

NEW HAMPSHIRE V. FURGAL, SUPREME COURT OF NEW HAMPSHIRE, NO. 2010-439 11/24/10

A provision of the New Hampshire pretrial release statute states that in cases where the defendant is charged with a crime that is punishable by life in prison and where the state shows that “the proof is evident or the presumption great” that the defendant will be convicted, the defendant must be held without bail. (New Hampshire RSA 597:1-c.) Corey Frugal mounted a facial challenge to this statute after being ordered held without bail following his arrest on a charge of second degree murder. After his challenge failed in the trial court he brought the case to the New Hampshire Supreme Court.

Fugal first argued that the statute denied him due process because it bars the court from considering whether in fact he poses a risk of danger to the community or failure to appear in court and whether he can be released with conditions designed to address any risks. He cited the U.S. Supreme Court case of *United States v. Salerno*, 481 U.S. 739, which upheld a facial challenge to the pretrial detention provisions of the Federal Bail Reform Act of 1984. That act requires prosecutors to show by clear and convincing evidence that the defendant poses a substantial risk to the community if released, and, based on such a finding, allows, but does not require, the court to order detention. Fugal claimed that *Salerno* stands for the proposition that in order to pass constitutional muster, a pretrial detention statute must expressly require an individual assessment of each defendant’s dangerousness, and give the court the discretion over whether to order detention or release after a finding of dangerousness.

In rejecting this argument, the court noted that “[t]he defendant conflates sufficient conditions with necessary ones. We do not read *Salerno* to hold that all statutory bail schemes must include an individualized inquiry into a defendant’s dangerousness in order to pass constitutional muster. Rather than setting a minimum threshold for all bail inquiries, the Court in *Salerno* was confronted with one specific bail scheme and decided only the narrow issue of whether that particular scheme could survive constitutional scrutiny. The Court did not hold that to be constitutional a statute that permits detention without bail must require that the individual defendant’s dangerousness be taken into account.”

Frugal next argued that if the rationale for RSA 597:1-c is that defendants facing a punishment of life in prison are at high risk to flee, then there must be an individualized assessment of his flight risk. In rejecting this argument, the court noted that Frugal “does not cite and we have not discovered any precedent that requires a court to consider the specific circumstances of each defendant’s risk of flight before denying bail. To the contrary, ... from the beginning of the bail system, an exception to the rule favoring bail was made for persons accused of serious crimes that focused the inquiry solely on the evidence of the defendant’s guilt.”

Finally, Frugal argued that the trial court erred when it held that the standard for showing that “proof is evident or the presumption great” under RSA 597:1-c is clear and convincing evidence. Instead, he argued, the standard should be beyond a reasonable

doubt. To address this argument, the court noted that standards of proof can be categorized into three groups: probable cause or fair likelihood that the defendant committed the crime; clear and convincing evidence; and beyond a reasonable doubt. The court rejected the probable cause standard because “if the statute were read in such a manner, the guarantee would add nothing to the accused’s rights, since a suspect may not be held without a showing of probable cause in any instance.” The court also rejected the beyond a reasonable doubt standard, saying that that standard is reserved for the question of guilt at trial, and “it is highly improbable that the legislature intended the bail hearing to determine the precise question to be answered at trial itself.” The court concluded that the clear and convincing evidence standard is the correct one to apply in determining if the proof is evident or the presumption great.