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Recent Developments: Booth v. Maryland: Victim Impact Statements Inadmissible at Sentencing Hearing in Capital Murder Case

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because it allows for consideration of other factors which serve to better protect the interests of society and of justice. *McIntyre*, 309 Md. at 622, 623, 526 A.2d at 37. (citing from *Com v. Christmas*, 502 Pa. 213, 465 A.2d 989, 992 (1983)). Applying this test, the court found that the defendant's "mere requests to see his mother, [under] the circumstances, [did not] factually constitute an invocation of his right to remain silent, "nor did it invoke his right to counsel." *Id* at 625, 526 A.2d at 39.

There was a lengthy and strongly worded dissent filed by Judge Adkins. The dissent argued that even if a juvenile appears mature, etc., he cannot be held to understand the full ramifications of being arrested. Other jurisdictions provide safeguards for juveniles including a per se rule invalidating waivers. See, e.g., *People v. Burton*, *supra* and special legislation. See, e.g. Conn. Gen. Stat. Ann. §§466-136 and 466-137 (West 1987). (holding inadmissible confessions, statements or admissions made by a juvenile unless made in the presence of a parent or guardian) *McIntyre*, 309 Md. at 629, 526 A.2d at 40 (Adkins, J. dissenting). The dissent was adamant that *McIntyre's* repeated requests for his mother should have been treated as a request for a lawyer.

Furthermore, even by using the totality of the circumstances test, the state failed to show that *McIntyre* had the necessary intelligence, knowledge, maturity or any previous experience with the criminal justice system. 309 Md. at 635, 526 A.2d at 44. The court observed that *Lodowski* dictates an adequate record is of utmost importance to determine if there was a constitutional waiver or rights. *Id* at 636, 526 A.2d at 44. Since the trial record was notably scant, the dissent urged that the conviction be reversed and a new trial be held.

The court of appeals' ruling appears to be stating that when a juvenile is charged as an adult, he or she will be considered an adult even under the totality of the circumstances test. Also, the court will not consider age by itself, but will look to other outside factors in determining if a valid waiver of *Miranda* rights has been made.

—Robert Feldman

***Booth v. Maryland*: VICTIM IMPACT STATEMENTS INADMISSABLE AT SENTENCING HEARING IN CAPITAL MURDER CASE**

In *Booth v. Maryland*, 107 S.Ct. 2529 (1987), the Supreme Court of the United States in a 5-4 decision, delivered by Justice Powell, rejected the introduction of victim

impact statements (VIS) at the sentencing phase of a capital murder trial. The Court reasoned that such information was irrelevant to the blameworthiness of a particular defendant and therefore violative of the eighth amendment's prohibition against cruel and unusual punishment. In rejecting the consideration of the VIS, the Court invalidated a Maryland statute to the extent that it mandated the compilation of a VIS in all felony cases.

In *Booth*, the victims, Irvin and Rose Bronstein were robbed and brutally murdered in their West Baltimore home by John Booth and Willie Reid. Booth, a neighbor of the elderly couple apparently entered the home to steal money in order to purchase heroin. Due to Booth's fear of identification by the victims, he and Reid gagged the Bronsteins and then stabbed them repeatedly with a kitchen knife. Two days later, the Bronsteins' son discovered the bodies of his murdered parents.

A jury found Booth guilty of two counts of first-degree murder, two counts of robbery and conspiracy to commit robbery. Prior to the sentencing phase of the trial, the State Division of Parole and Probation submitted a presentence report which described Booth's background, employment history, education, and criminal record. Pursuant to Md. Ann. Code art. 41, § 4-609(c) (1986), the presentence report included a VIS, describing the detrimental effects of the crime on the victim's family and society in general.

Defense counsel moved to suppress the VIS on the ground that it was "irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution." *Booth*, 107 S.Ct. at 2532. Denying the motion, the trial court submitted the information to the jury, who subsequently sentenced Booth to death. On automatic appeal, the Court of Appeals of Maryland affirmed both the conviction and the sentencing decision. *Booth v. State*, 306 Md. 172, 507 A.2d 1098 (1986). The court, relying on *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985) concluded that the VIS was not an arbitrary factor in the sentencing process, but rather an informative technique by which the sentencing body could measure the full extent of the harm caused by the perpetrator of the crime.

The United States Supreme Court granted certiorari and reversed the decision of the Court of Appeals of Maryland. Justice Powell distinguished between the use of a VIS in an ordinary civil or criminal case as opposed to the unique circumstance of a capital sentencing hearing.

A VIS, in the vast majority of cases, provides the jury with two types of informa-

tion. Initially, it describes the personal characteristics of the victim and the emotional impact of the crime(s) on the family. Secondly, it sets forth the family members' opinions and characterizations of the crimes and the defendant. *Booth*, 107 U.S. at 2533. In *Booth*, the VIS was based on interviews with the Bronsteins' son, daughter, son-in-law and granddaughter. The interviewer, an employee of the Division of Parole and Probation, compiled the information, comments and reactions of the family and prepared a VIS which was then considered by the jury during their deliberation of Booth's sentence.

The Court, in evaluating all plausible arguments as to the relevancy and effectiveness of the VIS, discusses several potentially unconstitutional results which illustrated the danger of allowing juries to consider this information. First, the Court noted that the function of the sentencing jury is to "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). In so doing, the jury is required to focus on the particular defendant as a "uniquely individual human being." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Applying this rationale, the Court explained that "the focus of a VIS is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. *Booth*, 107 S.Ct. at 2534. "Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id*. Consequently, the Court found that the nature of the information contained in a VIS created an impermissible risk that the capital sentencing decision would be made in an arbitrary manner.

Secondly, the Court addressed the dangers of imposing the death penalty based on the ability of the family members to articulate their grief and the extent of their loss. "[I]n some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe." *Id*. The fact that the imposition of the death penalty could turn on such unfair distinctions posed constitutional problems for the Court.

Finally, the Court examined the difficulty of rebutting the implications of the VIS, without shifting the focus of the sentencing hearing away from the defendant. "Presumably the defendant would have the right to cross-examine the declarants,

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