142(d) (emphasis added). The *Trujillo-Alvarez* court interpreted the sentence emphasized above, which provides that the judicial official should proceed in accordance with the BRA in the event ICE does not take custody during temporary detention, to mean that if the temporary detention period expires before ICE takes custody, then the BRA determines the defendant's release or detention for both the criminal case and the immigration case. *See Trujillo-Alvarez*, 900 F. Supp. 2d at 1179. Defendant encourages this Court to adopt the same understanding and find that the BRA preempts the INA and governs any detention. Mot. 9.

Trujillo-Alvarez relied on, and Defendant relies on, an overly expansive reading of § 3142(d). This Court hesitates to conclude that Congress intended the BRA to invade immigration proceedings, because the language of the BRA explicitly extends to "pretrial release" or release "pending judicial proceedings," not to release or detention in all contexts. *See, e.g.*, 18 U.S.C. § 3141 ("A judicial officer . . . before whom an arrested person is brought shall order that such person be released or detained, *pending judicial proceedings*, under this chapter." (emphasis added)); 18 U.S.C. § 3142(b)-(c) (providing that the judicial officer shall order "pretrial release"). Other courts have interpreted § 3142(d) not as Congress's statement that the BRA should supersede other statutory detention provisions, but as instructing the trial court that, after a temporary detention period expires, it should proceed to determine whether to grant pretrial release under the BRA as usual and that the defendant's immigration status or possible removal should not bar pretrial release. *See United States v. Todd*, No. CRIM.A. 2:08CR197-MH, 2009 WL 174957, at *2 (M.D. Ala. Jan. 23, 2009) (concluding that, although § 3142(d) "could be read

as limiting the applicability of such other laws once the ten days has passed [, t]he more natural, and more plausible, reading of this language, however, is as an admonition to courts not to use the immigration status of defendants against them or as the sole basis of a detention determination."); *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 964 (E.D. Wis. 2008) ("ICE has been notified of defendant's presence and has not taken him into custody, instead lodging a detainer. That being the case, § 3142(d) requires me to treat defendant like any other offender under the Bail Reform Act."); *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001) (recognizing that, by § 3142(d) "Congress expressly instructs this Court to disregard the laws governing release in INS deportation proceedings when it determines the propriety of release or detention of a deportable alien pending trial . . . [and] instructs this Court to apply the normal release and detention rules to a deportable alien").

The latter is the better reading of § 3142(d). This Court disagrees with *Trujillo-Alvarez* and Defendant that § 3142(d) means that ICE's ability to take a defendant into custody expires after the ten-day window of temporary detention. Notably, § 3142(d) applies only to those defendants who pose a risk of flight or a danger to the community. *See* 18 U.S.C. § 3142(d)(2). Defendant's interpretation would lead to the preclusion of ICE detention only in the most serious cases, an illogical result. Instead, understanding § 3142(d) as instructing the district court that potential immigration issues should not affect the analysis under the Bail Reform Act comports with *Trujillo-Alvarez*'s correct recognition that anticipated immigration consequences do not on their own justify pretrial detention under the BRA. *See Trujillo-Alvarez*, 900 F. Supp. 2d at 1178. *Trujillo-Alvarez* and Defendant err in interpreting § 3142(d), a statement that immigration issues should not affect bail proceedings, as a statement that bail proceedings should affect immigration issues. In short, the text of § 3142(d) does not suggest that it overrides the detention provisions

of the INA. Rather, it instructs the district court that, after the temporary detention period, it should proceed to a determination of pretrial release under the BRA. Nothing in the text of the BRA prevents ICE from enforcing a detainer and taking a defendant into custody for removal proceedings after an order of release under the BRA.

D. ICE has detained Defendant for removal proceedings, not prosecution.

Defendant argues that she is in ICE custody solely so she can be produced for criminal prosecution, as the *Trujillo-Alvarez* court found was true of the defendant. But with respect to this argument, Defendant's case differs from *Trujillo-Alvarez* in an important way: ICE took Defendant into custody to bring removal proceedings against her, but ICE took the defendant in *Trujillo-Alvarez* into custody to carry out a reinstated order of removal—that is, to deport him. *See Trujillo-Alvarez*, 900 F. Supp. 2d at 1171. In *Trujillo-Alvarez*, the defendant's immigration proceedings had concluded, and all that remained was his deportation. The court recognized that ICE could choose to deport the defendant at that point, even though the court had ordered pretrial release under the BRA, admitting that "[i]f ICE takes custody of Mr. Alvarez–Trujillo for the purpose of removing or deporting him, there is little (and probably nothing) that this Court can do about that." *Id.* at 1179. But ICE could not take the defendant in custody, take no steps to deport him, and hold him until his criminal trial:

> The government may be correct that ICE retains the ability to take Mr. Alvarez–Trujillo back into administrative custody—for the purpose of deporting him—but nothing permits ICE (or any other part of the Executive Branch) to disregard the congressionally-mandated provisions of the BRA by keeping a person in detention for the purpose of delivering him to trial when the BRA itself does not authorize such pretrial detention.

Id. at 1178. Other courts relying on *Trujillo-Alvarez* that Defendant cites have also involved defendants whose immigration proceedings have concluded and are subject to deportation,

barring only the conclusion of their criminal trials. *See United States v. Stepanyan*, No. 3:15-CR-00234-CRB, 2015 WL 4498572, at *1 (N.D. Cal. July 23, 2015) (addressing bail for defendant with an extant warrant of removal); *Blas*, 2013 WL 5317228, at *2 (requiring government to inform court whether it would prosecute defendant under reinstated order of removal or proceed with deportation). In these cases, the government was, in a sense, holding the defendants in immigration custody as a form of pretrial detention, as the government's only interest in keeping the defendants in custody instead of deporting them was to ensure their appearance at trial.[7]

But in Defendant's case, the government has a purpose in detaining her in immigration custody beyond simply waiting for the conclusion of her criminal case: securing her presence at removal proceedings. Defendant acknowledges that the INA provides for detention for the purpose of removal proceedings.[8] She nevertheless contends that the government's "true motive" in detaining her is to impede the defense of her criminal case, but she presents nothing more than her own conjecture in support of that position. In fact, Defendant concedes that she has received a Notice to Appear for removal proceedings. This Notice lists two grounds for potential removal: (1) Section 212(a)(6)(A)(i) of the INA, 8 U.S.C. § 1182(a)(6)(A)(i), which provides that any alien present in the United States without being admitted or paroled is inadmissible, and (2)

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[7] The Executive Branch may eventually face the decision of whether to deport Defendant or imprison her on a criminal conviction. Like many previous courts, this Court will not address a possible future internal difference of positions between the Department of Justice and the Department of Homeland Security that might or might not actually occur. *See United States v. Barrera–Omana*, 638 F. Supp. 2d 1108, 1111–12 (D. Minn. 2009) ("It is not appropriate for an Article III judge to resolve Executive Branch turf battles.") (rejecting argument that any defendant subject to ICE detainer must be detained pending trial lest deportation prevent the defendant from appearing at trial). *See also United States v. Ailon-Ailon*, 875 F.3d 1334, 1339 (10th Cir. 2017) (citing *Barrera-Omana* and holding that the risk that ICE would involuntarily remove defendant did not establish risk of flight for BRA purposes).

[8] That the Executive Branch, acting through, ICE, has the general power to detain an alien pending removal proceedings is beyond question. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.") (citing *Wong Wing v. United States,* 163 U.S. 228, 235 (1896)).

Section 212(a)(6)(C)(ii) of the INA, 8 U.S.C.§ 1182(a)(6)(C)(ii), which provides that any alien who falsely represents himself or herself to be a United States citizen for any purpose or legal benefit is inadmissible. *See* Notice of Removal, Ex. D to Mot., ECF No. 30-2. Neither of these grounds depends upon Defendant having been convicted of a crime. If ICE were seeking to remove her based upon a potential future conviction for a crime that justifies removal, such as a crime of moral turpitude or controlled substance violation, *see* Section 212(a)(2)(A) of the INA, 8 U.S.C. § 1182(a)(2)(A), while that prosecution was ongoing, this Court might reach a different conclusion. Here, though, ICE presents reasons for removing Defendant that would apply even if she were not being prosecuted for any crime. As a result, this Court cannot conclude that ICE has detained Defendant to secure her appearance for criminal trial as would be required to find a violation of the BRA.[9]

To the extent that Defendant challenges the legitimacy of her detention by ICE, she has available remedies. But those remedies lie in immigration court. Aliens held pursuant to 8 U.S.C. § 1226(a), like Defendant, are entitled to bond hearings at which they can secure

[9] Defendant also suggests, without much explanation, that her continued detention by the Executive Branch is "impinging" on her rights under the Fifth, Sixth, and Eighth Amendments, because Defendant is detained in the York County Prison, which is outside the Eastern District and a considerable distance from her counsel. Mot. 3-4. Defendant relies only on the fact that she is in custody at a distance from her counsel, but does not state that distance, or how specifically it has interfered with her representation, other than the obvious inconvenience that increased distance unfortunately imposes upon her counsel. With respect to Defendant's suggestion that ICE custody infringes upon her speedy trial rights, Defendant herself moved for continuances of her trial date, and this Court granted them, finding that the ends of justice served by granting the continuances outweighed the best interest of the public and Defendant in a speedy trial. *See* ECF Nos. 31, 37. Defendant does not challenge these findings. Moreover, the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, still applies to Defendant's case, and this Court will enforce it. Absent more, this Court declines to grant Defendant relief on these bases. *See Demeter v. Buskirk*, No. CIV. A. 03-1005, 2003 WL 22139780, at *3–4 (E.D. Pa. Aug. 27, 2003) (holding that plaintiff could not establish violation of Sixth Amendment rights to effective assistance of counsel and speedy trial where he was transferred only 77 miles away and offered no evidence that his transfer prevented counsel from assisting him).

their release if they can "demonstrate [that] they would not pose a danger to property or persons and . . . are likely to appear for any future proceedings." *Contant v. Holder*, 352 Fed. App'x. 692, 695 (3d Cir. 2009) (citing 8 C.F.R. § 236.1(c)(8)). An alien may seek review of the immigration judge's bond decision with the Board of Immigration Appeals, or may seek release through filing a request for bond redetermination. *Colon-Pena v. Rodriguez*, No. CV 17-10460 (SDW), 2018 WL 1327110, at *2 (D.N.J. Mar. 15, 2018) (citing *Contant*, 352 Fed. App'x at 695). However, a district court has no jurisdiction to review the decision of an immigration judge denying bond.[10] *See Pena v. Davies*, No. 15-7291 (KM), 2016 WL 74410, at *2 (D.N.J. Jan. 6, 2016) (citing 8 U.S.C. 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien, or the grant, revocation, or denial of bond or parole.")). The court presiding over her criminal case is the inappropriate forum in which to seek relief.

This Court finds no conflict between the BRA and the INA in this case. That Defendant was taken into ICE custody for what might be called "pre-removal release" does not run afoul of the BRA's requirement of pretrial release. Defendant finds it incongruous that the Executive Branch can on one hand be ordered to release her, and then on another hand, take her back into custody. Defendant is not alone in this intuition—indeed, previous courts have reasoned

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[10] After exhausting administrative procedures, a detained alien may file a writ of habeas corpus in the United States District Court for the district in which she is being held for a new bond hearing, but only where the petitioner can show that her bond hearing was conducted unlawfully or without due process. *See, e.g., Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 470–71 (3d Cir. 2015) (finding a due process violation and directing the district court to grant writ of habeas corpus to ensure detained alien was granted a bond hearing); *Colon-Pena v. Rodriguez*, No. CV 17-10460 (SDW), 2018 WL 1327110, at *2 (D.N.J. Mar. 15, 2018) (noting that habeas relief in the form of a new bond hearing is only available where petitioner can show that the previous hearing was conducted unlawfully or violated due process).

similarly. *See, e.g., Ventura*, 2017 WL 5129012, at *2 ("The United States Attorney's Office and ICE/DHS are part of one Executive Branch. As such, the Executive Branch should decide where its priorities lie: either with a prosecution in federal district court or with removal of the deportable alien."). But the Executive Branch does exercise multiple functions, having been granted various responsibilities by multiple statutes: it does not violate its duties in the criminal arena by exercising its valid powers in the immigration arena. Nor has it violated any right of Defendant by taking her into immigration custody in this case.

III. CONCLUSION

One of the district courts that recently addressed the alleged conflict between the BRA and INA concluded that, faced with the options of criminal prosecution and detention for removal proceedings, "[t]he Government cannot and should not have it both ways." *Ventura*, 2017 WL 5129012, at *2. This Court respectfully disagrees. The Executive Branch can exercise its separate powers in the criminal and immigration contexts.[11] Accordingly, Defendant's Motion to Dismiss the Indictment is denied. A separate Order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

[11] Whether it "should" could be viewed as a public policy issue that might be more suitably addressed to the Legislative Branch of government.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2341

UNITED STATES OF AMERICA

v.

ILMA ALEXANDRA SORIANO NUNEZ,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-18-cr-00040-001)
District Judge: Honorable Joseph F. Leeson, Jr.

Argued May 21, 2019

Before: McKEE, SHWARTZ, and FUENTES, Circuit Judges.

(Filed: July 2, 2019)

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OPINION

SHWARTZ, Circuit Judge.

Ilma Alexandra Soriano Nunez was charged with various crimes and appeared for a bail hearing. Conditions of release were set under the Bail Reform Act ("BRA"). Thereafter, Immigration and Customs Enforcement ("ICE") lodged and executed a detainer, and she was detained for removal proceedings. Because her detention for removal proceedings under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(a)(1), does not conflict with the order granting release in connection with her criminal case under the BRA, 18 U.S.C. § 3142, the District Court declined to dismiss the indictment and rejected Soriano Nunez's request

that it rely on the BRA to order her release from ICE custody. We lack jurisdiction over the ruling denying the request to dismiss the indictment and will dismiss that aspect of the appeal. We do, however, agree with the Court's bail ruling and will affirm that part of its order.

I

A grand jury indicted Soriano Nunez for passport fraud, 18 U.S.C. § 1542; making a false representation of United States citizenship, 18 U.S.C. § 911; using a false social security number, 42 U.S.C. § 408(a)(7)(B); and producing a state driver's license not issued for her use, 18 U.S.C. § 1028(a)(1), (b)(1)(A), and (2). Soriano Nunez surrendered and was brought before a Magistrate Judge. She was then temporarily detained under 18 U.S.C. § 3142(d), a provision of the BRA that allows for, among other things, the ten-day pretrial detention of non-citizens who may pose a flight risk or danger so ICE may take them into custody.[1] ICE lodged a detainer. Twelve days later, a different Magistrate Judge arraigned Soriano Nunez, denied the Government's motion for pretrial detention under 18 U.S.C. § 3142(e), and set conditions for her release. The District Court denied the Government's motion to revoke the order. Thereafter, ICE executed its detainer, taking Soriano Nunez into custody for her to appear for removal proceedings.[2]

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[1] As discussed herein, the ten-day detention period may also be invoked to allow state and local authorities to take persons on release into custody. 18 U.S.C. § 3142(d).

[2] Soriano Nunez is allegedly removable because she is an alien not admitted to the United States and she falsely represented that she was a citizen in violation of 8 U.S.C.

While in ICE custody, Soriano Nunez moved to dismiss her indictment or obtain release from detention, arguing that § 3142(d) gives the United States "the choice of [either] taking the Defendant into [ICE] custody during the ten-day period and proceeding with removal or continuing with the criminal prosecution in which case the BRA controls." App. 47. The District Court denied Soriano Nunez's motion to dismiss or for release, holding that the INA, 8 U.S.C. § 1226(a)(1), allowed ICE to detain Soriano Nunez during the pendency of removal proceedings notwithstanding the parallel criminal action, and her detention therefore did not conflict with the BRA. Soriano Nunez appeals.

II[3]

As a threshold matter, we must address the scope of our jurisdiction over Soriano Nunez's appeal. To the extent Soriano Nunez seeks review of the order denying her motion to dismiss the indictment, we lack jurisdiction. Generally, our jurisdiction is limited to final judgments. An order denying dismissal of an indictment is not a "final judgment of the district court." 28 U.S.C. § 1291. "Final judgment in a criminal case means sentence. The sentence is the judgment." United States v. Rodriguez, 855 F.3d 526, 530 (3d Cir. 2017) (quoting Berman v. United States, 302 U.S. 211, 212 (1937)). Moreover, none of the grounds for interlocutory appeal in a criminal case apply here. See, e.g., Heltoski v. Meanor, 442 U.S. 500, 508 (1979) (recognizing Speech or Debate Clause

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§ 1182(a)(6)(A)(i) and (C)(ii). Removal proceedings are ongoing.

[3] The District Court had jurisdiction under 18 U.S.C. § 3231.

immunity as a legitimate ground to appeal denial of a motion to dismiss an indictment); Abney v. United States, 431 U.S. 651, 662 (1977) (hearing appeal of motion to dismiss indictment on double jeopardy grounds); United States v. Mitchell, 652 F.3d 387, 392-93 (3d Cir. 2011) (setting forth the required elements of an appealable collateral order). Thus, we must dismiss her appeal to the extent it seeks review of the District Court's refusal to dismiss her indictment.

We do, however, have jurisdiction to review the ruling denying Soriano Nunez's claim that her BRA release order forecloses her ICE detention. She argues that the BRA, 18 U.S.C. § 3142, provides the sole means to release or detain a criminal defendant and that the District Court erred in refusing to extend its release order to bar her ICE detention. The BRA gives us jurisdiction to hear "[a]n appeal from a release or detention order, or from a decision denying revocation or amendment of such an order." 18 U.S.C. § 3145(c). Here, Soriano Nunez essentially challenges the Court's decision to deny her request to enforce its BRA order. Put differently, she asks us to review the Court's rejection of her assertion that the BRA order requires her release from ICE custody. To the extent Soriano Nunez challenges the enforcement of a BRA order, we have jurisdiction over this appeal. Our review over whether the BRA requires Soriano Nunez's release is plenary. United States v. Perry, 788 F.2d 100, 104 (3d Cir. 1986).

III

A

To decide this appeal, we must examine both the BRA and the INA's detention provisions. Congress passed the BRA to address whether and under what circumstances a district court may release a defendant pending trial. See United States v. Salerno, 481 U.S. 739, 742-43 (1987). It was enacted to ensure "all persons, regardless of their financial status, shall not needlessly be detained . . . pending appeal, when detention serves neither the ends of justice nor the public interest." United States v. Provenzano, 605 F.2d 85, 87 n.13 (3d Cir. 1979) (quoting Bail Reform Act of 1966, Pub. L. No. 89-465 § 2, 80 Stat. 214, 214 (1966)). The BRA thus requires the pretrial release of defendants unless "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1).

The BRA allows a court to temporarily detain persons not lawfully admitted to the United States, as well as individuals who are on pretrial or post-conviction release on other federal, state, or local charges, so that immigration and other officials can take custody of such individuals before BRA conditions of release are set. 18 U.S.C. § 3142(d). To this end, the BRA directs judicial officers to:

> order the detention of such person, for a period of not more than ten days . . . and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the

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

Id. Other than during this temporary detention period, individuals on release arising from other offenses and non-citizens are treated the same as other pretrial criminal defendants under the BRA.[4] See, e.g., United States v. Santos Flores, 794 F.3d 1088, 1091 (9th Cir. 2015) (stating that the possibility of removal by immigration authorities cannot provide the sole basis for denial of BRA release). The failure of a government agency to take custody of such person within the temporary detention period means that the court proceeds to apply the BRA to determine whether there is any condition or combination of conditions that will ensure the defendant's presence at trial and the safety of the community. United States v. Vasquez-Benitez, 919 F.3d 546, 553 (D.C. Cir. 2019).[5]

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[4] Thus, the presence of an ICE detainer and the threat of potential removal alone are not sufficient to deny BRA pretrial release. See United States v. Ailon-Ailon, 875 F.3d 1334, 1338-39 (10th Cir. 2017).

[5] An agency's inaction does not bar it from later taking custody of the individual pursuant to its lawful authority.

B

The INA, which governs immigration, gives the Attorney General the power to issue warrants for the arrest and seek the detention or release of an alien "pending a decision on whether [he or she] is to be removed from the United States."[6] 8 U.S.C. § 1226(a). Thus, while the BRA aims to ensure a defendant's presence at trial, the INA uses detention to ensure an alien's presence at removal proceedings. Vasquez-Benitez, 919 F.3d at 552-54. Where an alien is in the custody of another governmental entity, ICE officers may issue a detainer. See 8 U.S.C. §§ 1103(a)(3), 1357; 8 C.F.R. § 287.7(a). Via the detainer, ICE informs the agency that it "seeks custody" of such an alien "for the purpose of arresting and removing" the alien. 8 C.F.R. § 287.7(a). The INA permits an alien's detention, see, e.g., 8 U.S.C. § 1226(a), but not for the sole purpose of ensuring her presence for criminal prosecution.[7]

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[6] In some instances, ICE detention is mandatory. For example, aliens who have committed certain criminal offenses must be detained pending removal. See 8 U.S.C. § 1226(c)(1).

[7] An alien may seek district court review of a detention order in limited circumstances pursuant to 28 U.S.C. § 2241. See, e.g., Chavez-Alvarez v. Warden York County Prison, 783 F.3d 469, 470-71 (3d Cir. 2015) (ordering the grant of a § 2241 habeas petition challenging ICE detention under 8 U.S.C. § 1226(c) pending removal proceedings); Sylvain v. Att'y Gen., 714 F.3d 150, 153, 155 (3d Cir. 2013) (reviewing grant of a § 2241 habeas petition seeking release from ICE detention under 8 U.S.C. § 1226(c)).

C

Soriano Nunez asserts that the BRA and the INA conflict insofar as the INA allows for the detention of a criminal defendant who has been granted release under the BRA. No court of appeals that has examined this assertion has concluded that pretrial release precludes pre-removal detention. See Vasquez-Benitez, 919 F.3d at 553 ("Congress has never indicated that the BRA is intended to displace the INA."); United States v. Veloz-Alonso, 910 F.3d 266, 269 (6th Cir. 2018) ("[N]othing in the BRA prevents other government agencies or state or local law enforcement from acting pursuant to their lawful duties."); see also United States v. Ventura, 747 F. App'x 20, 22 (2d Cir. 2018) ("Neither side asserts that the BRA categorically prevents the Department of Homeland Security . . . from exercising its independent statutory authority to detain an arriving noncitizen pending removal."). We agree.

Instead, "[d]etention of a criminal defendant pending trial pursuant to the BRA and detention of a removable alien pursuant to the INA are separate functions that serve separate purposes and are performed by different authorities." Vasquez-Benitez, 919 F.3d at 552. Congress established laws governing the release or detention of criminal defendants, and the Executive has the authority to invoke those laws to ensure a defendant's presence at criminal proceedings and the community's safety. 18 U.S.C. § 3142(e)(1). Congress also gave the Executive authority to detain and remove suspected aliens in furtherance of its enforcement of the immigration laws. See 8 U.S.C. § 1231(a); Demore v. Kim, 538 U.S. 510, 523 (2003).

These laws serve different purposes and can coexist for four reasons. First, the text of 18 U.S.C. § 3142(d) does not compel a different conclusion. The text has a notice provision designed to give other agencies an opportunity to take custody of a defendant before a BRA release order is issued. 18 U.S.C. § 3142(d). By providing these other agencies an opportunity to take custody of such persons, the BRA effectively gives respect to pending cases and allows those officials to act before bail is set in the federal case. See United States v. Villatoro-Ventura, 330 F. Supp. 3d 1118, 1140-41 (N.D. Iowa 2018). The BRA's temporary detention scheme thus reflects Congress' recognition that immigration authorities and state sovereigns have separate interests. Had Congress wanted to limit a federal court's authority to consider state and local interests, Congress would not have included § 3142(d). Villatoro-Ventura, 330 F. Supp. 3d at 1139.

In addition, if immigration or other authorities choose to detain the defendant during the ten-day period, then such detention eliminates the court's "need to determine whether to release the defendant in the criminal case pursuant to the other provisions under the BRA. [Section 3142(d)] does not go on to say that the criminal case must end if ICE pursues deportation[,]" United States v. Pacheco-Poo, No. 18-CR-109-CJW-MAR, 2018 WL 6310270, at *6 (N.D. Iowa Dec. 3, 2018), or other authorities continue their prosecutions. In the immigration context, as the District Court aptly stated,

> the text of § 3142(d) does not suggest that it overrides the detention provisions of the INA. Rather, it instructs the district court that, after the temporary detention period, it should proceed to a determination of pretrial release under the

> BRA. Nothing in the text of the BRA prevents ICE from enforcing a detainer or taking a defendant into custody for removal proceedings after an order of release under the BRA.

App. 15-16.

Second, nothing in the BRA gives a district court the authority to compel another sovereign or judge in federal administrative proceedings to release or detain a defendant. The BRA applies to federal criminal proceedings, and detention and release decisions in those cases are subject to the BRA. Detention and release decisions by immigration and other government officials are subject to different statutory frameworks.

Third, detention for removal purposes does not infringe on an Article III court's role in criminal proceedings. In a criminal case, the court is tasked with deciding whether there are conditions of release that will ensure the defendant's appearance and the safety of the community. Vasquez-Benitez, 919 F.3d at 550-51. It carries out this duty without regard to whether a separate entity with different duties may reach a different conclusion. In an immigration case, those authorities are focused on enforcing the immigration laws and nothing in the BRA prevents them from acting pursuant to their lawful duties, which include detaining aliens for removal purposes. Veloz-Alonso, 910 F.3d at 269 (citing 8 U.S.C. § 1231(a)(2)).

Fourth and relatedly, nothing in either the INA or the BRA gives a court the authority to require the Executive to choose which laws to enforce. Pacheco-Poo, 2018 WL

6310270, at *5. Like our sister courts of appeals, we too must follow the principle that "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Vasquez-Benitez, 919 F.3d at 553 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)); see also Veloz-Alonso, 910 F.3d at 268-69.

Because (1) the BRA explicitly applies only to federal criminal proceedings, not state or immigration proceedings, (2) there is no textual conflict between the BRA and the INA, (3) these statutes serve different purposes, and (4) criminal and removal processes can proceed simultaneously, Pacheco-Poo, 2018 WL 6310270, at *6, the District Court correctly declined to hold that Soriano Nunez's BRA release order mandated her release from ICE detention.[8]

IV

For the foregoing reasons, we will dismiss the appeal in part and affirm in part.

[8] The record here does not indicate that the purpose of ICE detention was to circumvent a district court's BRA release order. Ventura, 747 F. App'x at 21. We therefore take no position on the remedies an alien may have or relief a court in a criminal case may grant if such evidence were presented.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1032

UNITED STATES OF AMERICA

v.

ILMA ALEXANDRA SORIANO NUNEZ, also known as M.D.C.R.R.,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 5-18-cr-00040-001)
District Judge: Hon. Joseph F. Leeson, Jr.

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 1, 2020

Before: SHWARTZ, PHIPPS, and FISHER, *Circuit Judges.*

(Filed: November 2, 2020)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PHIPPS, *Circuit Judge*.

In 1997, Ilma Alexandra Soriano Nunez, a native and citizen of the Dominican Republic, entered the United States without admission or parole to live with her aunt and uncle in Puerto Rico. She later moved to New York and lived with her husband, also a native of the Dominican Republic. They moved to Allentown, Pennsylvania, where they raised two children, who are now teenagers.

In building that life, however, Nunez relied on fraud. In 1997, while in Puerto Rico, she applied for and received a United States passport using a photograph of herself but another person's name, date of birth, and social security number. Nunez renewed that passport in 2007 and, with her false status as a United States citizen, sponsored her husband for naturalization and obtained a Pennsylvania driver's license. In 2016, the person whose personal information Nunez had misappropriated applied for a passport, prompting an investigation into passport fraud. In 2017, Nunez again attempted to renew the passport, and in 2018, a federal grand jury indicted her on four counts. *See generally* 18 U.S.C. § 3231 (granting district courts original jurisdiction over "all offenses against the laws of the United States"). Those counts were (i) passport fraud, *see* 18 U.S.C. § 1542; (ii) false representation of United States citizenship, *see* 18 U.S.C. § 911; (iii) Social Security fraud, *see* 42 U.S.C. § 408(a)(7)(B); and (iv) production of false identifying documents, *see* 18 U.S.C. §§ 1028(a)(1), (b)(1)(A), and (b)(2); *see also* 18 U.S.C. § 2(a) (aiding and abetting). The day after the indictment, which was her fortieth birthday, Nunez was arrested, and she attended her initial appearance.

A few days later, Nunez returned to court for a detention hearing. Following that hearing and consistent with the Bail Reform Act, *see* 18 U.S.C. § 3142(d), a Magistrate Judge ordered Nunez temporarily detained for ten days. That detention afforded Immigration and Customs Enforcement an opportunity to take Nunez into custody pending removal proceedings. Within those ten days, ICE lodged an immigration detainer against Nunez but did not take her into custody. After that ten-day period had expired, a Magistrate Judge held another hearing and ordered Nunez's pretrial release subject to several conditions. The prosecutor disputed that ruling, but a District Judge upheld it and ordered Nunez's pretrial release. The next day, ICE executed its detainer and took Nunez into custody pending her removal proceeding.

Nunez challenged the legality of her ICE detention. According to Nunez, the Bail Reform Act allowed the government the duration of her temporary detention – but no longer – to choose to detain her pending removal proceedings. Because ICE did not take her into custody during that period but did so afterwards, Nunez moved to dismiss the indictment and sought release from ICE custody. The District Court denied her requests to dismiss and for release, and Nunez filed an immediate appeal.

This Court resolved Nunez's interlocutory appeal in a precedential opinion. *See United States v. Nunez*, 928 F.3d 240 (3d Cir. 2019). As that opinion explained, the denial of Nunez's motion to dismiss the indictment was not a final judgment within this Court's appellate jurisdiction. *Id.* at 243–44. By statute, however, the District Court's order denying Nunez's request for release from detention could be immediately appealed. *See* 18 U.S.C. § 3145(c); *see also Nunez*, 928 F.3d at 244. In addressing that issue, this

Court held that ICE could execute its detainer against Nunez beyond the ten-day period of her temporary detention. *Nunez*, 928 F.3d at 247.

With that resolution of Nunez's interlocutory appeal, the criminal case against her proceeded. Nunez entered an open guilty plea to all four counts, and the District Court sentenced her to prison for a year and a day followed by a three-year term of supervised release.[1]

In this appeal, Nunez renews her challenge to the indictment based on her detention by ICE, and she disputes two components of her sentence – the term of imprisonment and the imposition of supervised release after her sentence. In exercising jurisdiction over those three challenges to a final judgment and sentence, *see* 28 U.S.C. § 1291; 18 U.S.C. § 3742(a), we will affirm for the reasons below.

I.

Nunez leads with the argument that her criminal indictment should be dismissed. As she sees it, dismissal of the indictment would remedy her detention by ICE after the expiration of her ten-day temporary detention. No relevant statute or rule provides such relief in this circumstance, and therefore to dismiss the indictment would require resort to a court's inherent powers. *See United States v. Serubo*, 604 F.2d 807, 816–17 (3d Cir.

[1] During the criminal case, the removal proceedings against Nunez continued as well. Before her guilty plea in District Court, the Immigration Court ordered Nunez's removal to the Dominican Republic and denied her request for cancellation of removal. *See Nunez v. Att'y Gen. of U.S.*, 804 F. App'x 184, 186–87 (3d Cir. 2020) (not precedential). Nunez administratively appealed those rulings to the Board of Immigration Appeals, and the Board affirmed the Immigration Court. *Id.* at 187. Nunez then sought review of the Board's decision, and a panel of this Court denied her petition. *Id.* at 189.

1979); *cf.* Fed. R. Crim P. 48(b) (permitting dismissal of an indictment on different grounds). By precedent, a court may exercise its inherent powers to dismiss an indictment "only if the Government engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice." *United States v. Wright*, 913 F.3d 364, 371 (3d Cir. 2019) (citations omitted); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion." (citation omitted)).

Nunez's effort fails at the outset because the government did not engage in misconduct. For perspective, Nunez makes no claim of any misconduct regarding the prosecution of her criminal case. Rather, the wrongful action she alleges is ICE's execution of a detainer following her release from temporary custody. Putting aside the deeper question of whether a court's inherent powers could ever permit remedying *immigration*-related misconduct through dismissal of a *criminal* indictment, ICE did not engage in wrongful conduct here. At the time it executed its detainer, no law prohibited that conduct, and this Circuit subsequently held that ICE can detain a deportable alien after her release from temporary custody under the Bail Reform Act. *Nunez*, 928 F.3d at 247. At the time, that holding did not apply to Nunez's motion to dismiss the indictment because Nunez had prematurely appealed, leaving this Court without appellate jurisdiction over that issue. But now that this appeal comes within this Court's jurisdiction, Nunez cannot escape the binding nature of that holding, which also carries force as law of the case. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (explaining the doctrine of law of the case as "when a court decides upon a

rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (citation omitted)). In short, under *Nunez* it was permissible for ICE to detain Nunez after the expiration of her temporary detention under the Bail Reform Act, and that forecloses the relief she now seeks.

II.

Nunez next challenges the length of her year-and-a-day prison sentence. In determining the term of incarceration, the District Court grouped three of her fraud offenses together under Sentencing Guideline § 3D1.2(b). It explained that those offenses of passport fraud, social security fraud, and production of false identifying documents were part of a common scheme or plan related to immigration. But the District Court separated out the fourth offense, reasoning that the fraudulent driver's license application was not part of a scheme related to immigration because it enabled Nunez to "carry out everyday functions while in the United States." Sentencing Tr. 10 at lines 19–20 (JA88). By separating out the fourth offense, the calculation of her sentence under the Guidelines included a multiple-count adjustment, and that resulted in a prison term of ten to sixteen months. If the District Court had instead grouped all the offenses together as part of the same common scheme, then the range for Nunez's sentence under the Guidelines would have been six to twelve months. She complains because the sentence she received from separating the offenses exceeded by one day the twelve-month upper limit that would have resulted if the offenses had all been grouped.

In reviewing the District Court's calculation for clear error – because Nunez preserved an objection to the grouping – we affirm the length of Nunez's prison term.

See United States v. Griswold, 57 F.3d 291, 295 (3d Cir. 1995) ("[A] determination of whether various offenses are part of one overall scheme is essentially a factual issue which we review under a clearly erroneous standard." (citation omitted)). Under the Guidelines, "counts involving substantially the same harm shall be grouped together into a single Group." U.S.S.G. § 3D1.2. One of the ways that counts can involve "substantially the same harm" is by implicating "the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." *Id.* § 3D1.2(b). As explained in the commentary to the Guidelines, immigration offenses are often grouped together:

> Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related.

Id. § 3D1.2 cmt. n.2. The District Court's grouping of Counts One through Three comports with that commentary. Each of those offenses related to fraud associated with an immigration document. But Count Four involved fraud related to the issuance of a Pennsylvania driver's license. The District Court's conclusion that a driver's license serves a different purpose than the immigration documents is not clearly erroneous and will be upheld.

III.

Nunez also challenges, for the first time on appeal, her three-year term of supervised release. Under the Sentencing Guidelines, supervised release is generally not appropriate for an alien subject to a deportation order. *See* U.S.S.G. § 5D1.1(c). But

supervised release for deportable alien is permissible "if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case." U.S.S.G. § 5D1.1 cmt. n.5. For a district court to impose a term of supervised release on a deportable alien, it "must state the reasons in open court for imposing a [term of supervised release on a deportable immigrant] so that the appellate court is not left to speculate about the reasons." *United States v. Azcona-Polanco*, 865 F.3d 148, 153 (3d Cir. 2017) (quoting *United States v. Albertson*, 645 F.3d 191, 200 (3d Cir. 2011)).

In reviewing Nunez's challenge for plain error, the District Court did not err. *See United States v. Flores-Mejia*, 759 F.3d 253, 254–55 (3d Cir. 2014) (en banc). Before explaining its rationale for imposing supervised release, the District Court mentioned the presumption against supervised release for a deportable alien and considered Nunez's ties to the community. It also accounted for Nunez's husband, two children, and other family and friends in the United States, finding that those ties would increase the likelihood that Nunez would attempt to reenter the United States upon removal. Ultimately, the District Court concluded that "supervised release is appropriate because of the length of the defendant's deception and to provide an added measure of deterrence to not commit future crimes." Sentencing Tr. 28, lines 20–23 (JA106). On this record, Nunez fails to establish any error, much less plain error, related to the imposition of supervised release.

* * *

For the foregoing reasons, we will affirm both the District Court's order denying Nunez's motion to dismiss the indictment and Nunez's sentence.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 5:18-cr-0040-001
	:	
ILMA ALEXANDRA SORIANO-NUNEZ	:	

ORDER

AND NOW, this 8th day of August, 2019, upon consideration of Defendant's Motion to Appoint Counsel, ECF No. 74, and her completed financial affidavit, ECF No. 74-1, and this Court finding that Defendant: (1) is financially unable to obtain representation by counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, **IT IS ORDERED** that:

1. Defendant's Motion is **GRANTED**.
2. Jose C. Campos, Esquire, 251 E. Broad St., Bethlehem, PA, 18018, (610) 868-2230, is hereby appointed pursuant to 18 U.S.C. § 3006A to represent the Defendant.[1]
3. This appointment shall remain in effect until terminated or a substitute attorney is appointed.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

[1] Although Attorney Campos is not on the CJA list, funds should be paid to him out of the CJA fund. The Court finds that the interests of justice are served by his continued representation of Defendant given his familiarity with this case, rapport with Defendant, and substantial experience in immigration law, which is relevant to this case. *See Perrone v. United States*, 416 F.2d 464, 466 (2d Cir. 1969) (trial court did not err in appointing attorney not on district court plan's panel); *United States v. Pope*, 251 F. Supp. 234 (D. Neb. 1966) (in interest of justice a district court may appoint as counsel any attorney admitted to practice in the court even if attorney is not on CJA panel). The Court made inquiries concerning Attorney Campos's experience in criminal law and finds that he has prior experience in federal criminal matters as well as extensive experience in state court criminal matters.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-1032

USA v. Ilma Soriano Nunez

(U.S. District Court No. 5-18-cr-00040-001)

ORDER REGARDING APPOINTMENT OF COUNSEL

Jose C. Campos, Esq. is hereby appointed to represent Ilma Alexandra Soriano Nunez on appeal. The appointment will be created in the Court's eVoucher program. Counsel is directed to the eVoucher page for information regarding the appointment terms and procedures.

CJA 20, 30, 21 and 31 vouchers are submitted for payment through the Court's eVoucher program. Upon receiving separate email notification of this appointment from the Court's CJA staff, counsel may create CJA 20, 30, 21 and 31 vouchers for use in maintaining time and expense records and paying for expert services.

Authorization for preparation of transcripts must be obtained in the District Court. Deadlines for ordering and filing the transcripts will be set by this Court. Counsel is required to file the transcript purchase order in this Court and should indicate in Part 1B of the form that the "CJA form submitted to District Court Judge". Counsel must complete the transcript request by filing an "Auth-24" request in the District Court's eVoucher program. Financial arrangements for the transcripts will not be considered complete until counsel has submitted an "Auth-24" request through the District Court's eVoucher program.

For the Court,

s/ Patricia A. Dodszuweit
Clerk

Dated: January 03, 2020
PDB/TMM/cc: Jose C. Campos Esq.
Michael J. Rinaldi Esq.
Melanie B. Wilmoth Esq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- **U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **U.S. Const. amend. VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- **18 U.S.C. § 3142(d)(2)**

Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion. — If the judicial officer determines that —

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

- **8 U.S.C. § 1226(a)**

Apprehension and detention of aliens —

(a) Arrest, Detention, and Release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1)may continue to detain the arrested alien; and

(2)may release the alien on—

(A)bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B)conditional parole; but

(3)may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.