No. 86-87

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner

v.

ANTHONY SALERNO AND VINCENT CAFARO,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Bar Association respectfully moves for leave to file the attached *amicus curiae* brief out of time. Because this Court ordered the petitioner's brief to be filed within fifteen days, the ABA has been unable to write, revise, and obtain approval of a brief within the time allowed under the Rules. Counsel for all parties have consented to the filing of this brief on this date. Their letters have been filed with the Clerk of the Court.

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. The ABA has been responsible for the preparation and implementation of a comprehensive set

of guidelines and recommendations for the criminal justice system, the ABA Standards for Criminal Justice (2d ed. 1980). Some of these Standards are directly concerned with pretrial detention and implicate some of the same constitutional questions as are raised by this case. Because the parties to this case are unlikely to bring these Standards to the attention of the Court, the ABA seeks to participate as *amicus curiae.*

While this brief is out of time under Rule 36, the ABA believes that there are compelling circumstances that would warrant the granting of leave to file on this date.

First, this case has been briefed under an unusual schedule. On November 3, 1986, when the petition for certiorari was granted, this Court granted the Solicitor General's motion for expedited consideration. The Court directed the filing of the Solicitor General's brief on November 18, 1986 and the respondents' brief on December 18, 1986. The extraordinary fifteen-day period for the filing of the petitioner's brief left little time for the preparation of *amicus curiae* briefs.

Second, the ABA has moved with expedition to prepare and submit this brief. Although the ABA has followed this case with interest, it was not possible to begin the lengthy and careful process of preparing an *amicus* brief until this Court granted review on November 3, 1986. Since that date, ABA committees with an interest in this case have worked quickly to draft both the application to the Board of Governors which is a prerequisite to the filing of an ABA brief and the brief itself. Because the ABA is a national organization representing a large cross-section of the legal community, it was essential that this brief be carefully reviewed, discussed, and approved within the ABA, as well as edited and printed. Despite this lengthy review process, this brief has been submitted in less than the 45 days from the granting of the peti-

tion—which is the minimum contemplated under the Rules for an *amicus curiae* brief.

Third, the filing of this brief on December 8, 1986 will not prejudice other parties. The respondents will have adequate time to include any response to this *amicus* brief in their brief, which is due on December 18, 1986. The Solicitor General will also have an opportunity to respond. In fact, all parties have consented to the filing of the ABA's brief *amicus curiae* on this date.

Because of the compelling circumstances arising from the expedited briefing schedule in this case, the ABA's efforts to conform in substance to the dictates of Rule 36, and the contribution that this brief may make to analysis of the important constitutional issue before the Court, the ABA respectfully requests leave to file the attached brief *amicus curiae* out of time.

Respectfully submitted,

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. Its more than 329,000 members come from every state, territory, and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an

active interest in the improvement of the administration of justice.

The ABA Standards for Criminal Justice (hereinafter ABA Standards) are a comprehensive set of "guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislatures, courts and practitioners to operate and keep it viable—all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future." American Bar Association Standards at xx (2d ed. 1980). The first edition of the Standards was described by former Chief Justice Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).

ABA Standard 10-5.4 [1] sets out bases for preventive detention where the defendant has been charged with a "felony involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm" and one of several criteria are present which indicate that the defendant poses a risk to the "safety of any person or the community. . ." This Standard is designed to serve as a model for jurisdictions considering the adoption or revision of criminal justice procedures addressing preventive detention.

In addition to the Association's general interest in guidelines for imposing pretrial restraint, its interest in

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[1] For the convenience of the Court, the principal ABA Standards relating to pretrial detention have been reproduced in an appendix to this Brief. The ABA Standards relating to Pretrial Release (Chapter 10) were revised in 1985 and an interim Commentary was published in 1986. *See* American Bar Association Standards for Criminal Justice (2d ed. 1980 Revised 1985).

this case is particularly keen because an issue before the Court is whether Congress may constitutionally make the public's interest in personal safety a decisive factor for a court in determining whether a defendant should be detained. That factor is an integral part of Standard 10-5.4 and the Court's disposition of this case could have a substantial and direct impact on the vitality of that Standard.

SUMMARY OF ARGUMENT

The American Bar Association believes that, although pretrial restraint should be used sparingly and under tightly controlled criteria, a demonstrated risk of danger either to the community or to an individual is a compelling governmental interest that may constitutionally justify deprivation of the defendant's liberty for a limited period of time prior to trial.

The liberty interest of a defendant must be balanced against legitimate and compelling interests of the public. Protection of the safety of either an individual or the community is an interest that, when accompanied by adequate procedural safeguards, can validate preventive detention.

Under the traditional tests for determining whether a measure is impermissibly punitive or instead a permissible regulatory restraint, preventive detention does not *per se* constitute punishment.

It is submitted that, where there has been a determination of probable cause to believe that a person has committed a serious crime, a court may constitutionally impose a brief period of preventive detention to protect the safety of an individual or the community against additional crimes, provided that there are adequate procedural safeguards assuring the brevity of the detention and the reliability of the determinations as to the specific danger from the defendants.

ARGUMENT

PREVENTIVE DETENTION OF A DEFENDANT BECAUSE OF DANGER TO THE COMMUNITY OR TO AN INDIVIDUAL COMPORTS WITH SUBSTANTIVE DUE PROCESS

In recent years there has been a growing concern over the risks posed by persons who have been formally charged with crimes but have been released pending trial and while in that status commit acts that threaten or injure others. In response to that concern, the Congress [2] and several states [3] have amended their bail regulations to provide for preventive detention where there is a strong indication that a defendant's release pending trial would physically endanger an individual or the community. This factor does not supplant the more traditional ground of detention, risk of flight,[4] which is designed to insure that a charged defendant will appear for trial and that the judicial process will not be frustrated.

The addition of the separately identifiable ground of dangerousness is based on the government's strong interest in protecting other potential victims from crimes. Moreover, in some cases, a defendant's interest in not fleeing may well hinge on his ability to profit from his continued criminal activity—activity which may pose a substantial danger to the community.

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[2] *See* Bail Reform Act of 1984, 18 U.S.C. (Supp. II) § 3141 *et seq.*

[3] *See, e.g.*, Ariz. Const. Art. I, § 22.3; Cal. Const. Art. I, § 12; Colo. Const. Art. II, § 19(b); D.C. Code Ann. § 23-1322 (1981 & Supp. 1985); Fla. Const. Art. I, § 14; Ill. Const. Art. I, § 9 (approved Nov. 1986); Code of Va. § 19-2-120, 126. *See also* 1984 Manual for Courts-Martial, R.C.M. 305(h)(2)(B) which provides for pretrial confinement of servicemembers who pose a danger.

[4] In some cases it may be necessary briefly to detain a material witness. 18 U.S.C. (Supp. II) § 3144. And in some instances it may be constitutionally appropriate to detain a defendant for his own protection. *See Schall v. Martin*, 467 U.S. 253, 265-266 (1984).

A. The ABA Standards For Preventive Detention

The American Bar Association generally disfavors pretrial restraint.[5] Nevertheless, the ABA Standards recognize that, under limited circumstances, preventive detention may be legitimately grounded on safety considerations of the community at large. This policy is reflected in ABA Standard 10-5.4, which permits preventive detention in precisely defined circumstances and when the judicial officer concludes that no conditions on release will reasonably assure the safety of any person or the community:

> (a) Preventive detention prior to any form of release on a defendant's current criminal charge:
>
> (i) Preventive detention may be imposed against a defendant who has been charged with a felony involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm if:
>
> (A) the crime was allegedly committed while the defendant was, with respect to another felony of violence, currently on pretrial or other release or on release pending completion of sentence, and the judicial officer finds that no condition or combination of conditions will reasonably assure the safety of any person or the community, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice; or if,
>
> (B) the defendant's pattern of behavior, consisting of past and present conduct, and specifically including a conviction for at least one felony involving violence within the preceding [ten] years, supports a judicial finding that no condition or combination of conditions will reasonably assure the safety of any person and the commu-

[5] *See* ABA Standard for Criminal Justice 10-1.1 (2d ed. 1980 Revised 1985).

> nity, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice.

This ABA Standard differs somewhat from the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) § 3142(e). Like the Act, the Standard requires a showing that no other condition or combination of conditions would reasonably assure the safety of the community or the orderly administration of justice.[6] But the Standard also requires, first, that the defendant has been charged with a felony involving a risk of serious bodily harm and second, that the defendant has either been on release from a prior charge or conviction for a felony of violence or has been convicted of a felony of violence within a limited number of years. In the present case it appears that, at the time of the determination to impose preventive detention, neither of the respondents had a prior felony detention or conviction, and thus would not have satisfied the criteria set out in ABA Standard 10-5.4.

However, under the reasoning of the Court of Appeals in this case, it appears that even a statute that conforms with all of the ABA Standards could be held invalid on substantive due process grounds.[7] The ABA disagrees with any such application of the constitutional standard. A statute limited to preventing crimes of violence and containing appropriate procedural safeguards would, we submit, satisfy due process requirements.[8]

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[6] 18 U.S.C. § 3142(e) provides in part:

If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assert the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

[7] *See, e.g.*, 794 F.2d at 73, ("[E]ven the probability that a convicted criminal will again engage in crime does not sanction his incarceration simply in anticipation of such future crimes.")

[8] The ABA's opposition to the New York juvenile justice statute involved in *Schall* v. *Martin*, 467 U.S. 253, 281 (1984), as expressed

B. Preventive Detention Can Satisfy Substantive Due Process

The issue which the ABA addresses is whether a jurisdiction under any circumstances may constitutionally detain a person charged with a violent crime because of prospective danger to the community. The ABA believes that under the tests employed by this Court in measuring substantive due process, according such weight to prospective dangerousness passes constitutional muster.

Pretrial detention is disfavored because of the limits that it places not only upon the defendant's freedom of movement but also upon his ability to prepare for trial and freely consult with counsel. ABA Standard 10-1.1 provides in part:

> Because deprivation of liberty pending trial is harsh and oppressive, subjects persons to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances deprives their families of support, these standards limit the circumstances under which preventive detention may be authorized and provide procedural safeguards to govern preventive detention proceedings.

While the right to unencumbered liberty pending trial is, therefore, of great importance, it is not absolute. Throughout the process of pretrial investigation, and

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in its *amicus* brief, rested on the absence of any such substantive limitations and procedural safeguards in the New York juvenile detention statute. The Court's ruling established that they were not required as a matter of constitutional law in the context of juvenile pretrial detention. The draftsmen of the Bail Reform Act were nevertheless properly concerned with the problems that disturbed the ABA and also the dissenting Justices in *Schall*. In particular, the Bail Reform Act's emphasis on public safety contrasts with the broad reference in the New York statute to any act which "would constitute a crime." Accordingly, even though the statute in *Schall* involved detention of juveniles rather than adults, the Bail Reform Act is substantially more narrow and precise than the New York statute upheld in *Schall*.

pretrial, trial, and post-trial proceedings, the weight to be given a defendant's liberty and privacy interest will vary with the degree of legitimate governmental interest at stake. For example, reasonable suspicion that criminal activity is afoot will support a stop [*Terry* v. *Ohio*, 392 U.S. 1 (1986)] and probable cause will support an arrest and brief detention to take necessary administrative steps incident to an arrest. *Gerstein* v. *Pugh*, 420 U.S. 103, 113-114 (1975). A judicial officer may detain a suspect to insure his presence at trial. *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979).

What this sliding scale approach makes clear is that a person charged with criminal activity retains important liberty interests, but countervailing and legitimate government interests may, when controlled by manageable procedural due process constraints, carry sufficient weight to permit limitations on that liberty interest. At a minimum, the defendant's interests are limited by the very fact that he is subject to the call of the court and to any conditions of release that may have been imposed.

The question of principle involved in this case is whether the government's countervailing concern for the safety of an individual or the community as a whole is ever sufficiently important to justify deprivation of a defendant's liberty prior to conviction. We believe that the government has a compelling interest in protecting either an individual or the community at large from further dangerous conduct while the government presses pending charges for a serious crime. The prevention of crime is a "weighty social objective," *Brown* v. *Texas*, 443 U.S. 47, 52 (1979), and the legitimate and compelling state interest in protecting the safety of the community against crimes of violence "cannot be doubted." *Schall* v. *Martin*, *supra* at 264 citing *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960). *See also United States* v. *Perry*, 788 F.2d 100 (3d Cir. 1986).

Thus, in *Schall*, this Court concluded that the interest in preventing crime, together with the public's interest

in protecting the juvenile from the consequences of his own future criminal activity, was sufficient to justify pretrial detention. While in *Schall* the competing interests of the public and the individual were weighed in the context of detention of a juvenile, the ABA believes that in limited circumstances, pretrial detention of an adult is also justifiable.[9] The liberty interest of an adult is undoubtedly more substantial than that of a juvenile who is "always in some form of custody." *Schall, supra,* at 265. But the threat posed to an individual or community by an adult may be significantly greater as well because of "superior access to the means of committing more serious and far-reaching offenses." *United States* v. *Salerno,* 794 F.2d 64, 76 (2d Cir. 1986) (Feinberg, C.J., dissenting), and the greater potential for organized criminal activity.

Moreover, the statutory scheme in *Schall* was concerned with "crime prevention" generally. As the dissenting opinion emphasized, 467 U.S. at 283, 295, 297, and the majority acknowledged, 467 U.S. at 268 n.18, the New York statute authorized pretrial detention even where the defendant had been charged with a relatively minor offense or was thought likely to commit only such an offense. The ABA Standard narrowly focuses upon protecting the physical safety of an individual or the community as being entitled to significantly more weight than a generalized interest in preventing crime.[10]

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[9] While it is not clear whether the Court considered either of the two interests in *Schall* sufficient in itself to support preventive detention, the government's interest in protecting safety of the community should be independently sufficient where specific indicia of dangerousness have been satisfied, such as by prior indictment or conviction for a violent crime.

[10] The Court of Appeals did not draw this distinction. Instead, it generally discussed the government's interest in stemming criminal activity, rather than the more specific interest of protecting the physical safety of its citizenry. *Compare,* 794 F.2d at 74, *with*

The compelling nature of the public's interest in safety is amply demonstrated by the legislative history of the 1984 amendments to the federal Bail Reform Act. Congress recognized that judicial officers faced with a clearly dangerous defendant had been forced either to free the defendant or to set extremely high money bonds ostensibly for the purpose of insuring presence at trial. The first option left the community open to victimization and the second forced hypocrisy on the judicial officer as the price of protecting the community. The resulting broad-based calls for reform came from the President of the United States, Chief Justice Warren Burger, the Attorney General's Task Force on Violent Crime, and a number of national organizations.[11]

The factual conclusions of Congress as to the need for preventive detention should be given substantial weight. Congress recognized that predicting risks to the community is not an exact science, and concluded that a judge considering such factors as the nature of the offense and the defendant's past record could make such a prediction with an "acceptable level of accuracy." [12] This Court reached a similar conclusion in *Schall* v. *Martin*, *supra* at 278-279, when it stated that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."

C. Preventive Detention Can be a Reasonable Regulatory Restraint

Under *Schall*, the second step in analyzing whether pretrial detention is permissible is to determine whether preventive detention based upon dangerousness is a regulatory restraint or instead an impermissible punitive

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S. Rep. No. 225, 98th Cong., 1st Sess. 10, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3193, citing the testimony of the Department of Justice.

[11] S. Rep. No. 225 at 5, 1984 U.S. Code Cong. & Ad. News at 3187.

[12] S. Rep. No. 225 at 9, 1984 U.S. Code Cong. & Ad. News at 3192.

measure. As this Court has noted, pretrial detention does not in and of itself amount to punishment. *Bell* v. *Wolfish*, 441 U.S. 520, 535-539 (1979); *Schall* v. *Martin*, 467 U.S. at 269. In *Schall*, the Court stated (at 269):

> "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell* v. *Wolfish*, 441 U.S. at 538. Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on "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." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168-169.

Preventive detention on grounds of dangerousness may satisfy this test. Such detention may be based upon an "alternative purpose": insuring the safety of the community.[13] Any punishment will be left to the outcome of the trial of the pending criminal charge. Similarly, detaining the dangerous defendant is a rational means of furthering that compelling interest and is not *per se* excessive. That a defendant might be detained under rigorous or closely monitored conditions does not detract from that interest nor does it facially indicate that the defendant is being punished rather than restrained.

Thus, the temporary "preventive detention" of an indicted defendant based upon prospective dangerousness

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[13] For example, the Bail Reform Act provisions for preventive detention are triggered in part by certain specified serious felonies which Congress concluded pose some significant risk of danger to the community. The Act further provides that preventive detention may be imposed only after the "judicial officer finds that no condition or combination of conditions will reasonably assure the safety of any other person and the community." 18 U.S.C. (Supp. II) § 3142(e). The applicable ABA Standard, 10-5.4, envisions that preventive detention may occur only where a "crime of violence" is involved and the judicial officer reaches a similar conclusion.

can serve a regulatory purpose and need not be punitive. Its proper characterization in a particular case depends upon whether the authorizing statute contains standards and limitations that show that temporary restraint rather than punishment is its goal.[14]

D. Procedural Safeguards for Preventive Detention

There remains, of course, the important issue of whether the procedures prescribed by statute adequately protect the defendant from unnecessary or erroneous deprivation of his important liberty interests. The majority opinion in the Court of Appeals' decision did not address the question of whether the procedures used in the Bail Reform Act for determining dangerousness are constitutional.[15] The ABA submits that procedural safeguards are of critical importance to the constitutionality of provisions for preventive detention.

In its Standards, the ABA sets out the procedural safeguards that it believes legislatures should adopt to protect the defendant from an unnecessary or erroneous deprivation of liberty. Some of these safeguards are recommended as a matter of policy; others are constitutionally required.[16] The principal procedural rights embodied in the Standards include:

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[14] In considering amendments to the 1966 Bail Reform Act, Congress was aware of the potential constitutional challenge that preventive detention amounts to punishment. The legislative history indicates that Congress specifically concluded that such detention is not designed to serve as punishment. S. Rep. No. 225 at 8, 1984 U.S. Code Cong. & Ad. News at 3191, citing *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

[15] The Court of Appeals did address the issue of whether the evidence was sufficient under the Bail Reform Act to support detention. It concluded that the respondents did pose a threat to the community. 794 F.2d at 71.

[16] Since the Court below did not address any procedural due process issues, they are not discussed here.

1. A written statement of the prosecutor's reasons for seeking pretrial detention, Standard 10-5.4 (a) (ii);
2. An immediate hearing, Standard 10-5.4 (a) (iii);
3. A right to counsel and appointment of counsel if the defendant cannot afford one, Standard 10-5.10 (a) (i);
4. A right to present and cross-examine witnesses, Standard 10-5.10 (a) (ii), (iii);
5. Application of the rules of evidence, Standard 10-5.10 (c);
6. Proof by clear and convincing evidence that the criteria for preventive detention have been met, Standard 10-5.10 (e);
7. Written findings of fact and statement of reasons for detention, Standard 10-5.10 (f) (ii).
8. An order stating the date by which pretrial detention must terminate, Standard 10-5.10 (f) (iii);
9. An expedited right of appeal, Standard 10-5.10 (g); and
10. A right to request an additional hearing based upon changed or additional circumstances, Standard 10-5.6.

The Association's Standards represent an attempt to balance the competing interests of the individual and the government, and propose procedural protections designed to insure an acceptable degree of accuracy in the decision to detain.

CONCLUSION

For the foregoing reasons, principles of substantive due process do not preclude a court from relying on danger to an individual or the community in ordering pretrial detention of a defendant formally charged with a serious crime.

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