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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES REEM,

Petitioner,

v.

VICKI HENNESSY,

Respondent.

Case No. [17-cv-06628-CRB](#)

**ORDER GRANTING MOTION TO
WITHDRAW STAY AND IMPOSING
NEW STAY**

On Nov. 16, 2017, James Reem filed a petition for habeas corpus in this Court. Reem, who is avowedly homeless and penniless, argued that he was being held in violation of his rights under the United States Constitution because the state magistrate had ordered him released on \$330,000 bail without considering non-monetary alternatives, such as reporting or electronic monitoring, that would ensure his appearance at trial. Arguing on behalf of the San Francisco Sheriff, the California Attorney General conceded that Reem’s detention violated his constitutional rights. This Court granted Reem’s petition on Nov. 29, ordering the sheriff to either release Reem or arrange for a second detention hearing. Reem was afforded another hearing in San Francisco Superior Court on Nov. 30. The state judge considered non-monetary alternatives, but ultimately maintained the earlier order, while acknowledging that it amounted to a detention order in practical effect because Reem was unable to afford bail in any amount.

Reem then moved this Court to withdraw the stay of its Nov. 30 order and grant his release. Finding that Reem’s detention violates the Equal Protection Clause of the Fourteenth Amendment, this Court grants his motion. However, it stays its order to allow the state an opportunity to conduct a hearing that comports with this order on or before

United States District Court
Northern District of California

1 Dec. 22.

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3 **I. BACKGROUND**

4 **A. California’s Pre-Trial Detention System**

5 California law entitles criminal defendants to an arraignment within 48 hours of
6 arrest. Cal. Penal Code § 825. The arraignment generally functions as a detention hearing,
7 as well. See Cal. Penal Code § 1269(b). While judges may release defendants on their
8 own recognizance or on a range of non-monetary conditions, usually a defendant is
9 released on bail. See Curtis E.A. Karnow, “Setting Bail for Public Safety,” 13 Berkeley J.
10 Crim. L. 1, 3 (2008). The idea behind the bail system is simple: requiring a defendant to
11 put up money that is returned only if he appears in court makes it more likely that he will
12 do so. A defendant may satisfy bail by posting collateral, such as the deed to a house, Cal.
13 Penal Code § 1298; by posting the total sum with the court, Cal. Penal Code §§ 1269,
14 1295(a); or (most often) by purchasing a bail bond, generally set at a non-refundable cost
15 of ten percent of the total bail amount, Cal. Penal Code §§ 1269, 1278; see also Karnow,
16 supra, at 3–4. Bail is discharged if the defendant appears for all his court dates. It is
17 forfeited if the defendant fails to appear. Id. at 4.

18
19 **B. Procedural History in Reem’s Case**

20 Reem is a 53-year-old San Francisco resident who is being detained in county jail
21 pending trial. He is currently homeless and unemployed. He was arrested on July 28,
22 2017, and charged with first-degree residential burglary, unlawful driving or taking of a
23 vehicle, receiving or buying stolen property, identity theft, resisting arrest, and being a
24 felon in possession of a firearm, among other things. Dkt. 1 Ex. 1 at 40–44.

25 At Reem’s arraignment before a magistrate in California Superior Court, defense
26 counsel requested release without financial conditions. The magistrate denied this request,
27 setting bail at \$330,000. Dkt. 1 Ex. A at 58. Reem moved to reduce bail, arguing that the
28 amount set was unreasonably high, and that, in the alternative, the magistrate failed to

1 make the findings required for a pretrial detention order. A different magistrate denied the
2 motion. Dkt. 1 Ex. A at 97–98.

3 On Sept. 11, Reem filed a petition for a writ of habeas corpus in the California
4 Court of Appeal. The court summarily denied his petition on Sept. 14. Dkt. 1 Ex. B at 40.
5 Reem next petitioned for review in the California Supreme Court. The Attorney General
6 filed a statement of non-opposition on behalf of the San Francisco Sheriff, acknowledging
7 that the initial hearing before the magistrate was deficient on several grounds. Response to
8 PFR (dkt. 1 Ex. C). The Attorney General conceded that the magistrate failed to discuss
9 whether Reem was a flight risk, failed to explain his determination that Reem posed a
10 threat to public safety, and failed to consider Reem’s ability to pay the bail amount “with
11 particular attention to whether available nonmonetary alternatives could serve the same
12 purpose.” Id. at 16. The Attorney General stated that, given the deficiencies in the record,
13 Reem’s bail hearing was constitutionally inadequate. Id.

14 The California Supreme Court denied the petition for review on Nov. 15. Dkt. 1
15 Ex. D. The following day, Reem filed an “emergency petition for writ of habeas corpus”
16 in this Court. Dkt. 1. The Attorney General moved to dismiss the petition (dkt. 5), arguing
17 that this Court should abstain from deciding the matter under Younger v. Harris, 401 U.S.
18 37 (1971). The Court declined this invitation and granted Reem’s petition on Nov. 29, but
19 stayed its order to allow the state court an opportunity to conduct another hearing that
20 accorded with constitutional requirements. Dkt. 8.

21 The Superior Court held another detention hearing the following day. See Nov. 30
22 Tr. (dkt. 11). The judge found that Reem represented both a risk of flight and a threat to
23 the public safety, and that there were no non-monetary conditions that would mitigate
24 those risks. Nov. 30 Tr. at 23. He thus declined to alter the terms of Reem’s release. Nov.
25 30 Tr. at 27. The judge stated, however, that he was willing to consider releasing Reem on
26 the condition that Reem be monitored electronically, pending an assessment by the
27 Sheriff’s Department. Nov. 30 Tr. at 32. The Superior Court held a subsequent hearing on
28 Dec. 5 to further explore the possibility of electronic monitoring, but deemed monitoring

1 infeasible. Dkt. 16 Ex. A at 11. When defense counsel challenged some of the evidence
2 on which the court had based its finding that Reem represented a flight risk, the court
3 appeared to amend its earlier order to state that it was only holding that Reem was a threat
4 to public safety: “Regardless of the lack of bench warrants or the prior convictions for
5 strike offenses, I do see an escalation here and a pattern of further narcotics use, theft and
6 burglary. . . . [T]he Court will find . . . that he represents a significant public safety risk.”
7 Dec. 5 Tr. at 7:13–15.

8 Following the Nov. 30 hearing, Reem moved this Court to withdraw the stay,
9 arguing that his Superior Court hearing was constitutionally inadequate. Dkt. 9. This
10 Court held a hearing (dkt. 12) and ordered the parties to submit supplemental briefing on
11 the issue (dkt. 14). It held a second hearing on Dec. 20.

12 13 **II. STANDARD OF REVIEW**

14 Because Reem is not in custody “pursuant to the judgment of a state court,” see 28
15 U.S.C. § 2254(a), this Court reviews Reem’s claims under 28 U.S.C. § 2241, which
16 implements the “general grant of habeas corpus authority,” see Frantz v. Hazey, 533 F.3d
17 724, 735 (9th Cir. 2008). Conclusions of law are reviewed de novo, and findings of fact
18 are reviewed with a presumption of correctness. Hoyle v. Ada Cty., 501 F.3d 1053, 1059
19 (9th Cir. 2007).

20 21 **III. DISCUSSION**

22 Reem argues that his detention violates both the Equal Protection Clause and the
23 Due Process Clause of the Fourteenth Amendment. The Court agrees that Reem’s
24 detention runs afoul of the Equal Protection Clause. Accordingly, it does not reach his due
25 process argument.

26 Under the Equal Protection Clause of the Fourteenth Amendment, wealth-based
27 classifications are reviewed under a rational basis standard. That is, a wealth-based
28 classification will pass muster so long as it is rationally related to a legitimate government

1 interest. Reem argues that setting monetary bail without considering his ability to pay
2 violated the Equal Protection Clause because a wealthy man in his shoes would have been
3 released. But an individual is not necessarily denied equal protection because he is unable
4 to make bail. Where bail serves as an incentive for a defendant to make court appearances
5 or avoid committing additional crimes, it is rationally related to a legitimate state interest.
6 See United States v. Jessup, 757 F.2d 378, 389 (1st Cir. 1985), abrogated on other grounds
7 by United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990) (The defendant “has been
8 detained . . . not because he cannot raise the money, but because without the money, the
9 risk of flight is too great.”). That is, where a person’s wealth provides a lever to shape his
10 behavior, the state has a rational basis for treating one with money differently from one
11 without.

12 Equal protection issues do arise, however, where there is no rational relationship
13 between the setting of bail and the state’s legitimate interests. This appears to be the case
14 under California’s bail scheme when it comes to imposing bail to address public safety
15 concerns. By statute, defendants do not forfeit the bail money they have put up solely by
16 virtue of committing a new offense while out on bail. Cal. Penal Code §§ 1269, 1305(a);
17 see also Cal. Penal Code § 1278(a). It follows, then, that it is illogical for a California
18 court to set bail in an effort to mitigate the threat a defendant poses to public safety. See
19 Karnow, supra, at 19–20. At the same time, the California Constitution guarantees bail (or
20 release on other conditions, or on no conditions) except on a narrow range of charges:
21 capital charges, charges involving sexual assault or violence, and charges that the
22 defendant has made threats. Cal. Const. art. I § 12.

23 The clear import of this scheme is that, except on this narrow range of charges, it is
24 pointless for a court to consider whether someone who has the means to make bail
25 represents a threat to public safety. A person who can afford bail is released,
26 notwithstanding that he may pose an appreciable risk to public safety. The court may
27 impose additional, nonmonetary conditions of release to address that risk. But the bail the
28 person posts does nothing to incentivize him not to commit crimes. See Karnow, supra, at

1 2 (It is “not usually possible” to set bail at a level that will ensure public safety, because
2 under California law, “there is no relationship between the dollar amount of bail and any in
3 terrorem inhibiting effect that would deter future criminal conduct by the defendant.”).

4 The only equitable way to make this system work would be to release indigent
5 people without requiring bail when the court deems them a threat to public safety, but not a
6 flight risk. And yet California’s statutory scheme requires judges to set bail in such cases.
7 A court must set bail whenever a defendant’s release would “compromise public safety.”
8 Cal. Penal Code § 1270. Indeed, public safety must be “the primary consideration” in
9 setting bail. Cal. Penal Code § 1275(a); see also Cal. Const. art. I § 28 (“Public safety and
10 the safety of the victim shall be the primary considerations.”). The upshot is that the poor
11 man who is deemed a threat to public safety remains imprisoned, while the wealthy man
12 who is a threat to public safety goes free—though he has no more incentive not to commit
13 crimes than the poor man would have had, had he been released.

14 Understanding how this odd scheme came about requires a brief detour through the
15 history of California’s bail system. Historically, courts set bail for the purpose of ensuring
16 that a defendant would make his court appearances. See People v. Gilliam, 41 Cal App. 3d
17 181 (1974), overruled on other grounds by People v. McGaughran, 22 Cal. 3d 469 (1978)
18 (purpose of bail is to ensure defendant’s presence, not protect public safety); see also Stack
19 v. Boyle, 342 U.S. 1, 9 (1951) (“The question when application for bail is made relates to
20 each [defendant’s] trustworthiness to appear for trial and what security will supply
21 reasonable assurance of his appearance.”) (emphasis added). A debate emerged in the
22 1950s, however, about whether defendants should be detained pending trial in order to
23 prevent them from committing more crimes. States began to enact statutes aimed at
24 preventive detention. See Donald B. Verrilli, Jr., “The Eighth Amendment and the Right
25 to Bail: Historical Perspectives,” 82 Colum. L. Rev. 328 (1982); Barbara Gottlieb, Nat’l
26 Institute of Justice, The Pretrial Processing of ‘Dangerous’ Defendants: A Comparative
27 Analysis of State Laws 25 (1984), reprinted in Report on Bail Reform Act of 1984, H.R.
28 Rep. No. 98-1121, app. A, at 90.

1 In the June 1982 election, California featured dueling ballot propositions that
 2 touched on the bail issue: Proposition 4 and Proposition 8. Both received a majority of the
 3 vote. Proposition 4 amended the California Constitution (art. I § 12) to require courts in
 4 setting bail to take into account “the seriousness of the offense charged, the previous
 5 criminal record of the defendant, and the probability of his or her appearing at the trial or
 6 hearing of the case.” Proposition 8, meanwhile, amended the California Constitution to
 7 add the following language:

8 Public Safety Bail. A person may be released on bail by
 9 sufficient sureties, except for capital crimes when the facts are
 10 evident or the presumption great. Excessive bail may not be
 11 required. In setting, reducing or denying bail, the judge or
 12 magistrate shall take into consideration the protection of the
 13 public, the seriousness of the offense charged, the previous
 14 criminal record of the defendant, and the probability of his or
 15 her appearing at the trial or hearing of the case. Public safety
 16 shall be the primary consideration. A person may be released
 17 on his or her own recognizance in the court's discretion, subject
 18 to the same factors considered in setting bail.

19 Cal. Const. art. I § 28. However, the California Supreme Court later ruled that the bail
 20 provisions of Proposition 8 were inconsistent with Proposition 4, which had garnered more
 21 votes. People v. Standish, 135 P.3d 32, 41 (2006), as modified (Aug. 23, 2006).

22 Nevertheless, in 1987, the California legislature added the language about public
 23 safety contained in the failed ballot initiative to Penal Code §§ 1270 & 1275. The sparse
 24 legislative history “did not explain how the new law was expected to work, that is, how
 25 setting bail at a given amount was supposed to protect public safety.” Karnow, supra, at 8.
 26 It simply included a copy of the United States Supreme Court’s opinion in United States v.
 27 Salerno, 481 U.S. 739 (1987)—in which the Court upheld the federal Bail Reform Act of
 28 1984, which provided that federal courts could detain defendants prior to trial when they
 represented a threat to public safety—and cited Proposition 8, the failed initiative.
 Larry Stirling, Cal. Assemb. Comm. on Pub. Safety, Position Paper on California and
Federal Bail Provisions (1987). The legislature did not, however, amend the state’s
 statutory scheme to provide that defendants forfeit bail when they commit new crimes. In
 enacting Marcy’s Law in 2008, voters again amended § 28 to add language similar to that

1 in Proposition 8 requiring courts to consider public safety in setting bail.¹

2 That California's statutory scheme is illogical does not by itself raise an equal
3 protection concern. The disparate way in which it affects the wealthy and the indigent
4 does, however. The state constitution requires state courts to set bail in cases like Reem's,
5 yet it has no rational basis for doing so where the defendant only poses a threat to public
6 safety—not a flight risk. The Supreme Court has made clear that the Equal Protection
7 Clause bars states from imprisoning an individual "solely because of his indigency." Tate
8 v. Short, 401 U.S. 395, 398 (1971); see also Bearden v. Georgia, 461 U.S. 660, 671–72
9 (1983) (court may not revoke probation for failure to pay a fine or restitution solely
10 because probationer does not have the means to pay). That is precisely what the state court
11 did in Reem's case. The state cannot detain the indigent person based on public safety
12 concerns while letting the wealthy person walk only because he has money.

13 At oral argument, Reem suggested that this particular feature of California's
14 detention scheme does not present an equal protection issue because the Superior Court
15 would have set bail at an unattainable amount no matter who the defendant was. But the
16 state-court judge said that he was basing the amount of bail on the bail schedule adopted in
17 San Francisco County. Dec. 5 Tr. at 10:7–14. There is nothing in the record to indicate
18 that the judge took into consideration Reem's ability to pay at all in setting bail, or that he
19 would have taken ability to pay into consideration if Reem were able to make bail and
20 departed upward from the bail schedule. And indeed, if Reem wins the lottery tomorrow,
21 he will be release solely because of his wealth. Hence the equal protection issue. See
22 Tate, 401 U.S. at 398.

23 24 **IV. CONCLUSION**

25 As described above, the Superior Court appeared to base its decision to release
26 Reem on \$330,000 bail (instead of on his own recognizance) solely on the basis that he

27
28 ¹ The validity as a matter of state law of the constitutional and statutory provisions
described here is not before this Court on this habeas appeal.

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1 represented a threat to public safety. This infringed on Reem’s right to equal protection of
2 the laws. The Court therefore **GRANTS** Reem’s motion to withdraw the stay of this
3 Court’s Nov. 29 order granting his habeas petition.

4 However, it is unclear from the record whether the Superior Court in the alternative
5 based its decision to impose bail on the basis that there was a risk Reem would not appear
6 in court. Given the novelty of the Court’s holding and the respect due the state court, the
7 Court **STAYS** its order, provided that a further hearing is conducted on or before Dec. 22.
8 Should this Court entertain another motion to withdraw the stay, its review of any future
9 state detention order would be aided if the Superior Court articulated which standard(s) of
10 proof and burden(s) of production apply to the issue of whether there are reasonable
11 alternative conditions of release that would sufficiently mitigate the risk of flight and/or
12 the threat to public safety.

13 **IT IS SO ORDERED.**

14 Dated: Dec. 21, 2017



15 CHARLES R. BREYER
16 United States District Judge