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Recent Developments: U.S. v. Salerno: Federal Bail Reform Act Does Not Contravene U.S. Constitution

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but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered." *Id.*

Justice Scalia, in his dissent, relied on *Tison v. Arizona*, 107 S.Ct. 1676 (1986) and concluded that "the amount of harm one causes does bear upon the extent of his personal responsibility." *Booth*, 107 S.Ct. at 2542 (emphasis added). In *Tison*, two brothers who planned and assisted in their father's escape from prison were sentenced to death because in the course of their escape, their father murdered four innocent people. Scalia's dissent pointed out that the difference between life and death for the two defendants was a matter "wholly unrelated to the[ir] blameworthiness," yet they were held personally responsible for the degree of harm that they had caused.

The impact of this decision is so potentially far-reaching as to render the recent "victims rights" legislation virtually obsolete. Although Justice Powell specifically distinguishes between the use of the VIS in capital sentencing hearings as opposed to noncapital cases, the distinction can hardly withstand the weakest attack on its logic. It remains to be seen just how far the Court will go in interpreting the effects of this decision, but the obvious implications suggest the beginnings of a new trend in "victims' rights."

— *Natasha Sethi*

U.S. v. Salerno: FEDERAL BAIL REFORM ACT DOES NOT CONTRAVENE U.S. CONSTITUTION

In *United States v. Salerno*, 107 S.Ct. 2095 (1987) the Supreme Court, as a matter of first impression, held that the 1984 Bail Reform Act, 18 U.S.C. § 3141 *et seq.*, ("Act") does not, on its face, violate either the due process clause of the fifth amendment or the excessive bail clause of the eighth amendment.

The Act authorizes the pretrial detention of arrestees who are charged with certain serious felonies and who are found, after an adversary hearing, to pose a threat to the safety of individuals or to the community.

Anthony Salerno and Vincent Cafero were arrested on March 21, 1986, on a 29 count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion and various criminal gambling violations.

At arraignment, the government moved to have the arrestees detained pursuant to

§ 3142. Section 3142 provides that an arrestee may be held without bail if no condition or combination of conditions would assure appearance at trial or assure the safety of another person or the community. The government claimed that no condition of release would assure the safety of any person or persons in the community. § 3142(e). The government proffered evidence which showed that Salerno was the "boss" of the Genovese Crime family and that Cafero was a "captain" in the family. Evidence also showed that the two men had participated in wide ranging conspiracies and that Salerno personally participated in two murder conspiracies.

The District Court granted the government's motion finding that the government met its burden of establishing by clear and convincing evidence that no condition or combination of conditions of release would insure the safety of the community or any person. *United States v. Salerno*, 631 F.Supp. 1364 (S.D.N.Y. 1986).

Both Salerno and Cafero appealed. They contended that, to the extent the Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, the Act is unconstitutional on its face.

The United States Court of Appeals for the Second Circuit agreed. It concluded that a person could not be detained consistent with due process merely because that person was thought to present a danger to the community. *United States v. Salerno*, 794 F.2d 64 (2nd Cir. 1986). The Second Circuit reasoned that the system of government in the United States holds persons accountable for past actions, and not anticipated future actions. The government appealed.

The Court, with Chief Justice Rehnquist speaking for the majority, began by stating that because respondents had challenged the Act on its face, they bore the burden of showing that the Act could not pass constitutional muster under any set of circumstances.

The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid... *Schall v. Martin*, [467 U.S. 253 (1984)].

United States v. Salerno, 107 S.Ct. at 2100.

The Court first addressed respondent's challenge of the Act as violative of both substantive and procedural due process. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. Cali-*

fornia, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). *United States v. Salerno*, 107 S.Ct. at 2101.

Respondent's main contention under "substantive" due process was that the Act authorized impermissible punishment before any adjudication of guilt. The Court rejected this premise, stating that "[t]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *Id.* at 2121, quoting *Bell v. Wolfish*, 441 U.S. 520, 532 (1979).

In determining whether the detention is punitive or regulatory, the Court fashioned the test "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Ibid.*, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *United States v. Salerno*, 107 S.Ct. at 2101.

Applying this test, the Court concluded that the detention imposed falls on the regulatory side of the dichotomy, thus no infringement of due process exists.

The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98-225, p. 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.* at 4-7.

United States v. Salerno, 107 S.Ct. at 2101.

The Court re-enforced the conclusion that the Act was regulatory by focusing on the limited circumstances with which a person may be detained. Section 3142(F) allows for detention only in cases involving crimes of violence, offenses which the crime is life imprisonment or death, serious drug offenses, or repeat offenders. Furthermore, the Speedy Trial Act, 18 U.S.C. §3161, remains in effect. *United States v. Salerno*, 107 S.Ct. at 2101.

Also persuasive to the Court was the long line of decisions which upheld the government's authority to invade an individual's interest in liberty. In each of those cases, the Court found the government's interest in detention compelling. In the instant case "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling." By enacting the Bail Reform Act, Congress made specific findings that individuals on bail awaiting trial "are far more likely to be responsible for dangerous acts in the community after

arrest." S. Rep. No. 98-225, p. 6-7.

The Court found that the already compelling interest in preventing crime is heightened when the government has convincing proof that the arrestee presents a demonstrable danger to the community. "Under these narrow circumstances, society's interest in crime prevention is at its greatest." *United States v. Salerno*, 107 S.Ct. 2095 at 2103.

When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

United States v. Salerno, 107 S.Ct. at 2103. The Court thus concluded there was no facial violation of substantive due process.

Turning to the facial challenge against the procedures, the Court stated that "[t]o sustain [the procedures] against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some persons charged with crimes." *Id.* at 2103, quoting *Schall v. Martin*, 467 U.S. 253 (1984). The Court then went on to detail the procedures called for under the Act.

Detainees have the right to counsel, to testify, present information by proffer or otherwise, and cross-examine witnesses. The government has the burden and must prove its case by clear and convincing evidence. Section 3142(F); and the judge must include written findings. §3142(i). There is also immediate appellate review. §3245(c).

The Court concluded that the extensive safeguards were sufficient to repel a facial challenge against the procedures.

The Court turned finally to respondent's challenge based on the excessive bail clause of the eighth amendment. The Court stated that the "[p]rimary function of bail is to safeguard the Courts' role in adjudicating the guilt or innocence of defendants. . . ." *United States v. Salerno*, 107 S.Ct. at 2104. However, the Court refused to interpret the bail clause in such a fashion as to make bail available in all circumstances.

The Court stated that, "[T]he Eighth Amendment does not prevent Congress

from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *United States v. Salerno*, 107 S.Ct. at 2105, quoting *Carlson v. Landon*, 342 U.S. 524, 545-546 (1952).

Thus, the Court expressly empowered Congress to impose other considerations other than questions of flight when deciding whether to allow an arrestee out on bail.

We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

United States v. Salerno, 107 S.Ct. at 2105.

In sum, the Supreme Court has found that Congress may constitutionally impose considerations other than flight to the decision of whether an arrestee is bail eligible. Where the considerations are compelling, the Court will defer to the will of Congress.

—Michael Scott Friedman

Arizona v. Mauro: POLICE ACTIONS OF WITNESSING AND RECORDING A PRE-DETENTION MEETING DID NOT CONSTITUTE AN INTERROGATION IN VIOLATION OF MIRANDA

In *Arizona v. Mauro*, — U.S. —, 107 S.Ct. 1931 (1987), the United States Supreme Court held that an "interrogation" did not result from police actions of recording and witnessing a pre-detention meeting between the accused and his spouse. In reversing a judgment of the Arizona Supreme Court, the Court decided that Mauro's invocation of his *Miranda* rights did not extend any privilege of confidentiality to remarks made to his wife in a "private" meeting arranged by police at the insistence of the defendant's spouse.

After admitting to police that he had murdered his son, William Carl Mauro was arrested and advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Mauro was twice read his right to refuse to make any statement without an attorney present. At Mauro's request, police interrogation immediately halted.

Meanwhile in another room at the police

station, Mrs. Mauro was also being questioned concerning the murder of her child. After questioning, she became adamant in her demand to meet with her husband. Although reluctant at first, the police consented to the meeting only on the condition that an officer be present. The Mauros were not consulted prior to their meeting, and their brief conversation was recorded by a tape recorder within their plain view. During the meeting, Mrs. Mauro expressed despair, while Mr. Mauro advised her not to answer any questions until an attorney was present. Mauro, 107 S.Ct. at 1933.

At trial, the defense put forth an insanity plea which the prosecution rebutted by playing back the recorded conversation, and arguing that the recording showed Mauro was sane on the day of the murder. The trial court refused Mauro's motion to suppress the recording, rejecting the defense that it was a product of police interrogation in violation of his *Miranda* rights. Mauro was convicted of murder and sentenced to death, and the present appeal ensued.

In reversing the trial court decision, the Arizona Supreme Court found that the police had interrogated Mauro under *Miranda* by allowing him to speak to his wife in the presence of an officer. *Arizona v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986). According to the court, the interrogation was invalid because Mauro had requested counsel before any further questioning. The court based its holding on *Rhode Island v. Innis*, 446 U.S. 291 (1980), which held that interrogation may include practices "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. Since two police officers had testified during pretrial hearings that they thought it possible that Mauro might make incriminating remarks during the meeting with his spouse, the court found that *Innis* applied, and overturned the trial court's admission of the recorded conversation into evidence.

The Supreme Court reversed, by a 5 to 4 margin. Writing for the majority, Justice Powell focused on the issue of whether the police actions were the "functional equivalent" of interrogation under *Innis*. In holding that no interrogation occurred, the Court found that the officer present at the meeting between the Mauros posed no questions to the defendant. This had the effect of rejecting the minority view, embraced by Justice Stevens, that the police "employed a powerful psychological ploy" against Mauro. *Mauro*, 107 S.Ct. at 1937. Justice Stevens, for the dissent, argued that the police actions overwhelmed Mauro because they did not pro-