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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	17-CR-00683(ENV)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Thursday, January 11, 2018
KARLA JULIETTE LOPEZ,	:	4:00 p.m.
	:	
Defendant.	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION
BEFORE THE HONORABLE ERIC N. VITALIANO
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

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1 THE COURTROOM DEPUTY: All rise. Court is now
2 opened. The Honorable Eric N. Vitaliano presiding.

3 Case on the calendar is USA versus Lopez, case
4 number 17-CR-683 on for motions.

5 Will the attorneys please note their appearance,
6 beginning with the Government counsel.

7 MR. McDONALD: Good morning, Your Honor. James
8 McDonald on behalf of the United States.

9 THE COURT: Good afternoon.

10 MR. JACOBSON: Good morning, Your Honor. Sam
11 Jacobson, Federal Defenders, on behalf of Karla Lopez, who
12 will be joining us shortly. We are joined today by Mr. Isaac
13 Wheeler, an immigration specialist at the Federal Defenders.

14 THE COURT: Good morning to all of you.

15 THE COURTROOM DEPUTY: We also have a Spanish
16 interpreter.

17 THE INTERPRETER: Certified Spanish interpreter,
18 Mario Michelena.

19 THE COURT: Good afternoon.

20 THE COURTROOM DEPUTY: All parties are present,
21 including the defendant.

22 THE COURT: We have gotten your written submissions.
23 I think the best way to deal with this is first to go to the
24 -- we won't call it the Government's lengthy motion, but it
25 seems to be in the nature of an appeal of Judge Levy's

1 determination to set bond in this case, so whether it is an
2 appeal or revocation. Obviously, if I were to grant the
3 Government's motion, it would effectively moot the defense
4 motion, so we might as well take Government's motion first.

5 MR. McDONALD: Thank you, Your Honor. And it was --
6 I think it's often styled as an appeal, but given the standard
7 is de novo as to the facts of the law, it seemed like a
8 difference without the distinction. Your Honor, in this case
9 the Government submits detention before trial is appropriate.
10 And the Government is willing to acknowledge at the initial
11 appearance on this case the Government, as it should be doing,
12 should be moving under 3142(d) to get a ten-day order of
13 detention in cases called for by that subsection of the
14 statute to give other interested authorities who may have a
15 conditional release over a charged defendant, who may have, as
16 in this case, an immigration warrant or detainer over an
17 individual, a chance to act on that warrant, and the purpose
18 of that, as best as I can tell from reading the early Bail
19 Reform Act cases and from reading the statute itself, is to
20 create a record, frankly, for the parties and for the Court as
21 to whether or not that other authority is going to take action
22 with respect to the request from the Government to take
23 detention of someone.

24 I do not understand the defendant to be arguing that
25 if there were a case of a U.S. citizen who had been released

1 on parole from New York State custody and was then arrested on
2 the exact same charges here and if the appropriate procedures
3 were not followed, let's say as in this case, detention had
4 been sought under 3142(e) and bail had been granted, that if a
5 New York State judge then came in and ruled that, in fact,
6 this was a possible violation of the parole, that the
7 Government or the Court or the defense would be able to argue
8 that that was somehow a runaround of the Bail Reform Act.
9 What this really comes down to is a much more fundamental
10 argument from defense counsel in this instance, that there is
11 this unitary, sole, monolithic executive.

12 THE COURT: That really is a defense motion you are
13 talking about.

14 MR. McDONALD: It returns me to sort of the basics
15 of the statute. If you follow the statute under 3142(d) in
16 this case, we would notify ICE as to whether or not they would
17 assume custody of the defendant with that record in place.
18 If they did assume custody, then that custody would be the
19 pretrial custody until a bond or other release is given, and
20 that is often the case in immigration custody. And we have
21 gone to some length in the brief, and I apologize to some
22 degree for that, trying to identify the basis under which a
23 person can seek a bond or release from immigration custody.

24 I will frankly acknowledge, there are a whole host
25 of circumstances that I could not even address within the

1 Title 8 situation that might apply here. And that's the very
2 point of it, is that there are immigration courts and
3 immigration authorities that are going to have to consider
4 that, that are familiar with that, and there are whole
5 separate routes of appeal and hearing that I am simply not an
6 expert in and are simply not before this Court at this point
7 but are available to the defendant, whatever they are, and her
8 counsel and immigration counsel and are often pursued in
9 circumstances where someone is being held in immigration
10 custody.

11 I found a number of cases and I tried to cite some
12 of them from the Second Circuit and Southern District and the
13 Eastern District of people seeking review of their immigration
14 custody. It's been a much more frequent topic. Lora versus
15 Shanahan in the Second Circuit was one of the cases recently.
16 Habeas review is now well established over some of the
17 determinations of the immigration authorities in these
18 contexts. So I think the Court would at least recognize or
19 should recognize that there are grounds that the defendant has
20 to pursue remedies within the immigration context.

21 So I am going to turn to the merits of why detention
22 is appropriate here. The standard under 3142(d) is first
23 whether or not the person, the individual is a citizen, and
24 here it's not contested, she's not a citizen, and then whether
25 she may flee or may pose a danger. We are not seeking or

1 moving under any sort of dangerousness, but the may-flee
2 standard simply recognizes that if there are factors in the
3 record that indicate a potential to flee, then a notification
4 period ought to be given to the Government.

5 Here, we have tried to highlight the circumstances
6 of the offense, the mandatory minimum nature of the proposed
7 -- of the indictment. The conduct of the defendant at the
8 airport when she came in gave one story to the initial
9 screeners and then gave another story upon the discovery of
10 the cocaine. The tenuous nature of the relationship to the
11 sureties. And I met the sureties myself at the initial bond
12 determination before Judge Levy. They seemed very sincere in
13 their willingness to help. They simply had never met the
14 person who they were standing next to. They knew her as well
15 I had known them. So I understand they wanted to help the
16 family, but moral suasion is about having some sort of
17 compulsion over the individual who might have an incentive to
18 flee and I don't think there was a sufficient record to find
19 moral suasion in this matter. So when you look at the
20 standard suggestions of why someone might flee in a situation,
21 I think they are all present here, and that meets the may-flee
22 standard under 3142(d).

23 We would ask to be given the 10-day period. If they
24 do not assume custody, we would then seek, I believe,
25 detention under 3142(e). We have briefed that as well. I

1 think the arguments are the same. I won't rehash them all
2 now. The Court is certainly familiar with them. But with
3 respect to the bail argument itself, I think the record
4 establishes that 3142(d) is the appropriate first course here.

5 THE COURT: Mr. Jacobson.

6 MR. JACOBSON: I think it makes sense for Mr.
7 Wheeler to address the procedural aspects of 3142(d)(2) and
8 then I can address the other provisions of the Bail Reform
9 Act.

10 THE COURT: I am listening.

11 MR. WHEELER: Thank you, Judge. The government's
12 argument that 3142(d)(2) specify procedures that need to be
13 followed now is troubling because they have been followed
14 already. I think we would acknowledge, and I'm sure the
15 Government would acknowledge, 3142(d)(2) is a little bit
16 archaic. It still refers to the INS that doesn't exist
17 anymore and it is not frequently invoked at initial
18 presentment in this courthouse. But be that as it may, the
19 detainer that the Government has introduced as an exhibit to
20 its motion is dated November 25th. On November 27th, two days
21 later, Magistrate Judge Mann did order the defendant's
22 detention and Mr. Kamdang from our office held a bail hearing
23 on December 15th, 18 days later. There was more than a
24 ten-day period between the initial detention order and the
25 hearing contemplated under 3142(e). So, with respect, I

1 simply don't understand the Government's contention that it
2 needs an additional 10 days now. It cannot be argued that the
3 Government was unaware of ICE's interest. The detainer had
4 been lodged by December 25th. The attorney for the Government
5 referred to it on the record at the December 15th hearing.
6 There was -- you know, CBP was the arresting agency. There
7 was simply no question that the defendant had been paroled for
8 prosecution and remained of interest to immigration
9 authorities. So 3142(d) has been followed here and the
10 suggestion that an additional 10 days of detention is now
11 warranted is very difficult to square with the language of the
12 statute.

13 As to the -- and this may bleed into the other part
14 of the discussion, but as to the Government's suggestion that
15 Ms. Lopez has remedies in immigration court, I think we agree
16 with the Government that the Court does not need to wade into
17 the thicket of what those remedies precisely are. Although,
18 as we said in our reply brief, the ones that the Government
19 had identified do not, in fact, apply to her. And I apologize
20 for the late filing of that reply, but we gave the Court
21 authority, that the Government has introduced the I-94
22 document that specifically says Ms. Lopez was paroled for
23 prosecution, which is a specific mechanism under the
24 immigration law. We have pointed the Court to the regulation
25 that provides that an immigration judge may not re-determine

1 her custody status. That's purely up to DHS since she is an
2 arriving alien and a parolee.

3 And the Government's arguments about why her
4 detention is ostensibly mandatory under the immigration law
5 are also wrong for the reasons set forth in our brief. But it
6 is beside the point, the gravamen of our argument is that she
7 is being denied her statutory rights under the Bail Reform
8 Act. And it is no answer to that argument to say even though
9 Magistrate Judge Levy set a bail package that has been
10 satisfied, she can gain the benefit of that package if she
11 pays an additional bond to a different agency. It is simply
12 unresponsive to the argument that her continued detention
13 violates her Bail Reform Act rights as all of the cases that
14 we cite and rely on have held.

15 So I think it is in the nature of a red herring,
16 respectfully, to argue about what immigration remedies may be
17 available. In any event, the Government, I think, has not
18 correctly identified those remedies and, in fact, as I note in
19 our reply brief, the Government has vigorously and repeatedly
20 disputed the premise and advances in this brief that the
21 Second Circuit case would cover someone in Ms. Lopez's
22 situation. They fight immigration lawyers on the beaches on
23 that in habeas actions in the Southern District.

24 I will let Mr. Jacobson turn to the merits of the
25 bail argument, unless the Court has questions.

1 THE COURT: I am satisfied with your argument.

2 MR. JACOBSON: Thank you, Your Honor. So that
3 18-day period of 3142(d)(2) took us to December 15th, when
4 Judge Levy granted bail. At no point after that grant of bail
5 did the Government appeal that determination until we noticed
6 this instant motion and they decided to cross move for
7 revocation of the bond. I think it is a clear tactic to
8 circumvent and to moot this motion. I have not had any
9 similarly situated clients where the Government has moved in a
10 similar fashion until today. I would rest largely on the
11 record that was before Judge Levy.

12 I do want to add that Ms. Lopez was not a risk of
13 flight on December 15th. I think she's even less of a risk of
14 flight today. I would point especially to the letter that the
15 suretor -- one of the two suretors, Marielle Rodriguez, wrote
16 this morning and which I filed with the Court. We didn't ask
17 her to write that letter. We didn't tell her what to put in
18 it. It came from her heart. She said this morning that she
19 couldn't be here today because of work. She just started a
20 new job recently, but she wanted to tell Your Honor about the
21 faith and trust she has in Ms. Lopez. I would point
22 specifically to the fact that she had not met her before
23 December 15th, but she has really developed a strong
24 relationship with her just in that three-week period. I know
25 that seems odd, and in the normal course of affairs, three

1 weeks is not a long time to get to know someone. But when Ms.
2 Lopez has been in probably the most stressful and difficult
3 position she has ever been in, it's important that Ms.
4 Rodriguez has spoken to Ms. Lopez every single day on the
5 phone since she has been detained.

6 She also went, even in the short period that Ms.
7 Lopez was in Goshen, New York at the Orange County facility,
8 Ms. Rodriguez twice went to visit Ms. Lopez. She stayed at
9 the facility for the maximum time allowed for social visits
10 and that was right in the middle of the holidays. She could
11 have easily been at home in New Jersey with her family.
12 Instead, December 23rd and December 30th she was up in Goshen,
13 New York spending the time with Ms. Lopez. She is the only
14 person who Ms. Lopez has and she tells the Court that she has
15 faith and trust in Ms. Lopez and that Karla is welcomed in her
16 home for any amount of time necessary and that she knows that
17 Ms. Lopez won't break this bond of trust that they have
18 developed. She knows that Ms. Lopez won't break the bond of
19 trust that both suretors have with Ms. Lopez's mother. They
20 really do believe it is family and it's not something Ms.
21 Lopez would ever do. I agree with the Government when the
22 Government says she might flee. That's true, but that's true
23 in every single case. The question is whether there are some
24 combination of conditions which can assure her appearance in
25 court, and I think that was established before Judge Levy, and

1 I think it is established in even a greater extent today.
2 Judge Levy released her without any sort of monitoring. I
3 think if the Court believed there was some risk of flight that
4 could be mitigated with perhaps some additional conditions.
5 But I think we have satisfied our obligations under the Bail
6 Reform Act.

7 I wanted to point also to her medical issues which I
8 think are in a way related to the bonds that we have asked
9 for. I have serious concerns that MDC cannot prevent her from
10 suffering from irreparable harm here. They haven't shown us
11 any ability to send her to a physician. As Your Honor knows,
12 we appeared last Friday on January 5th before this Court. She
13 had been in ICE custody at the Orange County facility and had
14 received, for her ovarian cysts, for her kidney stones, for
15 her asthma, she had received Tylenol.

16 On January 5th, Your Honor ordered MDC provide her
17 with prompt medical treatment. Since that time she has
18 received an inhaler that is not the inhaler that is the
19 prescription that she needs and she has received more Tylenol.
20 They have failed to bring her to a doctor. They have failed
21 to bring her to a hospital despite the fact that three
22 hospitals have all said she needs to see a specialist for her
23 kidneys. She hasn't been able to urinate. She is bleeding.
24 She is an incredible amount of pain. We could ask the Court
25 for some intervention.

1 I think if she is released on bond today, as she
2 should be, Federal Defenders would be ready to make sure she
3 receives that intervention. That's all I have on the
4 defendant's cross motion for revocation pending any questions
5 from the Court.

6 MR. McDONALD: Your Honor, if I may briefly reply.

7 THE COURT: Yes.

8 MR. McDONALD: I have tried to point the Court to a
9 Supreme Court case from 1990, Montalvo-Murillo, that I think
10 it is not directly on the issue here, but it says, I think
11 when you read it, that some procedural defect in application
12 of the Bail Reform Act should not be read to prejudice or
13 contravene the general tenor of the act, meaning that if you
14 do follow a 10- or 15-day or whatever day requirement, if you
15 don't make a motion at the first appearance, if the motion
16 itself is still valid and has a basis, the prejudice to the
17 general interest of not following the procedures or not having
18 the motion heard is not what the act is intended to do. It is
19 intended to set out the procedures to give guidance to the
20 parties and to the Court to try to, I think, obviate -- and it
21 directly contradicts one of the fundamental points of the
22 defendant's motion, which is that there will be an inevitable
23 inconsistency in the reading of the Bail Reform Act. If
24 actually applied consistently, there will be no fundamental
25 inconsistency. So I would point the Court to that.

1 On the questions of -- there's a couple of points
2 that the defense counsel made. On the questions of 3142(d)
3 and 3142(e), there is an important distinction in those two
4 subsections, and it is 3142(e) that calls for the condition or
5 combination of conditions this might mitigate risk or mitigate
6 danger to be considered. That is not called for under
7 subsection D, and that is the distinction we have tried to
8 draw and point the Court's attention to.

9 On the medical attention, I have made four separate
10 inquiries of the MDC. I understood that a nurse practitioner
11 saw the defendant earlier this week, that she had an
12 appointment with an OB/GYN scheduled for yesterday but the
13 OB/GYN did not show up, that the OB/GYN will be back next
14 Wednesday at the MDC. The Government has sought to intervene
15 as it can. I don't have a perfect answer to these points. I
16 would note that the defendant has been to the hospital,
17 Brooklyn Hospital on three different occasions apparently, and
18 I would presume saw a physician at least at one or more of
19 those hospital visits. That's not a perfect solution, but I
20 don't have a full record on which to fully respond to that
21 other than to say it does appear that there were some
22 circumstances where the defendant had access to a physician.
23 We are continuing to endeavor -- I personally am continuing to
24 endeavor with the Bureau of Prisons to try to get the
25 defendant to see a physician or whatever the Bureau of Prisons

1 can provide. I don't know what else I can say on that point.
2 We did respond to the Court's directive and instructions on
3 that point. And I will leave it at that, Your Honor.

4 THE COURT: Mr. McDonald, I think it is under the D
5 provision you were talking about this 10-day period.

6 MR. McDONALD: Yes, Your Honor.

7 THE COURT: 10 days to do what?

8 MR. McDONALD: 10 days in which to allow the other
9 authority that may have an interest, such as a state authority
10 or, here, immigration authorities, to make a decision. That
11 decision is whether to take custody of the person or not to
12 take custody of the person. Let's just assume they don't take
13 custody of the person, then we have a 3142(e), the normal bail
14 hearing --

15 THE COURT: But they have taken custody.

16 MR. McDONALD: They have taken custody. I agree
17 with you. But I would suggest, Your Honor, that it would
18 create a clearer record.

19 THE COURT: What is clearer than that there was a
20 detention and she was actually at their facility? Her body
21 was taken to Goshen, New York. What can be plainer than that?

22 MR. McDONALD: You would have a clear record, Your
23 Honor, that it was not an end run around a magistrate's --

24 THE COURT: It doesn't matter whether it is an end
25 run. It doesn't matter. There are two separate things going

1 here. The United States of America, in all of its agencies,
2 has made a determination to change a practice that it has
3 followed consistently, which is not to exercise any action on
4 an immigration detainer until the criminal proceeding is over.
5 They've decided to change that policy. That's what this is
6 all about. Not about anything else. This is not the State of
7 New York. This is the United States of America. Now, whether
8 you call it the Immigration and Naturalization Service,
9 whether you call it CIS, or whether you call it DOJ, it is all
10 the United States of America.

11 Now, with respect to the bail application, I have
12 reviewed the proceedings before Judge Levy. I have reviewed
13 the initial report by Pretrial Services. It's been
14 supplemented by the letter that was filed today. The Pretrial
15 Services recommendation to Judge Levy is precisely what Judge
16 Levy ordered; is that right?

17 MR. McDONALD: I believe, sir. I don't have the
18 Pretrial Services report.

19 THE COURT: Let me assure you that's what happened.
20 That's what happened. I see absolutely nothing, reviewing it
21 de novo, that leads me to disturb that conclusion. So to the
22 extent that the United States either in the nature of an
23 appeal of Judge Levy's determination to set bond or to seek
24 revocation, I see no basis to grant either. So that motion is
25 denied.

1 Now, that brings us to the defense motion. And this
2 is an area that has suddenly exploded in the change of
3 position by the United States of America and we have several
4 decisions, including two by Chief Judge Irizarry, one I think
5 was in the case of Ventura, which may or may not be on appeal
6 somewhere, somehow, and another one in Boutin. There is
7 another decision, the original decision, I guess it was
8 Trujillo-Alvarez. Judge Caproni had another one over in the
9 Southern District in Galitsa. In all of these cases, when
10 faced with the situation, when the United States is the
11 detaining authority on both sides, not the State of New York,
12 the United States is the detaining authority on both sides.
13 Bail was properly granted under the Bail Reform Act.

14 The Government then decides to effectively thumb its
15 legal nose at the decision to grant bail by taking the
16 defendant into custody, not into Bureau of Prisons' custody or
17 United States Marshal Service custody, but in CIS custody. It
18 is the United States.

19 Look, I have been around long enough to see agency
20 names change 100 times. When I was in the state legislature,
21 they would say well, what are they calling them this week?
22 The one thing they are calling them every day here is the
23 United States of America. So it seems to me, I have
24 absolutely -- and I see no reason for me to deviate in any way
25 from the reasoning that was set forth in Trujillo-Alvarez by

1 Chief Judge Irizarry, by Judge Caproni.

2 The United States has an option, it either complies
3 with the Bail Reform Act and releases the defendant on the
4 bail terms that were set by Judge Levy or the indictment gets
5 dismissed. Since it is the United States that is thumbing its
6 nose, that kind of conduct, the dismissal will be with
7 prejudice.

8 So, following the clear precedent in this district,
9 the Government will have until January 18th, a week from
10 today, to inform me whether or not the defendant will be --
11 the bail terms will be honored. If you advise me that they
12 will not be honored, then the Court will enter an order
13 dismissing the indictment with prejudice.

14 I would also hope that, for the sake of the
15 defendant, because people like you, Mr. McDonald, have worked
16 so hard to try to get medical attention for this defendant,
17 which I am not convinced will happen in Goshen, New York, I
18 would hope that that period between now and January 18th, we
19 continue to agree that the defendant can be kept in the
20 custody of the Bureau of Prisons and the Marshals Service.

21 To the extent that the Government elects to go
22 forward on the immigration removal, the detainer can be
23 exercised at that time. And if not, if that detainer is
24 withdrawn, then the defendant will be released on the bond
25 conditions set by Judge Levy, and we will proceed in the

1 ordinary course on this indictment.

2 Does everyone concur on where the defendant should
3 be kept for the next...?

4 MR. JACOBSON: Ms. Lopez consents to that, Your
5 Honor.

6 THE COURT: Mr. McDonald?

7 MR. McDONALD: That's fine, Your Honor.

8 THE COURT: So that's the Court's order. The
9 Government will file on ECF on or before January 18th its
10 decision and we will go from there. We will enter an order
11 accordingly, which will either be if you advise me that the
12 immigration removal proceeding will be pursued, this case will
13 be dismissed; if you advise me that the request for custody
14 has been withdrawn, then we will enter an order scheduling a
15 status conference on the case that will proceed at that time.

16 I thank you all for your written submissions, which
17 were very timely over the course of this week, and they were
18 topnotch on both sides. The Court appreciates the papers it
19 received from counsel on both sides on this matter. We will
20 see you electronically on the 18th, if not before.

21 MR. McDONALD: Thank you, Your Honor.

22 MR. WHEELER: Thank you, Judge.

23 MR. JACOBSON: Thank you, Your Honor.

24 (Matter concluded.)

25

MDL OCR RPR