

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

JAMES REEM,

Petitioner,

vs.

THE SUPERIOR COURT OF SAN
FRANCISCO COUNTY,

Respondent.

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Real Party in Interest.

No. _____

Ct. of Appeal No. A152333 (First District)

San Francisco Superior Court Limited
Jurisdiction No. 17011005

Petition for Review

Following Summary Denial of a Petition for Writ of Habeas Corpus
(challenging trial court order denying pretrial release on own recognizance
and setting secured financial condition of release)

First Appellate District (Division Three)
In re James Reem, A152333 (September 14, 2017)

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PETITION FOR REVIEW

To the Honorable Chief Justice and Associate Justices of the
Supreme Court of California:

James Reem petitions this Court for review following the Court of Appeal's summary denial of his petition for writ of habeas corpus. The core of Reem's claim is that the trial court imposed unattainable money bail without any inquiry into or findings concerning his ability to pay or consideration of non-financial alternative conditions of release. Because Reem cannot pay the financial condition required, the court's order imposing money bail is a de facto detention order made without the procedural protections, legal standards, and substantive findings that must accompany such an order under State and Federal law.

Petitioner's claims flow from two lines of precedent. First, the Supreme Court and federal circuit courts have held that equal protection and due process forbid jailing a person solely because of her inability to make a payment. *Bearden v. Georgia* (1983) 461 U.S. 600; *Turner v. Rogers* (2011) 564 U.S. 431; *Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053. Because of that substantive right, courts subject wealth-based detention to careful scrutiny and require procedures that include an inquiry into ability to pay and consideration of alternatives to money-based detention. Second, because the right to pretrial liberty is "fundamental,"

United States v. Salerno (1987) 481 U.S. 739, 750, an order resulting in pretrial detention must meet robust safeguards, including an adversarial hearing with counsel, an opportunity to present evidence, application of specific legal and evidentiary standards, and a finding that no less restrictive condition or combination of conditions can mitigate individualized risks. *Salerno, supra*, 481 U.S. at 751. Both lines of precedent require good reasons and specific procedures before the court can deprive an arrestee of her fundamental right to pretrial liberty.

A secured financial condition of release beyond an individual's ability to pay—i.e., unattainable money bail—may or may not be constitutional. This petition does not seek a ruling on whether unattainable money bail is unconstitutional per se or excessive under the California Constitution. Regardless, the law is that before detaining a presumptively innocent person pre-trial, the government must follow specific procedures and make specific findings that were not made here.

The California Constitution provides an honest and effective means of detaining arrestees that complies with the due process requirements outlined in *Salerno*. But instead of imposing transparent pretrial detention under the Constitution, the trial court subverted this process by imposing an unattainable financial condition with the intention of detaining Reem but evading the findings and procedures necessary for an order of detention.

I. Issues Presented for Review

1. Does the imposition of unattainable secured money bail as a condition of release, without an inquiry into Reem's ability to pay, consideration of non-financial alternatives, and findings concerning the least restrictive conditions of release, violate Reem's rights to equal protection and due process?

2. Does the imposition of a de facto order of pretrial detention, absent clear and convincing evidence that Reem poses a danger to the community or a finding that Reem poses an immitigable risk of flight, and without the legal standards and procedural safeguards required for a valid order of pretrial detention, violate Reem's right to due process?

II. Why Review Should Be Granted

Review of the issues should be ordered because this Court's guidance is necessary to settle important questions of law. (Cal. Rules of Court, Rule 8.500(b)(1)). This Court has never expressly stated what procedures and protections are required when a court issues an order of pretrial detention. As a result, the trial court in this case issued an order of detention that violated Reem's right to equal protection and due process.

This Court's review is also necessary because the constitutional violations that occurred in this case are standard operating procedure in courts throughout the state. It is routine practice that monetary bail is set

shortly after arrest by a judge without inquiry into ability to pay or specific findings that the person can afford to pay. Indeed, a recent study showed troublingly low rates of pretrial release across the state: Only 53.9 percent of people booked on low-level misdemeanors are released pretrial and only 29.8 percent of people arrested for felonies are released pretrial. Sonya Tafoya, et al., *Pretrial Release in California*, Public Policy Institute of California 11 (May 2017), available at http://www.ppic.org/content/pubs/report/R_0517STR.pdf.

“[I]n our society, liberty is the norm and detention prior to ... trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). California’s astronomical 46.1% detention rate for misdemeanors and 70.2% for felonies—accomplished with rote application of financial conditions of release—cannot be regarded as an “exception,” let alone a “carefully limited” one.

Despite the clear nature of these violations and the consensus among federal and state courts that have considered the issue, the culture of automatic application of financial conditions is rampant in San Francisco and throughout the state. A ruling from this Court mandating clearly-defined rights under state and federal constitutional provisions would put an end to the practice of automatically defaulting to money bail rather than providing proper procedures for pretrial release. See Brief of Conference of

Chief Justices as *Amicus Curiae*, *ODonnell v. Harris County, Tx.* (5th Cir. Aug. 9, 2017) No. 17-20333 p. 30 available at <http://www.law.georgetown.edu/academics/centers-institutes/constitutional-advocacy-protection/upload/brief.pdf> (“Absent state court decisions mandating definite rights under state or federal constitutional provisions, many policymaking bodies and many individual judges will never muster the will to change local rules and practices which automatically default to money bail.”).

Petitioner urges this Court to issue an opinion on the merits of his case to provide guidance for trial courts concerning what is required when determining conditions of pretrial release. There is urgent need for this Court’s guidance given the systemic nature of the error in Reem’s case. By addressing the merits of Reem’s claims, this Court can correct a pervasive and ongoing violation of arrestees’ constitutional rights in the courts of the state.

III. Statement of the Case

Petitioner James Reem is a 53-year-old longtime San Francisco resident who has recently struggled with homelessness and unemployment. He was arrested on July 28, 2017 and charged with first degree burglary-residential (Pen. Code § 459), unlawful driving or taking of a vehicle (Veh. Code § 10851(a)), receiving or buying stolen property (Pen. Code § 486(a)),

possession of firearm by a felon (Pen. Code § 29800(a)(1)), using personal ID of another with intent to defraud (Pen. Code § 530.5(c)(1)), identity theft (Pen. Code § 530.5(a)), theft of access card (Pen. Code § 484e(c)), and resisting, obstructing, delaying of a peace officer (Pen. Code § 148(a)(1)).

At arraignment, the court determined that Reem was unable to afford his own counsel and appointed the public defender. Defense counsel requested release without financial conditions, raising the fact that the court's Public Safety Assessment had recommended that Reem be released and that his prior convictions were from years ago.

The prosecutor requested \$350,000 secured money bail pursuant to the bail schedule. The judge denied the request for release on own recognizance, setting bail in the amount of \$330,000. The court emphasized Reem's prior offenses and prior strike in setting a financial condition of release. The court's imposition of \$330,000 had the intent and effect of detaining Reem pretrial solely because he did not have enough money to pay the amount of money required for his release.

Reem filed a motion for a hearing and requested release on his own recognizance. Reem argued that financial bail was set beyond his means, and violated the Fourteenth Amendment's guarantees of Equal Protection and Due Process. In the motion, Reem explained that if he were released, he would engage with Episcopal Community Services Navigation Center, a

program with living quarters that is designed to help homeless people find permanent housing and connect them with social services and housing advocates. The motion explained that Reem's behavior during the alleged crime was the result of substance abuse issues and suggested that the court address any public safety concerns by imposing conditions such as completion of a substance abuse treatment program, a stay-away order, or case management.

At the hearing on Reem's motion, the prosecution requested a de facto order of preventive detention because of the nature of the charges, Reem's criminal history, the high exposure in the case, and Reem's history of bench warrants. The magistrate denied Reem's request, stating that he was not willing to adjust the circumstances of bail at the time and that bail could be readdressed at the preliminary hearing based on the circumstances that come out factually from that hearing. The court made no inquiry of Reem's financial circumstances, and did not address the possibility of release with safety conditions. The court made no findings by clear and convincing evidence that there was a substantial likelihood that Reem's release would result in substantial harm to others or that he would carry out a threat if released pursuant to California Constitution Article I, Section 12.

On September 11, 2017, Reem filed a petition for writ of habeas corpus in the First District Court of Appeal. Reem argued that the trial court

violated state law and the United States Constitution in denying Reem's pretrial release and by failing to consider his ability to pay or alternatives to pretrial incarceration. The petition was summarily denied on September 14, 2017.

Reem is eligible for pretrial detention on public safety grounds, see Cal. Const. Art. I, § 12, but at no point did the prosecution seek nor did any court consider an order of pretrial detention. As a result, no detention hearing was conducted and no legal findings by clear and convincing evidence justifying pretrial detention were made as required by state and federal law. Instead, the court accomplished the functional equivalent of pretrial detention (without the requisite procedures or findings) by intentionally requiring a financial condition of release that Reem could not meet.

IV. Argument

A. Jailing an arrestee by requiring unattainable financial conditions without inquiry into ability to pay and rigorous findings concerning alternative conditions of release violates the Equal Protection and Due Process Clauses

A pretrial arrestee who remains jailed on unattainable money bail solely by reason of his poverty, and in the absence of required inquiry and findings, is denied equal protection and due process.

1. The Equal Protection and Due Process Clauses prohibit the government from jailing a person solely because he cannot afford a monetary payment without consideration of ability to pay

The rule that access to money has no place in deciding whether a human being should be kept in a jail cell relies on fundamental principles in American law. See *Williams v. Illinois*, (1970) 399 U.S. 235, 241 (“[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons.”). In *Griffin v. Illinois* (1956) 351 U.S. 12, 19, the Supreme Court put it simply: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” In *Douglas v. California* (1963) 372 U.S. 353, 355, the Supreme Court applied this rule to an indigent person’s appeal: “For there can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has.”

These principles have been applied in a variety of contexts where the government has sought to keep a person in jail solely because of the person’s inability to make a monetary payment. See, e.g., *Tate v. Short* (1971) 401 U.S. 395, 398 (“[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”). In *Bearden, supra*, 461 U.S. at 672–73, the Supreme Court

explained that to “deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.” For this reason, the Court held that a necessary pre-condition for a State to jail an individual for non-payment of a monetary obligation is an inquiry into the defendant’s ability to pay. *Id.* at 672.

Because of this binding United States Supreme Court precedent, California law holds that any kind of pay-or-jail system is unconstitutional when it operates to jail the poor. In *In re Antazo* (1970) 3 Cal.3d 100, two defendants were convicted of arson and the trial court suspended imposition of sentence upon conditions including that each pay a fine or, in lieu of payment, serve one day in jail for each \$10 unpaid. *Id.* at 106. While his co-defendant was able to pay the fine and did so, Antazo was indigent and was jailed upon his inability to pay the fine and penalty assessment. *Id.* In striking down the sentencing scheme, this Court observed:

[A] sentence to pay a fine, together with a direction that a defendant be imprisoned until the fine is satisfied, gives an advantage to the rich defendant which is in reality denied to the poor one. The “choice” of paying \$100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise \$100. The resulting imprisonment is no more or no less than imprisonment for being poor

Id. at 108 (citation omitted). See also *Charles S. v. Superior Court* (1982) 32 Cal. 3d 741, 751 (holding juveniles cannot be denied informal probation

solely because they are unable to make restitution payments because there are “less intrusive means to further the . . . state interests”); *In re Young*, (1973) 32 Cal. App. 3d 68, 75 (holding court cannot deny prison credit for pre-sentence incarceration that results from inability to post bail because “The additional deprivation suffered only by the indigent does not meet federal standards of equal protection and does not comply with the mandate of uniform operation of all general laws contained in article I, section 11 of the California Constitution”); *People v. Kay* (1973) 36 Cal. App. 3d 759, 763 (holding that “an indigent defendant cannot be imprisoned because of his inability to pay a fine, even though the fine be imposed as a condition of probation” and instructing the trial court, on remand, to take into account the “present resources of appellants and of their prospects” when determining their restitution payments”).

If access to money has no place in determining sentencing outcomes or probation revocation, it likewise has no place in pretrial release decisions. Just as it is unlawful to put a convicted person in jail because of the inability to make a monetary payment, a presumptively innocent person cannot be kept in jail on account of poverty. The principle in *Williams*, *Tate*, *Bearden*, and *Antazo* applies equally to pretrial and post-trial jailing. The “illusory choice” and the “different consequences . . . applicable only to those without the requisite resources,” *Williams*, *supra*, 399 U.S. at 242, are

the same.

2. The principle that a person cannot be jailed for lack of access to money applies prior to trial

For pretrial arrestees, the rights at stake are even more significant because the arrestees' interest in liberty is not diminished by a criminal conviction. Justice Douglas framed the basic question that applies to pretrial detainees:

To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"

Bandy, supra, 81 S. Ct. at 197–98 (Douglas, J., in chambers).

That question was answered in *Pugh v. Rainwater* (5th Cir. 1978) (*en banc*) 572 F.2d 1053, 1056: "At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." The panel opinion, *Pugh v. Rainwater* (5th Cir. 1977) 557 F.2d 1189, 1190, had struck down altogether the Florida Rule of Criminal Procedure dealing with money bail on the grounds that it is unconstitutional to keep an indigent person in jail prior to trial solely because of the person's inability to pay. Although the *en banc* court did not agree that the entire rule was *facially* invalid because financial conditions of release may be perfectly affordable and less restrictive for those who can

pay, it agreed as a matter of constitutional principle “that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.” *Pugh, supra*, 572 F.2d at 1057-1058. In sum, the *en banc* court held: “The incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” *Id.* at 1057.

Over the past several years, federal courts across the country have condemned the practice of requiring the payment of money bail without first determining that the arrestee has the ability to pay. See, e.g., *ODonnell v. Harris County, Tx.* (S.D. Tex. April 28, 2017) No. H-16-1414, 2017 U.S. Dist. LEXIS 65444 (enjoining county from detaining misdemeanor arrestees who are otherwise eligible for release but are unable because of their poverty to pay a secured money bail); *Walker v. City of Calhoun, Georgia* (N.D. Ga. Jan. 28, 2016) No. 4:15-CV-0170-HLM, 2016 U.S. DIST. LEXIS 12305, at *11 (“Certainly, keeping individuals in jail because they cannot pay for their release, whether via fines, fees, or a cash bond is impermissible.”), *vacated on other grounds*, (11th Cir. Mar. 9, 2017) No. 16-10521, 2017 U.S. App. LEXIS 4183; *Rodriguez v. Providence Cmty. Corr.* (M.D. Tenn. Dec. 17, 2015) 155 F. Supp. 3d 758, 786-69 (enjoining a

policy of detaining probationers who could not pay a predetermined amount of bail).

The Department of Justice announced its position that the use of secured money bail without an inquiry into ability to pay to keep indigent arrestees in jail “not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy.” United States Department of Justice, Statement of Interest, *Varden et al. v. City of Clanton* (M.D. Ala. 2015) 15-cv-34, PA 2, available at <https://www.justice.gov/crt/file/761266/download>; see also Brief for the United States as *Amicus Curiae*, *Walker v. City of Calhoun, Georgia* (11th Cir. Aug. 16, 2016) No. 16-10521-HH, p. 24, available at <https://www.justice.gov/crt/file/887436/download> (“[A] bail scheme violates the Fourteenth Amendment if, without a court’s meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial.”).

The ABA Standards also condemn the use of money bail set in an amount greater than a person can afford: “The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.” ABA Standards at § 10-1.4(e). The ABA commentary to § 10-1.4(c) explains: “If

the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; *however, the bail amount must be within the financial reach of the defendant* and should not be at an amount greater than necessary to assure the defendant's appearance in court." *Id.* at 44 (emphasis added).

The Conference of Chief Justices recently requested that the Fifth Circuit address the "pressing constitutional issues" raised by money bail "by articulating the constitutional principles that, while protecting public safety, likewise protect the pretrial rights of indigent defendants." Brief of Conference of Chief Justices as *Amicus Curiae*, *supra*, at 39. After discussing the holdings of *Bearden*, *Tate*, and *Griffin*, the Conference of Chief Justices argued: "If special burdens cannot constitutionally be imposed on indigents *convicted* of a crime, still less should they be imposed on indigents merely *charged* with a crime." *Id.* at 34.

Bail reform is now a popular topic and legislation has been proposed in California to make improvements to these serious problems. But whatever reforms are made, the basic principle that a court must release a presumptively innocent person unless the state makes the required showing after proper procedures of a danger to the community or a risk of flight (and that alternative conditions cannot mitigate those risks) is required of any system under the state and federal Constitutions.

Since his arraignment, Reem has been permitted to go home, but only upon payment of \$330,000 (or payment of between 1%–10% of that amount to a private company). The trial court determined that he is eligible for immediate release, but made his freedom contingent on a single condition unrelated to public safety: access to money. The court neither inquired into, nor made a finding about, whether he could pay the amount of money asked of him, and it did not make findings concerning alternative conditions of release. As a result, the court issued a de facto detention order without any of the procedural requirements or findings that must attend such an order.

3. Because of the substantive right against wealth-based jailing, the government must not detain a person prior to trial using a financial condition without making findings about the availability of alternative conditions of release

Because it infringes on a fundamental substantive right, wealth-based detention is subject to careful scrutiny and can only be imposed after procedures that include an inquiry into ability to pay and consideration of alternatives to money-based detention. In *Bearden*, for example, in examining the constitutionality of revoking probation due to inability to pay a fine, the Court made “careful inquiry” into the state’s professed “interests” and “the existence of alternative means for effecting” those interests. 461 U.S. at 666–67. See also *Pugh*, *supra*, 572 F.2d at 1058

(holding that if “appearance at trial could reasonably be assured by . . . alternate [conditions] of release, pretrial confinement for inability to post money bail” is unconstitutional); *ODonnell, supra*, 2017 U.S. Dist. LEXIS 65444 at *68 citing *Bearden, supra*, 461 U.S. at 674 (“[P]retrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government’s compelling interest.”).

If the court determines that a financial condition of release is required, the inquiry into ability to pay must be rigorous. In *Turner, supra*, 564 U.S. at 447, the Supreme Court explained the basic protections that a state must provide before jailing a person for non-payment of a monetary sum:

Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the . . . proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g. those triggered by his responses to the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 2519.

State law also requires that the court make inquiry into an arrestee’s

ability to pay money bail. In the absence of a detention hearing under California Constitution Article I, Section 12, an arrestee is entitled to release on bail and a court cannot set a bail amount that is the functional equivalent of no bail. See *In re Christie* (2001) 92 Cal.App.4th 1105, 1109 (for offenses that do not qualify for detention under Article I, Section 12 “the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail”); *People v. Remijio* (1968) 259 Cal. App. 2d 12, 14 (remanding to the trial court in case where money bail had been set so high that it amounted to a denial of bail with instructions that the court “may decide to deny bail altogether, but if it rules otherwise, the bail should be set at a more realistic figure”). A no-bail equivalent means different amounts to different people depending on their financial resources, therefore a court must inquire into an arrestee’s financial resources to determine what amount could act as an incentive and what amount will result in her detention. Cf. *Van Atta v. Scott* (1980) 27 Cal.3d 424, 431 superseded on other grounds via constitutional amendment (Prop. 4) as recognized in *In re York* (1995) 9 Cal. 4th 1133, 1134, n.7) (expressing concern that where financial ability is not considered, it cannot be known whether money bail creates an incentive to return to court).

The trial court here made no inquiry into Reem’s ability to pay, let alone the rigorous inquiry required by *Turner*. The court imposed a

\$330,000 secured financial condition of release based solely on Reem's criminal history, without any inquiry into whether Reem could afford that amount and in the face of strong evidence (such as Reem's homelessness) that such an amount was unattainable for Reem. This failure to make findings regarding ability to pay resulted in an order that was equivalent to no bail, in violation of *Christie*.

The court also did not consider non-financial alternatives or make findings that less restrictive alternatives could not reasonably meet the government's interest as required by *Bearden* and *Pugh*. The court did not acknowledge Reem's plan to engage with Episcopal Community Services Navigation Center or his willingness to abide by any condition of release that the court deemed appropriate, including substance abuse treatment. The court's order requiring a secured financial condition of release beyond Reem's ability to pay without consideration of alternatives violated the Equal Protection and Due Process Clauses.

Reem's claim that equal protection and due process require the court to consider his ability to pay is not a claim that unaffordable money bail is excessive under the California Constitution. See Cal. Const. Art. I, § 12 ("Excessive bail may not be required."). This case is distinct from the line of cases in which lower courts have held that money bail is not excessive under the California Constitution simply because an arrestee cannot afford

it. See, e.g., *In re Smith* (1980) 112 Cal.App.3d 956, 966–67 & fn. 7 (refusing to find that inability to make bail per se constitutes denial of equal protection); *People v. Gilliam* (1974) 41 Cal.App.3d 181, 190–91 (finding “a person’s inability to give bail does not of itself entitle him to be discharged from custody”).

This case does not present the question of whether those cases are wrongly decided. Nonetheless, the abbreviated reasoning in those cases has never been adopted by this Court or the United States Supreme Court. They pre-date *Salerno*’s articulation of pretrial liberty as a “fundamental” right and 1982 amendments to California Constitution Article I, Section 12 providing for preventive detention in certain limited circumstances. They therefore do not even reflect the State’s current bail regime. Furthermore, these cases are irrelevant to the claim at issue here because this case is about the procedures and findings that must accompany a pretrial detention order, whether that order is based on money or otherwise.

Moreover, those cases are inconsistent with the history of excessive bail jurisprudence. See U.S. Department of Justice—National Institute for Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (August 2014) p. 13, available at https://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf; Brief for Amicus

Curiae CATO Institute, *Walker v. City of Calhoun, Ga.* (11th Cir. 2016) No. 16-10521 at p. 3, available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf> (explaining that, throughout the history of bail, since the Magna Carta, bail has been a mechanism of release, and any financial condition of bail had to be imposed in an amount that the presumptively innocent person could pay); cf. *Bandy v. United States* (1960) 81 S. Ct. 197, 197–98 (Douglas, J., in chambers) (“To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.”).

Most fundamentally, because the purpose of a financial condition is to incentivize an arrestee to come back to court, it makes no sense to require a financial incentive of *release* that results in a person’s *detention* because the arrestee will therefore never be in a position for that incentive to operate.

The question of whether unattainably high money bail is also “excessive” under the California Constitution is different from whether imposition of financial conditions of release without an ability-to-pay determination or consideration of alternatives satisfies equal protection and due process. This Court need not address the issue of “excessive” bail here.

B. The trial court’s de facto detention order violates the Due Process Clause

The interest in pretrial liberty is a “fundamental” right. *Salerno*, *supra*, 481 U.S. at 750; *Zadvydas v. Davis* (2001) 533 U.S. 678, 690 (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”); *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) (*en banc*) 770 F.3d 772, 781 (applying strict scrutiny to law regarding bail because it implicates “the individual’s strong interest in liberty”); *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, superseded on other grounds via constitutional amendment (Prop. 4) as recognized in *In re York* (1995) 9 Cal. 4th 1133, 1134 n.7 (“Th[e] decision [whether an individual will be released prior to trial] affects the detainee’s liberty, a fundamental interest second only to life itself in terms of constitutional importance.”).

Because it is a fundamental right, any deprivation of pretrial liberty must withstand strict scrutiny. See, e.g., *Lopez-Valenzuela*, *supra*, 770 F.3d at 781 (applying strict scrutiny to strike down Arizona bail law that required detention after arrest for undocumented immigrants accused of certain offenses). This heightened scrutiny requires that the deprivation of pretrial liberty be evaluated based on whether it was “narrowly focused” to serve “compelling” interests. *Lopez-Valenzuela*, *supra*, 770 F.3d at 791 (citing

Salerno, supra, 481 U.S. at 750-51); see also *Simpson v. Miller* (Ariz. 2017) 387 P.3d 1270, 1276 (“[I]t is clear from *Salerno* and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards.”). For this reason, the Supreme Court in *Salerno* applied exacting scrutiny when the government sought to deprive a presumptively innocent person of her pretrial liberty.

Secured money bail required in an unattainable amount is equivalent to an order of detention. See *Christie, supra*, 92 Cal.App.4th at 1109 (for offenses that do not qualify for detention under Article I, Section 12 “the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail”); *State v. Brown* (N.M. 2014) 338 P.3d 1276, 1292 (“Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.”); *Leathers, supra*, 412 F.2d at 171 (“[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all.”); *ODonnell, supra*, U.S. Dist. LEXIS 65444 at *72 (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention). The order setting unaffordable bail must therefore be accompanied by all of the process required for a valid order of detention.

As a result, when requiring unattainable conditions of release that result in detention, the court must provide the procedures and make the

findings necessary for an order of detention. *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550 (“[O]nce a court finds itself in this situation—insisting on terms in a “release” order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order”). In order to detain an arrestee pretrial, a trial court is therefore required to apply all of the protections outlined by the Supreme Court in *Salerno* and California Constitution Article I, Section 12, including a full and robust adversarial hearing with (1) heightened legal and evidentiary standards, and (2) findings on the record that no alternative conditions or combination of conditions could serve the government’s compelling interests. Here, the trial court did neither.

1. *Salerno* requires rigorous procedures prior to pretrial detention

The Supreme Court has explained the procedures and protections that due process requires for a valid order of pretrial detention to be entered. In *Salerno, supra*, 481 U.S. 739, the Court considered a facial challenge to the federal Bail Reform Act, which permits the government to detain people found to be dangerous after an individualized “full blown adversary hearing,” *id.* at 740, only where the “Government . . . convince[s] a neutral decisionmaker by clear and convincing evidence that no conditions of

release can reasonably assure the safety of the community” *Id.* The Supreme Court subjected the Bail Reform Act to heightened judicial scrutiny, holding that the government may detain individuals before trial only where that detention is carefully limited to serve a “compelling” government interest. *Id.* at 746 (citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335).

In *Salerno*, the due process inquiry produced three basic requirements. First, pretrial detention of a presumptively innocent person in the federal system is allowed only in case of “the most serious of crimes.” *Id.* at 747. Only in such cases does the balance of interests allowing deprivation of an individual’s “fundamental” right begins to tilt in the government’s favor. This requirement is reflected in the California Constitution, which allows for preventative detention only in serious felony cases. Cal. Const. Art I, § 12.

Second, an order of detention may lie only after a rigorous adversarial hearing with counsel and heightened evidentiary burdens. *Id.* at 750. The harms are too great, both to the individual’s core right to bodily freedom and to the future of the person’s criminal case, to permit detention without rigorous protections.

Third, there must be detailed findings that explain why the person must be fully incapacitated prior to being found guilty of a crime, *id.* at 752,

including an explanation why no other condition or combination of conditions can protect against specifically identified risks that the individual has been found to pose.

Here, the trial court evaded all of these findings by ordering pretrial release, but then conditioning that release on an amount of money that Reem could not afford. That is the kind of less “transparent,” *Brown, supra*, 338 P.3d at 1292, order of de facto detention that has no place in American law.

The court made no findings that pretrial detention is the least restrictive available means to advance a compelling government purpose. The de facto detention order was entered despite the existence of ample constitutionally permissible and practically sound alternatives that do not infringe on fundamental liberties. See Pen. Code § 1318 (before being released on his or her own recognizance, defendant must promise to obey “all reasonable conditions imposed by the court or magistrate); *In re York, supra*, 9 Cal.4th 1133, 1145 (trial court has “broad discretion to impose reasonable conditions of OR release,” even if the condition is not concerned with guaranteeing the defendant’s presence at court hearings). The trial court should have considered less-restrictive alternatives that have proven effective. These include substance abuse counseling and testing, regular check-ins with ACM, protective orders, alcohol monitors, text message and

phone call reminders of court dates, anger management counseling, curfew, and, as a last resort, home confinement or GPS monitoring. These alternatives are not only constitutional, but they are cheaper, more effective, and far less intrusive than pretrial detention. Pretrial Justice Institute, *Pretrial Justice: How Much Does it Cost?*, Jan. 2017, pp. 4-6.

Courts may not use money to determine freedom or detention unless that decision is made on the basis of rigorous proceedings and unless the court finds that no other alternative is sufficient. The court did not meet that standard here.

2. Consistent with *Salerno*, California Constitution Article I, Section 12 provides for preventive detention under limited circumstances

Consistent with *Salerno*, state law provides for preventive detention after a hearing with a heightened evidentiary burden and findings that detention is required to prevent great bodily harm. Cal. Const. Art. I, §12. But here, at no point did the prosecution seek—nor did the trial court invoke—the constitutional procedures that would allow for preventive detention. To the contrary, the judge ordered Reem *released*—so long as he could come up with enough money to pay for his release. By imposing unaffordable money bail, the court evaded the legal standards and procedures of a detention hearing by intentionally imposing a monetary amount that operates as a de facto detention order.

Under the state constitution, a detainee is entitled to release as a matter of right. Cal. Const. Art. I, § 12 (right to bail); Pen. Code § 1271 (bail a matter of right). There are only three express exceptions to the right to bail:

- a) Capital crimes when the facts are evident or the presumption great;
- b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon *clear and convincing evidence* that there is *a substantial likelihood the person's release would result in great bodily harm to others*; or
- c) Felony offenses when the facts are evident or the presumption great and the court finds based on *clear and convincing evidence* that *the person has threatened another with great bodily harm* and there is *a substantial likelihood that the person would carry out the threat if released*.

Cal. Const. Art. 1, § 12 (italics added). Before bail is set or denied under section 12, the detainee is entitled to a full evidentiary hearing, and the court must make findings based on “clear and convincing evidence” of a substantial likelihood of great bodily harm to others or a specific person. See, e.g., *In re Nordin* (1983) 143 Cal.App.3d 538, 546 (denying habeas writ following lower court order denying release to arrestee following a detention hearing under Article I, Section 12 where court found by clear and convincing evidence that

arrestee posed a substantial threat of harm to another person).

No detention hearing was held in this case. The prosecution simply relied on the seriousness of the offenses charged and Reem's criminal record in asking the court to impose unaffordable money bail. Likewise, the trial court entered a de facto order of detention on the grounds that Reem was a potential public safety threat without providing the procedures or making the findings required by Article I, Section 12.

There are several problems with the trial court's reliance on public safety in setting a secured financial condition of release. First, the court can only detain an arrestee on public safety grounds after undertaking the procedures required by Article I, Section 12. Unattainable money bail cannot substitute for this constitutionally required process. See *Brown, supra*, 338 P.3d at 1292 ("If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required.").

Second, the only valid purpose of money bail is to incentivize future court appearance. *Stack v. Boyle* (1951) 342 U.S. 1, 5 ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of

that defendant.”) (citations omitted). In certain limited circumstances, the Supreme Court has authorized an order of *pretrial detention* as consistent with the federal Constitution, *Salerno, supra*, 481 U.S. at 755, but it has never authorized the use of *money bail* to keep anyone in jail who has not been deemed necessary of detention. The federal bail statute upheld by *Salerno* specifically forbids financial conditions that result in the preventive detention of the defendant. See 18 U.S.C. § 3142(c)(2) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”).

Third, this public-safety justification is foreclosed by California law. Under California law, money bail can have no deterrent effect on new criminal activity as a matter of law because committing a crime while out on money bail does not justify forfeiture of the bail amount. In other words, money bail can have no rational connection to the risk of new criminal activity in California because a person does not forfeit his money bail for committing a new crime. Pen. Code §§ 1269b(h), 1305(a); see also Pen. Code § 1278(a) (surety only guarantees appearance of defendant, *not* that defendant will not commit crimes while on bail). Money bail thus cannot create a financial deterrence against new crimes. Accordingly, as a matter of law, the court’s only valid interest in *secured money bail* is reasonably assuring appearance at trial.

Moreover, the public safety justification rings hollow as a matter of logic because Reem could be released immediately, even if he were a public safety risk, if he could pay money bail (or approximately 1% of the amount to a for-profit company). An arrestee with the exact same charges and the same risk of failure to appear who has access to money could pay the secured bond and be released, despite the alleged risks to public safety. See *ODonnell, supra*, 2017 U.S. Dist. LEXIS 65444 at *31–32 (“An order imposing secured money bail is effectively a pretrial preventive detention order only against those who cannot afford to pay. It is not a detention order as to defendants who can pay, even if they present a similar risk of failing to appear or of committing new offenses before trial as those who cannot pay.”).

Under *Salerno* and California Constitution Article I, Section 12, the court here had the option, after an appropriate hearing, of ordering Reem’s detention if it found that he posed a danger to public safety. Absent the entry of a transparent pretrial-detention order, the court has the option of imposing non-financial conditions reasonably necessary to protect the public. But the court cannot lawfully impose money bail in lieu of conditions of release for the asserted purpose of protecting public safety.

V. Conclusion

Petitioner respectfully asks that the Court issue the writ of habeas corpus on an expedited basis and either order his immediate release on his own recognizance or remand the matter to the Superior Court for an expedited hearing with instructions to either: (1) conduct a detention hearing consistent with the procedural requirements of *Salerno* and California Constitution Article I, Section 12; (2) set whatever least restrictive, non-monetary conditions of release will protect public safety; or (3) if necessary to assure his appearance at future hearings, impose a financial condition of release after making inquiry into and findings concerning Reem's ability to pay. Petitioner also urges that the Court issue an opinion on the merits of his case to provide guidance for trial courts concerning what is required at the remand hearing and, as a general matter, to ensure that similar daily violations of basic rights do not recur.

Dated: September 20, 2017

Respectfully submitted,

_____/s/_____
Crystal Lamb
Deputy Public Defender
Attorney for James Reem

Word-Count Certificate

I, Crystal Lamb, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 185810) and employed as a Deputy Public Defender for the City and County of San Francisco. I certify that the attached petition for review is prepared in 13-point Times New Roman font and contains 7254 words, excluding captions, tables, verification, and this certificate.

Dated: September 20, 2017

_____/s/_____
Crystal Lamb
San Francisco Public Defender

Proof of Service

I, the undersigned say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, CA 94103. I personally caused to be served copies of the attached petition for review on:

Hon. Christopher Hite, Dept. 9
850 Bryant Street, Room 101
San Francisco, California 94103

Allison Macbeth
Office of the District Attorney
850 Bryant Street, Room 322
San Francisco, California 94103
(via email: allison.macbeth@sfgov.org)

The Attorney General of the State of California
455 Golden Gate Avenue, Ste. 11000
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Court of Appeal, First Appellate District
350 McAllister Street
San Francisco, California 94102
(via U.S. Postal Service)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2017, at San Francisco, California.

/S/ Armando Miranda

Attachment

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE



In re JAMES REEM,
on Habeas Corpus.

A152333

(San Francisco County
Super. Ct. No. 17011005)

THE COURT:*

The petition for a writ of habeas corpus is denied.

Dated: SEP 14 2017

McGuiness, P.J. P.J.

* McGuiness, P.J., Pollak, J., & Jenkins, J.