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U.S. v. Salerno: The Due Process Required to Detain a Person Prior to Trial and the Indigent Defendant

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Recent Supreme Court cases have reinforced the long held assumption that the Eighth Amendment prohibition on excessive bail applies to the states through the Fourteenth Amendment. *See McDonald v. City of Chicago*, 130 S.Ct. 3020, 3034-35, n.12 (2010); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). In *U.S. v. Salerno,* 481 U.S. 739 (1987), the court also applied the Due Process Clauses of the Fifth and Fourteenth Amendments to the constitutional limitations on which defendants can be permissibly detained without bond. This article outlines the impact of this constitutional limitation on Kentucky's detention and bond statues, specifically addressing why this limitation should prevent indigents from being detained with cash bonds unless the test for pretrial detention in *Salerno* is met.

The Constitutional Floor: Two Limits on Pre-Trial Detention

The Supreme Court addressed the constitutionality of pre-trial detention without bond in *Salerno*. Prior to *Salerno*, the Court had established that the Eighth Amendment prohibits setting bail higher than what is reasonably calculated to assure that the accused will appear at trial. *See Stack v. Boyle* 342 U.S. 1 (1951). In *Salerno*, the Court recognized that the Fifth and Fourteenth Amendments also prohibited pretrial detention without due process. *Salerno*, 481 U.S. 739. Due process requires, among other things, a showing of compelling governmental interest in pretrial detention. *Id*.

In *Salerno, t*he Court took up the question whether future dangerousness to others could be a compelling governmental interest sufficient to deny bail consistent with the Fifth and Eighth Amendments, and if so, under what circumstances. It held that the protection of the community was a sufficiently compelling governmental interest which might overcome the defendant's pretrial liberty interest. *Salerno*, 481 U.S. at 752. The Bail Reform Act of 1984, 18 U.S.C §3141, et seq., reviewed in *Salerno*, was held not to violate the Eighth Amendment reasonable bail clause on a similar basis. *Id.* at 754-55. As to other due process requirements, in order to detain a person pretrial, the Act required the government to show that no conditions of release or bond could assure the appearance of the person in court and provide for the safety of the community. 18 USC 3142(e); *Salerno*, 481 U.S. at 750. It required (1) the government to apply for an evidentiary hearing in which the government would have to make this showing by clear and convincing evidence and (2) the defendant was represented by counsel. 18 USC 3142(f). The Court reasoned that the Act's requirement of a hearing at which the government must demonstrate dangerousness by clear and convincing evidence sufficiently protected the due process rights of defendants who were entitled to release. Only where the government could meet its burden at this hearing did the governmental interest in pretrial detention outweigh the defendant's liberty interest and his right to reasonable bail. *Id.* at 750, 754-55.

Prior to *Salerno*, the Court had required clear and convincing evidence in other cases as the basis for overcoming liberty interests in the detention context. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court required clear and convincing evidence of dangerousness to others as the standard of proof for involuntary commitment of the mentally ill. It required clear and convincing evidence as the standard for post-trial confinement of those acquitted on the ground of insanity in *Foucha v. Louisiana*, 504 U.S. 71 (1992). In both cases, the Supreme Court stressed the importance of the right to a hearing and the clear and convincing evidence standard. *Addington,* 441 U.S. 418, 431-33; *Foucha*, 504 U.S. 71, 79-80. The right to a hearing, counsel, and proof by clear and convincing evidence is common to all these situations and provides additional rationale for the standard set forth in *Salerno*.

If *Salerno* sets the constitutional floor for pre-trial detention, then Kentucky law must be interpreted to require a hearing in which the Commonwealth, by clear and convincing evidence, establishes that the defendant poses a danger to others or a risk

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Argersinger v. Hamlin: The Importance of Legal Representation in Misdemeanor Cases

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In its unanimous opinion, *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), the United States Supreme Court clearly states that a defendant's Sixth Amendment right to counsel is attached by the time of entering a guilty plea. Although the Court notes that the trial judge is not required to follow an exact script, it outlines a basic starting point for ensuring a "knowing" and "intelligent" waiver of the right to counsel: "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* Later in its opinion, the Court adds another layer to this baseline instruction by requiring that the colloquy incorporate advice based on "case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88 (citation omitted). In short, a defendant who intends to enter a guilty plea and waive his right to counsel deserves constitutionally-required individualized attention.

Misdemeanor cases have been overcrowding court dockets and creating mammoth caseloads for at least the past thirty years. *See* Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, Nat'l Assoc. of Criminal Defense Lawyers, April 2009, *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808. Factor in an overall lack of resources, and the shortcomings of the criminal justice system become glaringly apparent: "An inevitable consequence . . . is the almost total preoccupation . . . with the movement of cases. . . . 'Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.'" *Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972) (citations omitted). Aside from these systemic pressures, a closer look at the indigent-misdemeanant population reveals numerous internal and personal pressures weighing on the individuals. We see that they too are motivated to resolve their cases as quickly as possible (*i.e.*, kids to feed, rent to pay, jobs to work, addictions to satisfy). The misdemeanor defendant's mentality of "I just want to go home today" often means that his first appearance before the judge is also his last.

At arraignment, this misdemeanor defendant probably (hopefully) will be informed of the charges against him and receive some kind of offer from the prosecution. He may be asked if he has an attorney but will not be appointed counsel unless he affirmatively requests a public defender. This defendant stands alone at the podium, under an impression that the prosecutor's offer is set to expire in about 30 seconds, and pleads guilty to just end the whole matter. He leaves with a fine and term of probation, which may seem like a slap on the wrist until he tries to get employment, education, housing, or loans, or is picked back up by the system in the next two years when he still has time on the shelf.

Without information or thought about the collateral consequences of a conviction, misdemeanor defendants are making these hasty plea decisions every day. Judges and lawyers should not be taken in by this same short-term thinking. Yes, court will take longer and public defenders will get appointed to more cases. Taking a step back with an eye on the big picture reveals how the rush to resolve cases also runs the inevitable risk of backlogging the system down the road.

Consider the following example based on the facts in *Dixon v. Commonwealth*, 982 S.W.2d 222 (Ky. App. 1998). The defendant, Mr. Jones, is arrested under KRS 189A.090 for driving on a DUI-suspended license, second offense and receives an offer of time served. To complicate matters, Mr. Jones already pled guilty last year to a DUI first and had his license suspended for 90 days. Like the defendant in *Dixon*,

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of flight prior to detention, whenever the Commonwealth seeks a bond higher than necessary to assure appearance. Kentucky law already substantially complies with these requirements. The requirement of reasonable bail found in the Eighth Amendment is echoed in Section 17 of the Kentucky Constitution and is also codified in rule and statute. KRS 431.520; RCr 4.12. Defendants must be admitted to bail in all cases except those involving capital offenses when the Commonwealth proves at a hearing that the proof of guilt is evident. KY Const § 16; RCr 4.02. The second section of this article addresses the situation of the indigent defendant and argues that it presents a special need to comply with the due process requirements of *Salerno*.

The Indigent Case: Inability to Pay is Not a Compelling Governmental Interest

The indigent defendant is a special case in which the defendant may be held prior to trial for reasons having nothing to do with the compelling governmental interest required by *Salerno*. Implied in the requirement of *Stack v. Boyle* that bond be set at an amount calculated to assure the defendant's presence at trial is a demand that judges evaluate the ability of the defendant to post bond. 342 U.S. at 3-5. Federal law prohibits the setting of a bail which will result in the pretrial detention of the defendant simply because of an inability to pay. 18 U.S.C. § 3142(c)(2). Kentucky statues codify this constitutional requirement by including ability to post bond as a factor in the bond amount. *See* KRS 431.525(1)(e); RCr 4.16(1). In practice, however, cash bonds are too often set for indigent defendants, resulting in pretrial detention of the person due solely to an inability to pay.

An indigent defendant usually cannot post a sizeable cash bond. Release on recognizance or an unsecured bond is often necessary to avoid pretrial detention, the result of an inability to pay. Before a payable bond can be denied an indigent defendant, there must be compliance with the test laid out in *Salerno*. Any less violates the Eighth Amendment right to reasonable bail and the Fifth and Fourteenth Amendments' due process rights to remain at liberty absent a compelling reason by the government for detention demonstrated by clear and convincing evidence.

The system established by the Legislature to determine when release on recognizance can be denied in large part complies with the *Salerno* test for pre-trial detention. Pretrial release is the default presumption. KRS 431.520. When conditions are placed on the defendant's release, they are required to be the least onerous conditions reasonably likely to assure the defendant's appearance. RCr. 4.12. Judges are required to release on recognizance or unsecured bond those defendants which evidence based measures show to be a low or moderate risk of dangerousness or flight. KRS 431.066(2)&(3). For those defendants detained, bail credit ensures eventual release unless a finding is made, on the record, that they are a danger to others or a flight risk. KRS 431.066(4). In short, release without a cash bond must be granted in all cases except those in which the judge makes a finding that the defendant meets one of the two criteria which justify overcoming his due process and Eighth Amendment rights to pretrial liberty under *Salerno*.

The law must be interpreted to require that any pretrial detention based on a finding of future dangerousness must include the right to a hearing, with counsel, in which the Commonwealth bears the burden of proof by clear and convincing evidence. Defendants are entitled to an adversarial hearing on bond, RCr. 4.40, and *Salerno* and the other detention cases decided by the Court provide the standard of proof. The clear and convincing evidence standard is already required in Kentucky when the Commonwealth moves to revoke or increase bond. RCr. 4.40(3) & RCr. 4.42(3)&(4). Likewise, when the Commonwealth seeks to effectuate the pretrial detention of an indigent defendant by the setting of a cash bond the defendant cannot pay, it bears the burden of showing by clear and convincing evidence at the bond hearing or at a subsequent adversarial hearing set pursuant to RCr. 4.40, that the defendant is a flight risk or a danger to others.

It is the odd function of our bond system to infuse the importance of wealth into the courtroom, where the law strives so diligently to remove all taint of bias or prejudice. Our respect for liberty drives us all to want those who are a danger to society to remain detained and those who can be released safely to be so released. Following the pre-trial detention procedure prescribed in *Salerno* before the setting of a cash bond takes wealth out of the equation and pursues that goal directly.

Argersinger v. Hamlin: The Importance of Legal Representation in Misdemeanor Cases (cont'd)

Mr. Jones failed to complete the necessary alcohol treatment classes to get his license back. Six months later, he is arrested for driving on a DUI-suspended license, first offense, and pleads guilty – without counsel – at arraignment. Another six months passes and Mr. Jones – still without a license – is picked up on his second offense under KRS 189A.090 (above). Thinking that he is in fact "guilty" of the crime charged (after all, he was caught driving with a license that was suspended because of his DUI), the time-served offer sounds pretty good. A third offense is a felony, but for now, Mr. Jones gets to go home instead of going to jail. Without any sort of waiver colloquy, he forgoes his right to counsel and takes the offer.

Unfortunately, Mr. Jones is not guilty of either offense for driving on a DUI-suspended license. The Kentucky Court of Appeals held in *Dixon* that "KRS 189A.070 provides for a specific license suspension period based upon the number of violations of [the DUI law]. Once the suspension period has expired, one whose license has been suspended can reapply for his driving privileges once he has complied with KRS 189A.070(3), by completing an alcohol abuse treatment program." 982 S.W.2d at 224. Basically, Mr. Jones was "conditionally eligible" for reinstatement of his driving privileges after the 90 day suspension period, *id.*; his license remained suspended only because of his failure to complete the treatment program. Therefore, instead of being prosecuted under KRS 189A.090, Mr. Jones should have been charged both times with driving on a suspended license under KRS 186.620(2), which does not enhance to a felony.

When Mr. Jones is picked up for his third offense, he is charged with a felony and is appointed counsel. His attorney will now have to file a motion to have the two prior convictions set aside for enhancement purposes under *Boykin v. Alabama*, 395 U.S. 238 (1969), and KRS 189A.310: "A court may ... order that a prior conviction not meeting applicable case law regarding admissibility of a prior conviction cannot be used to enhance criminal penalties including license suspensions...."

In what universe does this support judicial economy? What could have been forestalled by appointing counsel at the earliest opportunity has now caused the system to come to a screeching halt and to start backtracking in order to remedy the situation. Even if Mr. Jones decided to proceed *pro se* and plead guilty, the trial judge should have informed him of the collateral consequences, including the potential enhancement or the danger of pleading to something of which he may or may not be guilty – regardless of the facts as he believes them to be.

The reality is that a colloquy takes up some of the court's time and appointment of counsel adds another client to a public defender's caseload. Perhaps a better solution is to shift the focus to the types of misdemeanor cases that are actually ending up in district court and question whether those cases are best handled by the criminal justice system. *See also Decriminalization of Minor Offenses*, A.B.A. Criminal Justice Section, *available at* http://www2.americanbar.org/sections/criminaljustice/CR203800/PublicDocuments/minoroffenses.pdf (urging the decriminalization of minor crimes, which clog court calendars and waste prosecutorial resources that could be spent on investigation and more serious cases, and imposing civil citations to generate a stream of income for states). As long as poverty and unemployment rates continue to hover around all-time highs and the trend of over-criminalization wins out in state legislatures, we can expect the crisis of the misdemeanor docket to persist. The fact of the matter, however, is that an informed waiver and appointment of counsel are also part of every individual's basic constitutional guarantees and part of our jobs as judges and lawyers.

The Public Defender Corps recruits third year law students, recent law school graduates, and attorneys with legal experience in indigent defense of less than three years to work in host site offices for a three year term. These candidates demonstrate a commitment to social justice and as part of the Fellowship, participants must attend a 14-day summer institute and 5 subsequent 2-day trainings every six months through the duration of their term. Through the Public Defender Corps Fellowship, participants receive the skills needed to provide the highest quality representation to clients and instill in them a commitment to indigent defense reform. The 2011 Public Defender Corps Fellows are pictured here with Attorney General Eric Holder. DPA employs 5 Fellows: Andrea Kendall located in the Boone County Trial Office (Front Row, 2nd from the Right), Kate Benward in the LaGrange Trial Office (Front Row, 3rd from the Right), Ashley Graham in the Covington Trial Office (Front Row, 3rd from the Left), Adam Braunbeck in the Louisville Jefferson County Public Defender Office (Back Row, 7th from the Right), and Ray Ibarra in our Covington Trial Office (Back Row, 6th from the Left).

Bond Appeals:
Releasing the Client Should Not Moot the Issues

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This year's enactment of HB 463 prompted significant change in the way criminal defense attorneys advocate pretrial release for clients. The legislature deviated substantially from the bond consideration factors previously provided to the judiciary (compare new KRS 431.066 to 431.525 prior to the latter's amendment). Hopefully, the result will prove to be a great deal many more persons released from jail pretrial under the presumption of innocence. Nevertheless, a corollary result of HB 463 has been a greater number of appeals than ever before, both by writ of habeas corpus at the district court level, and by regular appeal to the Court of Appeals at the circuit court level.

Sometimes, perhaps as a result of the appeal being filed, an agreement on bail is reached which frees the client. In that event, is the appeal now moot? Can the court sitting in appellate jurisdiction continue to decide the issues of bond that were presented prior to the client's release, or must the appeal be dismissed?

Present published case law suggests that the appeal can still go forward to a decision, and the issue of bond is not moot until the final disposition of the case. For one reason, a person who is free on bond is still subject to having his bond modified or revoked at any time, which would bring back into question whether the bond has been properly decided. While not specifically addressing issues of bond, cases involving the wrongful detention of defendants have held that the release of such individuals did not deprive the courts of deciding the issues of law which resulted in their detention in the first place.

Continuing Legal Interests of the Accused

In *Rosales-Garcia v. Holland,* 322 F.3d 389 (6th Cir. (Ky) 2003), the Sixth Circuit held that a Cuban citizen's appeal of the denial of his habeas petition, in which he challenged his indefinite detention following revocation of his immigration parole and pending Cuba's acceptance of his return, was not rendered moot when he was released from detention and paroled into the United States, inasmuch as he was still "in custody" for purposes of habeas statute, and relief sought, if granted, would make a difference to his legal interests, in that he would no longer be subject to possibility of revocation of parole "in the public interest." *Id.*

In *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the United States Supreme Court held that a paroled prisoner was in the custody of his state parole board for the purposes of 28 U.S.C. § 2241: "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute...." *Jones,* 371 U.S. at 243, 83 S.Ct. 373; *see also DePompei v. Ohio Adult Parole Auth.,* 999 F.2d 138, 140 (6th Cir.1993).

In *Spencer v. Kemna,* 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), the Court addressed the issue of mootness: "The parties must continue to have a personal stake in the outcome of the lawsuit. This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* (quotations and citations omitted).

In a case where a defendant is unable to make bond, but then released, his bond can be changed by the trial court at any time for almost any reason. When this happens, the defendant may be placed back on the original bond that he was unable to make and is thus threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Therefore, the defendant's bond appeal is not moot. Given the fact that House Bill 463 is new law and there are no written opinions regarding it yet, all parties in this matter should want guidance from the higher Court as to how it is to be applied if the Circuit Court judge should ever be asked to review the Appellant's bond again.

Capable of Repetition, Yet Evading Review

Another reason that bond appeals should not be held to be moot following the release of a client is that often rulings resulting in "excessive bonds" are often capable of repetition yet evading review. An action is capable of repetition yet evading review if the challenged action cannot be fully litigated prior to its expiration and there is a reasonable expectation that the complaining party will be subject to the same action. *Commonwealth v. Hughes,* 873 S.W.2d 828, 830-31 (Ky.1994).). "The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that same complaining party would be subject to the same action again.' " *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).

As to the first question, the issue is whether the nature of the action renders the time frame too short to permit full litigation of the issues through the appellate process. Disputes involving pretrial bond decisions are too short in duration to litigate prior to their expiration. In *Lexington Herald-Leader Co. v. Meigs*, 660 S.W.2d 658, 660 (Ky. 1983), the Kentucky Supreme Court found the problem of media exclusion from voir dire capable of repetition, yet evading review. The Court quoted the United States Supreme Court's determination that "because criminal trials are typically of 'short duration,' such an order will likely 'evade review.' Id. (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 1982)).

Likewise, in *Riley v. Gibson*, 338 SW3d 230 (Ky. 2011), the media was denied access to a juror contempt hearing. The case was unquestionably moot by the time the writ had been filed with the appellate court as the hearing the media sought access to was over. However, the appellants believed the writ would serve to bar the exclusion of the media in future contempt proceedings. The Court agreed with the appellants.

Bond appeal cases are analogous to the aforementioned cases because they are equally capable of repetition, yet evading review. Pretrial bond hearings carry the same inherent immediacy and expiration as voir dire or juror contempt hearings. As per §11 of the Kentucky Constitution, defendants have the right to a fast and speedy trial. Under RCr 9.02, the trials of all persons in custody under arrest shall be held as promptly as reasonably possible. The very nature of our criminal process could prohibit one from obtaining the benefit of any relief a higher court could give him prior to trial once the issue of bond becomes moot.

In one appeal filed by the authors, the client's initial trial was scheduled for September 19, 2011. The Court of Appeals motion panel assigned to hear the bond appeal, however, was not scheduled to meet until October, 2011. Technically, his appeal would have become moot if he had been tried in September. The people of the Commonwealth should not be punished whenever bond appeals, despite expedited review, nevertheless fall behind speedy trials on the calendar.

As to the second question, Kentucky courts have focused on the probability of the same controversy arising again, even where the harm contemplated would not necessarily arise with respect to the original defendant. See *Lexington-Fayette Urban County Government v. Lexhl, LP*, 315 S.W.3d 331, 334 (Ky.App.,2009).

In *Meigs*, supra, the matter involved a trial court's closure of *voir dire* proceedings in a criminal prosecution involving the death penalty. The Kentucky Supreme Court recognized that individual criminal trials are typically of a short duration, but the trial courts are faced with death penalty actions on a regular basis. "The problem of when to hold individual *voir dire* in such cases, together with the important questions this raises related to public access, and more particularly news media access, to criminal trials, will likewise be with us." *Id.* at 661. Thus, the Supreme Court addressed the merits of the claim even though the particular criminal prosecution had concluded. See e.g. *Fletcher v. Commonwealth,* 163 S.W.3d 852 (Ky.2005) (Supreme Court addressed constitutionality of public services continuation plan where same situation had recurred three times in past ten years); and *Woods v. Commonwealth,* 142 S.W.3d 24 (Ky.2004) (Supreme Court addressed authority of judicially-appointed guardian to make health care decisions on behalf of the patient even though patient had already died).

The issue of a criminal defendant being unable to bond out of jail is not only likely, but certain to be repeated. The trial courts are faced with pretrial bond decisions on a regular basis. This issue is not unique or specific in nature. And regardless of the reasons why a particular individual is not released (perhaps due to a finding of flight risk or danger to the community or both) there are certain to be similarly situated defendants, both in the present and the future, that need the benefit of a ruling on the issues presented appeals.

Ultimately, the Courts will interpret the bond statutes as modified by HB 463 and render opinions that provide guidance for the citizenry of the Commonwealth, and the defendants who are brought to answer for charges in the courts of this state. Until we have ample authority upon which the criminal bar and the trial courts can make decisions, the appellate courts should continue to decide cases whenever a question of law that has yet to be decided appears before them, and not dismiss on ground of mootness merely because the client has been released. The issue, most likely, will rise again.

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