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Criminal Procedure - Preventative Detention - Provision of 1984 Bail Reform Act Permitting Pretrial Detention of Arrestees Charged with Serious Felonies Who Are Found to Pose a Danger to the Community, Does Not, on Its Face, Violate Either the Fifth Amendment's Due Process Clause or the Eighth Amendment's Prohibition of Excessive Bail Recent Development.

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current Court would find an individual "handicapped" solely due to his contagious nature if such facts were before it. As a result of *Arline*, the well-informed federally assisted program should withhold benefits from individuals with contagious diseases only after carefully considering whether the individual is "otherwise qualified" based on the factors enumerated by the Court and whether "reasonable accommodations" could be made to reduce the risk that others will contract the disease to an acceptable level.

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CRIMINAL PROCEDURE—PREVENTATIVE DETENTION—PROVISION OF 1984 BAIL REFORM ACT PERMITTING PRETRIAL DETENTION OF ARRESTEES CHARGED WITH SERIOUS FELONIES WHO ARE FOUND TO POSE A DANGER TO THE COMMUNITY, DOES NOT, ON ITS FACE, VIOLATE EITHER THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE OR THE EIGHTH AMENDMENT'S PROHIBITION OF EXCESSIVE BAIL. *United States v. Salerno*, ___ U.S. ___, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

Reacting to "the alarming problem of crimes committed by persons on release," S. Rep. No. 225, 98th Cong., 2d Sess. 6 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3188-89, Congress created the Bail Reform Act of 1984 (the "Act" or "BRA"), 18 U.S.C. §§ 3141-3156 (1982 & Supp. III 1985), to explicitly grant courts discretion to consider the danger a criminal defendant may pose to others if released before trial. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 3 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3189.

Section 3142(e) of the BRA specifically authorizes pretrial detention of arrestees who have been charged with serious felonies upon a finding, after an adversary hearing, 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) (1982 & Supp. III 1985)(emphasis added). The statute requires the judicial officer to conduct a detention hearing if the prosecutor requests such a hearing and if the offense is one of the following:

> (1) a "crime of violence," defined in 18 U.S.C. § 3156(a)(4) (Supp. III 1985) as an offense that has an element of use or threatened use of physical force to person or property, or any felonious offense involving a substantial risk of the use or threatened use of force;

> (2) an offense for which the maximum penalty is life imprisonment or death;
> (3) any narcotic offense carrying a penalty of ten years imprisonment or more as prescribed in the Controlled Substances Act of 1970, Pub. L. No. 91-513, § 101, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§ 801-802 (1982 & Supp. III 1985));
> (4) any felony, even a nonviolent offense, if the defendant already has two or more federal or equivalent state convictions for crimes of violence, crimes punishable by life imprisonment or death, or ten-year drug felonies.

See 18 U.S.C. § 3142(f)(1) (Supp. III 1985).

In a court's evaluation of the arrestee's future dangerousness, the judicial officer is instructed to consider, among other factors, the underlying facts surrounding the offense charged, the sufficiency of the evidence against the arrestee, the arrestee's background and criminal record, and the possible danger presented to the community if the arrestee is released. *Id.* § 3142(g). The arrestee has a right to counsel at the detention hearing, may testify in his own behalf, present evidence, and cross-examine witnesses who appear at the hearing on behalf of the government. *Id.* § 3142(f). The government must prove its case by clear and convincing evidence, *id.*, and the judicial officer must prepare written findings of fact and a statement setting forth the reasons for detention of the arrestee, *id.* § 3142(i)(1). An immediate appellate review of the detention order is accorded the detainee. *Id.* § 3145(c).

In *United States v. Salerno*, 631 F. Supp. 1364 (S.D.N.Y.), *vacated*, 794 F.2d 64 (2d Cir. 1986), *rev'd*, ___ U.S. ___, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), principal defendants Anthony Salerno and Vincent Cafaro were charged along with thirteen other members of the "Genovese Organized Crime Family" with thirty-five specific violations of the Racketeer Influenced and Corrupt Organizations Act, including mail and wire frauds, extortion, gambling, and two conspiracies to commit murder. *See id.* at 1366. At the arraignment of Salerno and Cafaro, the government requested pretrial detention of both defendants pursuant to 18 U.S.C. § 3142(e), contending that "no condition of bail or combination of conditions [would] assure the safety of the community." *Id.* At the subsequent detention hearing, the government offered evidence which indicated that Salerno and Cafaro were officers in the criminal organization, and that the two had used violence to eliminate competition for their gambling operations, collect monies related to their loan-sharking businesses, and control labor unions. *See id.* at 1367-70. Electronic surveillance tapes were admitted which disclosed Salerno's approval of at least one plan to commit murder. *See id.* at 1367. Salerno challenged the credibility of the prosecution's key witnesses based on their past criminal conduct and their favorable cooperation agreements with the government. *See id.* at 1370. Salerno further offered testimony of several

character witnesses, as well as a letter from his doctor stating that Salerno was in poor health. *See id.* Cafaro did not present any evidentiary material at the hearing but merely characterized the wiretap conversations relied on by the government as "tough talk." *Id.* At the finish of the two-day hearing, the district court concluded that the government had established "by clear and convincing evidence that no condition or combination of conditions of release" would ensure the "safety of any other person or of the community." *Id.* at 1375. The district court remarked as to Salerno that:

> [T]he government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word "hit." Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community.

Id. at 1371. Salerno and Cafaro appealed to the United States Court of Appeals for the Second Circuit arguing that section 3142(e) of the BRA is unconstitutional to the extent that it authorizes pretrial detention on the basis that the arrestee is likely to commit future crimes. *See United States v. Salerno*, 794 F.2d 64, 66 (2d Cir. 1986), *rev'd*, __ U.S. __, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The second circuit, diverging from the unanimity of other circuits, agreed, holding that to the extent section 3142(e) of the BRA allows pretrial detention based upon a fear of future dangerousness, it violates due process. *Compare id.* at 71 *with United States v. Rodriguez*, 803 F.2d 1102, 1103 (11th Cir. 1986) *and United States v. Zannino*, 798 F.2d 544, 548-49 (lst Cir. 1986) *and United States v. Perry*, 788 F.2d 100, 118 (3d Cir. 1986), *cert. denied*, __ U.S. __, 107 S. Ct. 218, 93 L. Ed. 2d 146 (1986) *and United States v. Portes*, 786 F.2d 758, 766 (7th Cir. 1985). The court of appeals in *Salerno* adopted both the reasoning and opinion of Judge Newman in *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986). In *Melendez-Carrion*, the court found section 3142(e) unconstitutional when used to permit pretrial detention of arrestees for a period exceeding eight months. *See id.* at 1004. The court held that guarantees of individual liberties cannot be suspended solely to avoid an unverifiable risk of danger to society. *See id.* at 1000-01. The majority in *Melendez-Carrion*, however, was divided on whether the detention provisions of the BRA would constitutionally permit any period of pretrial detention based upon a finding of dangerousness to the community. *See id.* at 1005 (Feinberg, C.J., concurring) (excessive length of pretrial detention can turn valid regulatory measure into impermissible punishment).

Although the Court of Appeals for the Second Circuit in *Salerno* recognized that pretrial detention would be constitutionally permissible if the judge determined the defendant was likely to flee or intimidate witnesses, the court found that pretrial detention based upon a finding that a defendant is

likely to commit future crimes in the community pending trial, even if shown beyond a reasonable doubt, is irreconcilable with substantive due process. *See Salerno*, 794 F.2d at 72-73. The court declared that if a person is not accused of a crime he may not be incarcerated simply on the grounds that he is believed to pose a threat to the safety of the community. *See id.* at 72 (quoting *Melendez-Carrion*, 790 F.2d at 1001). The court of appeals found it reasonable that a policeman may arrest and detain a person suspected of a crime, even before probable cause has been determined by a neutral magistrate, because this brief period of detention is necessary to "take the administrative steps incident to arrest." *Salerno*, 794 F.2d at 74 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)(upholding police detention pursuant to arrest to ensure arrestee will not escape or commit future crimes)). The court of appeals in *Salerno*, however, did not interpret *Gerstein* to permit continued detention; rather, the court construed *Gerstein* as limiting such detention to the "administrative steps incident to arrest." *Id.* The court of appeals also distinguished *Schall v. Martin*, 467 U.S. 253 (1984), in which the Supreme Court upheld preventative detention of juveniles, *see id.* at 264, on the basis that juveniles are always under some form of custody and a child's interest in liberty may be subordinated to the state's interest in promoting the welfare of the child. *See Salerno*, 794 F.2d at 74 (juveniles have a lesser interest in liberty than do adults). Dissenting Chief Judge Feinberg argued that, while unduly extended incarceration for general dangerousness of persons not convicted of a crime can cross the line separating a valid regulatory measure from punishment imposed in violation of the due process clause, on its face the BRA adequately balanced the federal government's compelling interest in community safety against the detainee's liberty interests. *See id.* at 75 (Feinberg, C.J., dissenting).

Due to the evolving conflict among courts of appeals concerning the constitutionality of the BRA, the Supreme Court granted certiorari. The Court held that the defendants "failed to shoulder their heavy burden to demonstrate that the Act [was] facially unconstitutional." *United States v. Salerno*, __ U.S. __, __, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). The Supreme Court noted that a facial challenge to a legislative act requires the challenger to establish that under no circumstances could the act be held valid. *See id.* at __, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707. Therefore, the Supreme Court did not consider whether section 3142 of the BRA, as applied under some conceivable set of circumstances, could be unconstitutional.

The defendants offered two grounds for invalidating those provisions of the BRA which authorize pretrial detention on the basis of potential dangerousness to the community. First, the defendants argued that to the extent section 3142(e) of the Act permits pretrial detention of dangerous arrestees on the sole ground of assuring the safety of the community, that section

violates the due process clause of the fifth amendment. *See id.* at __, 107 S. Ct. at 2100, 95 L. Ed. 2d at 708. Second, respondents claimed that the BRA violated the eighth amendment's prohibition against excessive bail. *See id.* at __, 107 S. Ct. at 2100-01, 95 L. Ed. 2d at 708.

Two cases provided the legal groundwork for the Court's constitutional analysis to determine if the BRA is facially consistent with substantive due process: *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Schall v. Martin*, 467 U.S. 253 (1984). The Court in *Salerno* relied upon the reasoning of *Bell* wherein the Supreme Court found that the mere fact that a person is detained prior to trial does not necessarily establish that the government is imposing punishment on the defendant. *See Bell*, 441 U.S. at 536-37. The Court noted that Congress' intent in enacting the BRA was to provide pretrial detention as a regulatory measure to prevent danger to the community—not punishment. *See* Sen. Rep. No. 225, 98th Cong., 2d Sess. 8 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3191. The Court reiterated that preventing danger to the community is a legitimate regulatory goal. *See Salerno*, __ U.S. at __, 107 S. Ct. at 2101, 95 L. Ed. 2d at 709 (citing *Schall*, 467 U.S. at 253). The Court concluded further that the scope of the detention permitted by the Act was not "excessive in relation to the regulatory goal Congress sought to achieve," and that the detention was thus a valid regulatory measure. *See id.* at __, 107 S. Ct. at 2101, 95 L. Ed. 2d at 708-09. In *Schall*, the Supreme Court upheld the constitutionality of preventative detention of juveniles, stating that juvenile detention comports with substantive due process because detention based on dangerousness serves a "legitimate and compelling" goal and does not rise to the level of punishment. *Schall*, 467 U.S. at 268. In *Salerno*, the Supreme Court, conceding that juveniles may have a lesser interest in liberty than do adults, noted that the same interest recognized as compelling in *Schall*, protection of the community from potential crimes by defendants while on release, is not of any less importance because of the age of the defendant. *See Salerno*, __ U.S. at __, 107 S. Ct. at 2103, 95 L. Ed. 2d at 710. Indeed, the dissenting opinion in the *Salerno* court of appeals decision stated that the need to protect the community from pretrial crimes of adults is more compelling because adults "have superior access to the means of committing more serious and far-reaching offenses." *Salerno*, 794 F.2d at 76 (Feinberg, C.J., dissenting). As noted by the Court in *Schall*, "the harm suffered by the victim of a crime is not dependent on the age of the perpetrator." *Schall*, 467 U.S. at 264-65.

The Supreme Court in *Salerno* reaffirmed that under special circumstances authorized governmental restraint of an individual's liberty may be constitutional. For example, mentally unstable individuals may be detained by the state to protect the safety of the community. *See Addington v. Texas*, 441 U.S. 418, 427 (1979)(dangerous defendants who become incompetent to stand trial); *Jackson v. Indiana*, 406 U.S. 715, 736-37 (1972)(violently dis-

turbed individuals). The Supreme Court has also held that a person arrested for a crime may be temporarily detained pending a finding of probable cause, not only to prevent interference with the judicial process but also to ensure "there no longer is any danger [the] suspect will escape or commit future crimes." *Gerstein*, 420 U.S. at 114.

The *Salerno* Court rejected the court of appeals' suggestion that section 3142 could create a scenario wherein "the government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future." *Salerno*, 794 F.2d at 72 (quoting *Melendez-Carrion*, 790 F.2d at 1001), *quoted in Salerno*, __ U.S. at __, 107 S. Ct. at 2101, 95 L. Ed. 2d at 707. The *Salerno* Court stated that Congress had exhibited due regard for the detainee's interest in liberty by providing elaborate and restrictive guidelines which must be followed if the government wishes to detain a defendant before trial to protect the community. *See Salerno*, __ U.S. at __, 107 S. Ct. at 2101, 95 L. Ed. 2d at 709. Because of these limitations on pretrial detention, the scenario suggested by the court of appeals is unlikely to occur. First, the BRA is more restrictive than the statute upheld in *Schall*, which permitted pretrial detention of any juvenile arrested for any crime after proof that the juvenile might commit further crimes if released. Secondly, the government must show by clear and convincing evidence that the defendant is so dangerous that no condition or combination of conditions of release could ensure the safety of the community from further crimes. Furthermore, the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, 3152-3156 (1982 & Supp. III 1985), was enacted by Congress to ensure that pretrial detainees would not be subject to prolonged detentions resembling jail sentences. Under the Speedy Trial Act, pretrial detainees must come to trial within ninety days after detention begins. *Id.* § 3164(a), (b).

The procedural safeguards contained in the pretrial detention provisions of the BRA, such as a prompt hearing requirement, the right to counsel, the rights to testify, present evidence, and cross-examine witnesses, the placement of the burden of proof on the government, as well as the immediate appellate review and right to a speedy trial, are more than sufficient to repel a facial due process challenge. Furthermore, the Supreme Court in *Salerno* noted that there is nothing inherently shocking to the judicial conscience or "inherently unattainable about a prediction of future criminal conduct." *Salerno*, __ U.S. at __, 107 S. Ct. at 2103, 95 L. Ed. 2d at 711; *see also Schall*, 467 U.S. at 278; *Rochin v. California*, 342 U.S. 165, 172 (1952).

The defendants in *Salerno* also challenged the BRA as violating the excessive bail clause of the eighth amendment. *See Salerno*, __ U.S. at __, 107 S. Ct. at 2103, 95 L. Ed. 2d at 712. Although the issue was not addressed by the court of appeals, the Supreme Court found that the Act also survives an eighth amendment challenge. *See id.* at __, 107 S. Ct. at 2104-05, 95 L. Ed. 2d at 713-14. The eighth amendment provides merely that "[e]xcessive bail

shall not be required." U.S. Const. amend. VIII. The right to bail itself, however, is not absolute. *See United States v. Hazzard*, 598 F. Supp. 1442, 1449 (N.D. III. 1984)(history refutes absolute right to bail; Congress free to determine which offenses bailable).

The bail process has historically been a matter of judicial discretion. *See* Kennedy, *A New Approach to Bail Reform: The Proposed Criminal Code and Bail Release*, 48 Fordham L. Rev. 423, 427 (1980). Typically, when an arrestee is brought before the court for a determination of bail the judge or magistrate uses a fixed bail schedule relative to the criminal offense along with his discretion in setting the amount of bail or denying bail. *See* R. Rossum, *Politics of the Criminal Justice System: An Organizational Analysis* 203 (1978). Even prior to the BRA magistrates considered several of the same factors listed in section 3142(g) in the determination of bail, such as the seriousness of the crime and the defendant's prior criminal record, likelihood to flee, and propensity to commit further crimes if released.

Justice Marshall's dissent in *Salerno*, joined by Justice Brennan, refers to section 3142(e) of the BRA as "an abhorrent limitation of the presumption of innocence," *Salerno*, __ U.S. at __, 107 S. Ct. at 2109, 95 L. Ed. 2d at 719 (Marshall, J., dissenting), even though the statute specifically proscribes any judicial action which would "modify[ ] or limit[ ] the presumption of innocence," 18 U.S.C. § 3142(j) (1982 & Supp. III 1985). Justice Marshall contended that pretrial detention permits the government to "imprison someone for uncommitted crimes based on 'proof' not beyond a reasonable doubt." *Salerno*, __ U.S. at __, 107 S. Ct. at 2110, 95 L. Ed. 2d at 719 (Marshall, J., dissenting). However, a defendant's pretrial liberty may be restrained on the basis of probable cause, a threshold level of suspicion less demanding than that beyond a reasonable doubt. *See Gerstein*, 420 U.S. at 114. The dissent failed to address the structured, indeed elaborate, safeguards afforded the accused by the BRA. Pretrial detention has a regulatory purpose—detention of the arrestee in order to prevent reasonably predictable dangerous conduct—not to punish for possible past crimes. Thus, a defendant has no right to have his release determination based on a reasonable doubt standard. Indeed, the Court in *Bell* held that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell*, 441 U.S. 520, 533 (1979).

The dissent in *Salerno* also failed to address the fact that although the defendant could be detained on a probable cause finding without offending due process, as in *Gerstein*, the pretrial detention provisions of the BRA require more. At the pretrial detention hearing, a court must make two determinations. First, the court must determine that probable cause exists that the crime charged was committed by the defendant. Section 3142(f) only permits the government to initiate a pretrial detention hearing if the defendant is charged with a crime of violence as defined by section 3156(a)(4), a

capital offense, a narcotics violation that carries a penalty of ten years or more in jail, or any felony committed after conviction for two other state or federal felonies. Second, the court must determine if there exists clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any person and the community.

By providing elaborate restrictions on the discretion of a trial court to deny bail, Congress has effectively safeguarded the liberty interest of a pretrial detainee, and thus struck a proper constitutional balance between that interest and the government's legitimate and compelling interest in community safety.

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