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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES REEM, Petitioner, vs. VICKI HENNESSY, Sheriff of San Francisco, Respondent.	Case No. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner James Reem offers this memorandum of points and authorities in support of his emergency petition for a writ of habeas corpus and order to show cause.

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INTRODUCTION

Petitioner James Reem is confined in a San Francisco jail cell. He has not been convicted of a crime, and no court has found that he is a flight risk or poses a danger to the community that no reasonable alternatives to complete incapacitation of a presumptively innocent person can address.

The State of California has conceded that Petitioner did not receive an adequate bail hearing and therefore chose not to oppose Reem's state habeas Petition for Review to the Supreme Court of California. Nevertheless, the state courts denied the petition without explanation.

Petitioner therefore remains detained because the state trial court required an unattainable secured financial condition of pretrial release without making any inquiry into his ability to pay or considering alternative, non-financial conditions of release. The trial court thus imposed a de facto detention order without the procedural protections, legal standards, and substantive findings that must accompany such an order under well-settled State and Federal law.

Petitioner's claim that his detention is unconstitutional flows 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* 461 U.S. 600 (1983); *Turner v. Rogers*, 564 U.S. 431 (2011); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978). Second, the Supreme Court has held that the right to pretrial liberty is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987)*; see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (noting that in the context of pretrial detention, "a vital liberty interest is at stake") (citing *Salerno*, 481 U.S. 739); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (*en banc*) (applying

heightened scrutiny to Arizona bail law because in infringes on the "fundamental" right to pretrial liberty).

Because of these substantive constitutional rights, courts subject wealth-based pretrial detention to careful scrutiny. An order of transparent or de facto pretrial detention requires (1) a substantive finding that pretrial detention is necessary because no alternative conditions or combination of conditions short of complete pretrial incapacitation can serve a compelling government interest and (2) robust procedural safeguards, including, at a minimum, an adversarial hearing with counsel, an opportunity to be heard and to present evidence, application of specific heightened legal and evidentiary standards, and a finding in writing or otherwise on the record that no less restrictive condition or combination of conditions can mitigate specific and individualized risks. *See Salerno*, 481 U.S. at 750.

These requirements apply when a court requires an unattainable financial condition of release because, as every federal and state court to consider the question has held, the use of a financial condition of release to accomplish pretrial detention is the functional equivalent of an order of pretrial detention. *See, e.g., United States v. Mantecon-Zayas*, 949 F.2d 548, 550–51 (1st Cir. 1991) ("[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.") (emphasis in original); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *ODonnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1053, 1140 (S.D. Tex. 2017) ("[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.");

Brangan v. Commonwealth, 80 N.E.3d 949, 963 (Mass. 2017) ("[W]here a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

The state trial court in Petitioner's case evaded the findings and protections required for lawful pretrial detention by intentionally using a financial condition of release to accomplish detention. Because it purported to issue an order of release, the trial court made none of the required findings and provided none of the requisite procedures necessary for an *order of detention*. Solely because of Petitioner's poverty, the order releasing him prior to trial was converted into a de facto order of detention without factual or legal basis. A writ of habeas corpus requiring such findings and procedural safeguards must issue immediately.

STATEMENT OF FACTS

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 several felony and misdemeanor offenses. Ex. A, Petition for Writ of Habeas Corpus at Petitioner's Exhibit ("PE") 1–9. At arraignment, the court determined that Reem was unable to afford his own counsel and appointed the public defender. *Id.* at PE 14. Defense counsel requested release without financial conditions, raising the fact that the court's Public Safety Assessment had recommended that Reem be released, *id.* at PE 16, and that his prior convictions were from years ago, *id.* at PE 19.

The magistrate denied the request for release on own recognizance, setting bail in the amount of $330,000. *Id.* at PE 20. The court emphasized Reem's prior offenses and prior strike

in setting a financial condition of release.[1] *Id.* at PE 19. 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 renewed his bail motion and requested release on his own recognizance, arguing that bail was set beyond his means and violated the Fourteenth Amendment's guarantees of Equal Protection and Due Process. *Id.* at PE 32–54. The magistrate denied Reem's motion, stating that he was not willing to adjust the circumstances of bail at the time. *Id.* at PE 59–60. The court made no inquiry into Reem's financial circumstances, and did not address the possibility of release with non-financial conditions to address public safety concerns.

On September 11, 2017, Petitioner filed a petition for writ of habeas corpus in the First District Court of Appeal, arguing 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. Ex. A, Petition for writ of Habeas Corpus. The petition was summarily denied on September 14, 2017. Attachment to Ex. B, Petition for Review. On September 20, Reem filed a Petition for Review in the Supreme Court of California. Ex. B, Petition for Review. On October 12, 2017, Respondent State of California filed an Answer to the Petition for Review stating that the record did not reflect that the magistrate had considered Reem's ability to pay or alternative methods of assuring appearance at trial as required by law and therefore Respondent would not defend the magistrate's decision. Ex. C, Answer to Petition

[1] The court's reliance on factors relating to public safety to justify setting a financial condition of release was irrational because, 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. *See* Cal. Pen. Code §§ 1269b(h), 1305(a); *see also* Cal. Pen. Code § 1278(a) (surety only guarantees appearance of defendant, *not* that defendant will not commit crimes while on bail).

for Review at 6. On November 15, the petition was denied without explanation. Ex. D, Supreme Court of California Denial of Petition for Review.

STANDARD OF REVIEW

Petitioner brings this action under 28 U.S.C. § 2241. Because he has not been convicted of a crime and is not in custody "pursuant to the judgment of a state court," Petitioner may bring this action under § 2241 and need not bring this action under § 2254, which governs habeas petitions challenging state criminal convictions. *McNeely v. Blanas*, 336 F.3d 822, 824 n.1 (9th Cir. 2003). Thus Section 2254's heightened standards of review do not apply to this case and this Court reviews the legal determinations of the state courts, and the constitutional adequacy of the procedures they used to make them, de novo. *See Frantz v. Hazey*, 533 F.3d 724, 736 (9th Cir. 2008); *Hoyle v. Ada Cty.*, 501 F.3d 1053, 1058 (9th Cir. 2007).

ARGUMENT

Petitioner's constitutional claims have "both substantive and procedural aspects." *Washington v. Harper*, 494 U.S. 210, 220 (1990). Substantively, Petitioner has (1) a right against wealth-based incarceration, arising under both the Equal Protection and Due Process Clauses of the United States Constitution, and (2) a right against the deprivation of pretrial liberty, arising under the Due Process Clause alone. These substantive rights cannot be denied unless the government satisfies heightened scrutiny—here, by showing that no alternative to pretrial detention would serve the government's compelling interests in reasonably assuring Petitioner's appearance at trial or the safety of the community. Procedurally, no court made the decision to deny these substantive rights pursuant to an adversarial hearing with transparent and appropriate legal standards. Due process at minimum guarantees "protections . . . necessary to ensure that" any deprivation of a substantive right is "neither arbitrary nor erroneous under the [aforementioned] standards." *Id.* at 228.

Accordingly, Reem seeks a writ of habeas corpus ordering his immediate release unless the state conducts an expedited pretrial release and detention hearing that complies with the requirements for preventive detention set forth in *Salerno* and codified in California law, which include making findings by clear and convincing evidence about whether he is a danger to the community or risk of flight and, if so, whether there are conditions of release that could reasonably assure his presence at trial and the safety of the community.[2]

I. The Equal Protection and Due Process Clauses Establish a Substantive Right Against Wealth-Based Jailing

The rule that access to money has no place in deciding whether a person should be kept in a jail cell relies on fundamental principles in American law. *See Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("[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*, 351 U.S. 12, 19 (1956), 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*, 372 U.S. 353, 355 (1963), 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*, 401 U.S. 395, 398 (1971) ("[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*, 461 U.S. at 672–73, the Supreme Court explained that to "deprive [a] probationer of his conditional

[2] The question of whether imposition of a de facto money-based detention order without consideration of alternatives satisfies equal protection and due process is distinct from whether unattainably high money bail is also "excessive" under the Eighth Amendment. The latter question is not raised here and need not be resolved to rule on this petition.

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.

The principles that forbid jailing a convicted defendant because he is unable to make a payment apply with even greater force to someone who has not yet been convicted. 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 v. United States, 81 S. Ct. 197, 197–98 (1960) (Douglas, J., in chambers).

That question was answered in *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (*en banc*): "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*, 557 F.2d 1189, 1190 (5th Cir. 1977), 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 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*, 572 F.2d at 1057–58. 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 and state courts across the country have condemned the practice of requiring the payment of money bail without first determining whether the arrestee has the ability to pay. *See, e.g.*, *ODonnell*, 251 F. Supp. 3d 1052 (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*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *11 (N.D. Ga. Jan. 28, 2016) ("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*, 682 Fed. App'x 721 (11th Cir. Mar. 9, 2017); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-69 (M.D. Tenn. Dec. 17, 2015) (enjoining a policy of detaining probationers who could not pay a predetermined amount of bail).

As a result, when a court requires a financial condition of pretrial release, it must, at a minimum, conduct an inquiry into ability to pay in order to determine whether that financial condition of release will result in the person's detention because of an inability to pay. *See, e.g.*, *Mantecon-Zayas*, 949 F.2d at 550–51 ("[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."); *Leathers*, 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*, 251 F. Supp. 3d at 1167 (finding that secured money bail set in an amount an arrestee cannot afford is constitutionally equivalent to an order of detention); *Brangan*, 80 N.E.3d at 964–65 ("[W]here, based on a defendant's credible representations and any other evidence before the judge, it appears that the defendant lacks the financial resources to post the amount of

bail set by the judge, such that it will likely result in the defendant's long-term pretrial detention,[3] the judge must provide findings of fact and a statement of reasons for the bail decision, either in writing or orally on the record."); *Brown*, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

In a recent amicus brief, the Conference of Chief Justices, whose membership consists of the highest judicial officer of every American state and territory, reiterated that indigent arrestees are entitled to *Salerno*'s substantive findings and procedural safeguards prior to de facto detention based on a financial condition that they cannot afford. *See* Brief of Conference of Chief Justices as *Amicus Curiae*, *ODonnell v. Harris County, Tx.*, No. 17-20333, 2017 WL 3536467 at *38 (5th Cir. Aug. 9, 2017) ("*Salerno* upholds procedural safeguards for defendants 'arrested for a specific category of extremely serious offenses,' that 'Congress specifically found . . . more likely to be responsible for dangerous acts in the community after arrest.' An indigent defendant deprived of pretrial liberty is no less entitled to the safeguards of due process.").

The United States Department of Justice and the American Bar Association agree. *See* Brief of United States as *Amicus Curiae*, *Walker v. City of Calhoun, Ga.*, No. 17-13139-GG, at *26 (11th Cir. Aug. 9, 2017)[4] (arguing that where imposition of money bail results in a person's pretrial detention, the deprivation of liberty must not be based solely on inability to pay, but rather on an individualized assessment of risk and finding of no other adequate alternatives); Brief for American Bar Association as *Amicus Curiae*, *ODonnell v. Harris Cty., Tx*, No. 17-203332017, 2017 WL 3536469, at *25 (5th Cir. Aug. 9, 2017) (arguing bail systems that penalize persons who cannot afford to pay money bail with pretrial detention cannot satisfy *Salerno*'s due process requirements); United States Department of Justice, Statement of Interest, *Varden et al. v. City of*

[3] The *Brangan* Court defined "long term" pretrial detention simply to mean "detention for a period of time longer than the defendant might need to collect cash or collateral to post bail." *Id.* at n.4.
[4] *Available at* https://www.justice.gov/crt/file/887436/download.

Clanton, 15-cv-34, PA 12 (M.D. Ala. 2015)[5] ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. . . *Imposing those consequences on anyone who has not yet been convicted is serious.* It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.") (quoting *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) (emphasis added)).

The Attorney General of California agreed with this position during Petitioner's state court proceedings, conceding that courts must consider arrestees' ability to pay money bail in conjunction with alternative methods of assuring appearance and conceding that the record in Reem's case did not reflect careful or meaningful consideration of his ability to pay or alternative methods of assuring his appearance. Ex. C at 6.

II. The Supreme Court in *Salerno* Recognized the "Fundamental" Substantive Right to Pretrial Liberty

A second substantive right is implicated in this petition: The "fundamental" right to pretrial liberty. *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("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."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (explaining that release prior to trial is a "vital liberty interest"); *Lopez-Valenzuela*, 770 F.3d at 781 (applying

[5] *Available at* https://www.justice.gov/file/340461/download.

strict scrutiny to law regarding pretrial release and detention because it implicates "the individual's strong interest in liberty").

Any deprivation of that liberty interest must withstand heightened constitutional scrutiny, which requires that the deprivation be narrowly tailored to advance a compelling government interest. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (noting that when the government's action infringes a fundamental right, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"). As the Supreme Court stated in *Salerno*, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. at 755. In *Salerno* the Court considered a facial challenge to the federal Bail Reform Act, which permitted the government to detain people charged with "extremely serious offenses" found to be highly dangerous, after an individualized "full blown adversary hearing," 481 U.S. at 740, and 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 . . . ."[6] *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

[6] Neither the Supreme Court nor the Ninth Circuit have explicitly held that the same "clear and convincing" evidence standard applies to an order imposing detention based on a purported risk of flight, and the Court need not reach that issue here because the state trial court apparently detained Reem on the basis of public safety. However, because the right to pretrial liberty is "fundamental," *Salerno*, 481 U.S. at 750, there is no reason to apply a lesser evidentiary standard in such circumstances. Moreover, in other areas in which a fundamental right is at stake, including detention of an unconvicted person, courts apply the "clear and convincing" evidence standard. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 433 (1979) (holding that due process requires proof by clear and convincing evidence at an initial civil commitment hearing. Furthermore, in *Lopez-Valenzuela*, 770 F.3d at 784, the Ninth Circuit struck down an Arizona statute requiring pretrial detention for undocumented immigrants in part because it did not "require a full-blown adversary hearing at which the state is required to prove that an individual arrestee presents an unmanageable flight risk." In discussing the requirements of such an adversary hearing, the court cited to *Salerno*'s "clear and convincing evidence" standard. *Id.* at 785.

"compelling" government interest. *Id.* at 746 (describing "procedural due process" restrictions on pretrial detention, and citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Thus, *Salerno* reiterated that there is a substantive interest in pretrial liberty and required that pretrial detention decisions be subjected to heightened constitutional scrutiny. The government may deprive a presumptively innocent person of her physical liberty only if doing so is carefully tailored to advance a compelling interest. *Id.* at 746–48. Therefore, the government may detain someone pretrial only if other, less restrictive means are unavailable to serve the state's interests: if no condition or combination of conditions could reasonably mitigate those risks such that complete pretrial capacitation of a presumptively innocent person is necessary.

Following *Salerno*, courts across the country, including the Ninth Circuit, have applied the Supreme Court's reasoning to protect the substantive right to pretrial liberty. *See Lopez-Valenzuela*, 770 F.3d at 780 (applying heightened scrutiny to Arizona bail law because in infringes on the "fundamental" right to pretrial liberty); *ODonnell*, 251 F. Supp. 3d at 1143 (finding that release from custody before trial "implicates fundamental constitutional guarantees: the presumption of innocence and the right to prepare for trial"); *Carlisle v. Desoto Cty., Miss.*, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required for pretrial detention, the plaintiff's rights were violated if he was jailed without a consideration of non-financial alternatives); *Williams v. Farrior*, 626 F. Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue); *Simpson v. Miller*, 387 P.3d 1270, 1276 (Ariz. 2017) ("[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."); *Brangan*, 80 N.E.3d at 954 (applying strict scrutiny to protect the "fundamental right to liberty").

III. The Trial Court's Requirement of an Unattainable Financial Condition of Release Was Functionally Equivalent to Ordering Pretrial Detention

Federal courts have unanimously held that monetary conditions of "release" that result in detention are equivalent to orders of detention and, therefore, must meet the exacting procedural and substantive requirements for orders of detention. *See, e.g.*, *Mantecon-Zayas*, 949 F.2d at 550–51 ("[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 . . . ."); *Leathers*, 412 F.2d at 171 ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988) ("When no attainable conditions of release can be put into place, the defendant must be detained pending trial. In such an instance, the court must explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release."); *United States v. LeClercq*, No. 07-80050-CR, 2007 WL 4365601 at *3 (S.D. Fla. Dec. 13, 2007) ("If after being advised by a defendant that she cannot meet the financial conditions imposed by a release order the district court nonetheless determines that the bail is reasonably necessary to ensure the defendant's presence at trial, *the district court can proceed to make the requisite findings and issue a detention order*."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."); *ODonnell*, 2017 WL 1735456, at *72 (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention).

Most recently, in *Brangan*,[7] the prosecution opposed lowering the defendant's money bail because he was allegedly too dangerous for release. 80 N.E.3d at 964. The court responded,

[7] The *Brangan* Court first decided that unaffordable money bail is not *per se* unconstitutional before holding that, if money bail is unaffordable, it must be treated as the equivalent of an order

"These would be proper arguments if the Commonwealth had sought to detain Brangan under [a valid order of detention], but it never did so." *Id.* at 964. To set a secured financial condition of release to *detain*, without following a detention proceeding, circumvents the "due process requirements of the Fourteenth Amendment because [it] "essentially grant[s] the judicial officer unbridled discretion to determine whether an arrested individual is dangerous," without the "procedures designed to further the accuracy of the judicial officer's determination." *Id.* at 963 (citation and quotation omitted). If an individual must be jailed before trial, then the court must follow rigorous procedures of pretrial detention.[8] *Id.* at 962 (citation and quotations omitted).

In this case, the court required a secured financial condition of release that it knew Petitioner could not pay. For Reem—who was homeless and unemployed at the time of his arrest—a money bail amount of $330,000 is equivalent to a money bail amount of $330,000,000:

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of pretrial detention. The first of those holdings is not at issue here and is likely incorrect as a matter of history, logic, and law. *See* Brief for *Amicus Curiae* Cato Institute, *Walker v. City of Calhoun, Ga.*, No. 16-10521 at 3 (11th Cir. 2016) 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). To put it simply, for centuries, money bail was required to be set in an amount that actually accomplished its purpose: release. To require a financial condition of release that results in detention is a logical impossibility—it can never produce the incentive that it is theoretically designed to create because the person is never in a position in which that incentive can operate. In any event, this case raises a far simpler and antecedent question of clearly established law: if a court issues an order of release that results in pretrial detention, must it make the substantive findings and follow the procedures that are required for a transparent order of pretrial detention?

[8] The *Brangan* Court held that the trial court:

> must provide findings of fact and a statement of reasons for the bail decision, either in writing or orally on the record. The statement must confirm the judge's consideration of the defendant's financial resources, explain how the bail amount was calculated, and state why, notwithstanding the fact that the bail amount will likely result in the defendant's detention, the defendant's risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings.

Id. at 964–65 (citing *Mantecon–Zayas*, 949 F.2d at 550–51) (footnotes omitted).

the conditions is simply impossible for Reem to meet. Setting an impossible condition of release is the functional equivalent of setting no condition at all and, therefore, effectively an order for pretrial detention.

IV. A De Facto Detention Order Deprives an Arrestee of His Right Against Wealth-Based Detention and Right to Pretrial Liberty and Cannot Be Required Without Rigorous Procedural Due Process Safeguards

Here, because no substantive finding was ever made that pretrial detention is required, Petitioner's detention is unlawful. Petitioner's procedural due process rights were also violated because the legal standards and procedural safeguards required prior to the entry of a detention order were entirely absent. As a result, this Court should articulate the basic minimum procedural safeguards required by the Due Process Clause for any further pretrial detention proceedings initiated by the State in his case.

"As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)). The first step has been satisfied because, as explained above, Petitioner has been deprived of two liberty interests: the right against wealth-based detention and the "fundamental" "interest in [pretrial] liberty." *Salerno*, 481 U.S. at 750. Because unattainable money bail is a de facto detention order, money can only be used to accomplish pretrial detention after a court makes the substantive findings and provides the procedures required by due process for a valid order of detention.

The second step of the procedural due process analysis—determining the procedures required for a valid pretrial detention order—proceeds under the *Mathews v. Eldridge* three-part balancing test, in which a court must consider (1) "the private interest" at issue, (2) "the risk of

an erroneous deprivation" absent the sought-after procedural protection, and (3) the state's interest in not providing the additional procedure. 424 U.S. 319, 334–35 (1976). The balancing of the *Mathews* factors establishes that a court issuing a valid order of pretrial detention must inquire into ability to pay and provide rigorous procedural safeguards including a counseled, adversarial hearing with findings on the record that no alternative to a secured financial condition of release could reasonably meet the government's interests.

A. The Court Must Inquire into Ability to Pay to Determine Whether the Financial Condition of Release Will Result in the Arrestee's Detention

When requiring a financial condition of pretrial release, the first step is to determine whether that condition of release will result in a person's detention because of the person's inability to pay. In other words, the court must inquire into ability to pay. In *ODonnell*, the court determined, after weighing the *Mathews v. Eldridge* factors, that four procedural protections are required in order to rigorously determine if a financial condition of pretrial release is actually operating to detain:

> (1) notice that the financial and other resource information its officers collect is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.

251 F. Supp. 3d at 1145. *ODonnell* thus essentially incorporated the procedural due process requirements from *Turner v. Rogers*, 564 U.S. 431 (2011), to the pretrial context. In *Turner*, the Supreme Court articulated the minimum procedural safeguards that a state must provide before jailing someone on allegations of failing to comply with an order to pay child support:

> (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 on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 447–48.

This determination of ability to pay is crucial because further robust findings and procedures are required if the order of release on financial conditions will, in fact, operate as an order of detention. As explained above, wealth-based detention, even in the post-conviction context, is subject to heightened scrutiny because the government must minimize wealth-based detention only to those circumstances in which it is necessary to serve some interest. *See* Section I, *supra.* In cases involving wealth-based detention, the due process inquiry therefore requires that the court consider 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*, 572 F.2d at 1058 (holding that if "appearance at trial could reasonably by assured by . . . alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional); *ODonnell*, 251 F. Supp. 3d at 1140 ("[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." (citing *Bearden*, 461 U.S. at 674)).

B. The Court Must Provide Procedural Safeguards to Ensure the Accuracy of the Pretrial Detention Determination

The substantive due process right to pretrial liberty requires rigorous process to ensure that the balancing of the government's compelling interest with the individual's "fundamental" interest is accurate and that pretrial detention is ordered only when necessary. In *Salerno*, 481

U.S. 739, the due process analysis focused on three basic principles: First, pretrial detention of a presumptively innocent person in the federal system was contemplated 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 petition does not implicate that concern.[9] Second, an order of detention may be issued only after a "full-blown adversary hearing" with counsel, *id.* at 740; a heightened legal and evidentiary standard of proof of dangerousness, *id.* at 751 (by "clear and convincing evidence,"); and consideration of alternative conditions of release to evaluate whether there is any condition or combination of conditions short of complete incapacitation that can reasonably protect the government's intrests, *id.* at 741. Third, there must be detailed "written findings of fact and a written statement of reasons for a decision to detain." *Id.* Consistent with its reliance on procedural due-process cases, *id.* at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), *Salerno* insists on procedures that ensure with accuracy and fairness that any preventive pretrial detention in a society in which detention of the innocent is the "carefully limited exception" is reserved for only those situations in which it is absolutely necessary.

In summary, *Salerno* and subsequent cases make clear that, before depriving the fundamental right to pretrial liberty, the government must provide the following procedural safeguards: a full-blown adversarial hearing with counsel, *see Salerno*, 481 U.S. at 751; notice and an opportunity to be heard concerning the critical legal and factual questions involving danger, *id.*; *ODonnell*, 251 F. Supp. 3d at 1145; a heightened evidentiary standard, *Salerno*, 481

[9] Because Reem is eligible for detention on the basis of dangerousness under California Constitution article I, section 12, and because the money-based order of detention in his case is so clearly deficient, he does not raise the issue in this petition of whether his offense qualifies as sufficiently serious to qualify for pretrial detention under *Salerno*.

U.S. at 750; *Lopez-Valenzuela*, 770 F.3d at 785; and findings on the record by a neutral decisionmaker, *Brangan*, 80 N.E.3d at 964–65.

C. The Procedures Required for a Valid Order of Detention Were Absent from Petitioner's Bail Hearing

As explained above, two separate lines of constitutional precedent establish generally that the procedures required for a valid order of pretrial detention include (1) inquiry into and findings concerning the arrestee's ability to pay (in order to determine whether a financial condition of release will operate in fact as an order of detention); (2) an adversarial, counseled hearing before an impartial decisionmaker at which the arrestee has opportunity to be heard and present evidence; and (3) findings on the record by the decisionmaker pursuant to a heightened evidentiary standard of "clear and convincing evidence"[10] that, considering all available alternatives, the secured financial condition is the only reasonable way short of complete incapacitation to meet a specific compelling interest articulated by the government.

The procedures required for a lawful order of pretrial detention did not occur in Petitioner's case. Petitioner presented unrebutted evidence that he was unable to pay the $330,000 secured financial condition of release. But the court made no inquiry into or findings regarding his ability to pay and simply declined to alter the secured financial condition of release without additional information.

The trial court therefore did not make constitutionally adequate findings on the record about Petitioner's alleged dangerousness or the availability of alternatives to mitigate such an unarticulated risk, such as rigorous pretrial supervision. The trial court made no findings about what purported danger existed, let alone the sufficiency of these alternatives to mitigate it. Nor did the trial court employ any legal standard or procedures, let alone the heightened standards and

[10] This is also the standard required by California law if prosecutors seek a transparent order of pretrial detention. Cal. Const. art. I, § 12(b)-(c).

robust procedures required by law. Instead, the court (as is rote practice in San Francisco) required a financial condition of release that resulted in Petitioner's de facto detention. All of these findings and procedures were likely evaded because the prosecution elected *not* to seek Petitioner's pretrial detention under California law allowing detention in serious cases (like the offense with which Petitioner is charged) and instead asked the trial court to *release* him.

Accordingly, the State provided no constitutionally sufficient ground on which to detain Petitioner and, therefore, a writ of habeas corpus should issue ordering his release unless the state procures a constitutionally valid order of pretrial detention. If this Court issues the writ, the State will have the opportunity to meet its burden to obtain a lawful order of pretrial detention incapacitating Petitioner at a robust proceeding, and Petitioner will have the opportunity to contest any evidence presented at such a hearing. But Petitioner's ongoing pretrial detention is in clear violation of the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner James Reem respectfully requests that the Court issue an Order to Show Cause with an expedited briefing schedule followed by a writ of habeas corpus ordering his release.

Dated: November 16, 2017

Respectfully submitted,

By:_____/s/_____
Katherine Hubbard
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