

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

JAMES REEM,  
Plaintiff,  
v.  
VICKI HENNESSY,  
Defendant.

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

**ORDER GRANTING MOTION TO  
WITHDRAW STAY**

This case involves a habeas appeal by an indigent defendant, James Reem. Reem is being detained by the State of California pending trial because he is unable to make bail, which has been set at \$330,000. Since holding that Reem’s initial detention hearing in state court was unconstitutional, this Court has granted the Superior Court two additional opportunities to articulate a constitutional basis for detaining Reem pending trial. Both times, the Superior Court failed to do so. Accordingly, this Court ORDERS Reem’s release.

**I. BACKGROUND**

Reem, a 53-year-old San Francisco resident, was homeless and unemployed at the time of his arrest on July 28, 2017. The state does do not dispute that he lacks the ability to make bail in any amount.

At Reem’s arraignment in state court on Aug. 1, 2017, defense counsel requested release without financial conditions. The magistrate denied this request, instead setting bail at \$330,000. Aug. 1 Hearing Tr. (dkt. 1-2 at 58). Reem appealed, eventually making his way to this Court on a petition for habeas corpus. This Court granted that petition on Nov.

1 29, on the ground that the state’s pre-trial detention of Reem violated his right of  
2 procedural due process because the Superior Court had failed to properly consider non-  
3 monetary alternatives to detention.

4 This Court stayed its order, however, to allow the Superior Court to hold another  
5 detention hearing. While the Superior Court initially seemed inclined to rule that detention  
6 was appropriate because Reem presented a risk of flight, it eventually decided to “release”  
7 him on \$330,000 bail on the basis that he was a danger to the community. Dec. 5 Superior  
8 Court Order (dkt. 16). The Superior Court acknowledged that this amounted to a detention  
9 order, given Reem’s inability to post bail in any amount. Id.

10 Reem promptly filed a motion with this Court to withdraw its previous stay. The  
11 Court granted that motion on the ground that there is no rational relationship between  
12 money bail and protecting the public under California law. It held that the Superior  
13 Court’s order violated the Equal Protection Clause because Reem would have gone free for  
14 no reason other than his wealth, had he been able to obtain the money. Order Withdrawing  
15 Stay (dkt. 26).

16 This Court again stayed its order to afford the Superior Court the opportunity to  
17 hold a constitutionally adequate detention hearing. The Superior Court held a hearing and  
18 issued a written order on Dec. 22, again ordering Reem detained. Dec. 22 Tr. (dkt. 27-1).  
19 This time, it based its decision on the fact that Reem would pose a “significant” risk of  
20 flight were he released. Dec. 22 Detention Order (dkt. 27-2) at 2. The Superior Court  
21 reasoned as follows:

22 The San Francisco Police Department Criminal History Record  
23 shows at least four bench warrants. The Court has considered  
24 the circumstances of two bench warrants that were issued while  
25 he was in custody on other criminal proceedings. Defendant  
26 offers no competent evidence of any ties to the community.  
27 The CLETS printout clearly shows a pattern of escalating  
28 criminal behavior and a history of resisting arrest. . . Defendant  
has also been the subject of multiple probation and parole  
revocation hearings. His sentencing exposure is up to 22 years.  
Defendant has no incentive to return to Court.

Id. at 2.

1 Following the Dec. 22 hearing, Reem again moved this Court to withdraw the stay  
2 and order his release. That motion is now before the Court.

3  
4 **II. LEGAL STANDARD**

5 Because Reem is not in custody “pursuant to the judgment of a state court,” see  
6 28 U.S.C. § 2254(a), this Court reviews his claims under 28 U.S.C. § 2241, which  
7 implements the “general grant of habeas corpus authority,” see Frantz v. Hazey, 533 F.3d  
8 724, 735 (9th Cir. 2008). Review under § 2241 is de novo. Id. at 736.

9 In part, Reem argues that the stay should be withdrawn because the Superior Court  
10 violated his procedural due process rights by failing to provide sufficient evidentiary  
11 safeguards. See Washington v. Harper, 494 U.S. 210, 228 (1990). Due process is a  
12 “flexible” inquiry, and the procedures required in any given situation depend on the  
13 particular circumstances at hand. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). For  
14 instance, due process recognizes that an evidentiary hearing is “neither a required, nor  
15 even the most effective, method of decisionmaking in all circumstances.” Id. at 348. The  
16 key is that a person “in jeopardy of serious loss” be “given a meaningful opportunity to  
17 present [her] case.” Id. at 348–49.

18 To determine what procedures apply in a given situation, courts weigh

19 (1) the burdens that a requested procedure would impose on the  
20 Government against (2) the private interest at stake, as viewed  
21 alongside (3) “the risk of an erroneous deprivation” of that  
22 interest without the procedure and “the probable value, if any,  
23 of [the] additional . . . procedural safeguard[ ].”

24 Kaley v. United States, —U.S.—, 134 S. Ct. 1090, 1100 (2014) (quoting Mathews, 424  
25 U.S. at 335) (alterations in original)). In simpler terms, courts balance the marginal  
26 benefits of additional procedural requirements against their marginal costs. The Mathews  
27 test recognizes that “[a]t some point the benefit of an additional safeguard to the [affected]  
28 individual . . . and to society in terms of increased assurance that the action is just . . . may  
be outweighed by the cost.” 424 U.S. at 348.

The required procedural protections may be separated into two categories. First,

1 there is the question of what formal procedures a defendant is entitled to. Second, there is  
2 the issue of what evidentiary burden of proof a state must meet if it wishes to detain a  
3 charged defendant prior to trial. This order focuses on the first category.

4 The parties are in agreement as to the basic procedural protections required by due  
5 process in the context of pre-trial detention hearings. Specifically, they agree that due  
6 process requires notice, an adversarial hearing with counsel, and an opportunity to present  
7 and confront evidence. See Bail Reform Act of 1984, 18 U.S.C. § 3142(i) (The defendant  
8 “may request the presence of counsel at the detention hearing, he may testify and present  
9 witnesses in his behalf, as well as proffer evidence, and he may cross-examine other  
10 witnesses appearing at the hearing.”). The parties also agree that the evidence may come  
11 from proffers—it need not satisfy federal or state rules regarding what evidence is  
12 admissible at trial. However, any evidence admitted must have sufficient indicia of  
13 reliability, and the court must consider competing evidence. See United States v.  
14 LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000) (“[W]hile the informality of bail hearings  
15 serves the demands of speed, the magistrate or district judge must also ensure the  
16 reliability of the evidence, by selectively insisting upon the production of the underlying  
17 evidence or evidentiary sources where their accuracy is in question.”). In addition, a court  
18 presiding over a detention hearing must provide a reasoned decision on the record, such  
19 that a reviewing court may evaluate whether the hearing comported with due process.

### 21 **III. DISCUSSION**

22 Among other things, Reem contends that the Superior Court failed to provide  
23 procedural safeguards sufficient to ensure the accuracy of its determination regarding  
24 Reem’s past history of attending court-ordered hearings. The Public Safety Report  
25 (“PSR”)—the system on which the Superior Court relies in determining whether a criminal  
26 defendant poses a threat to public safety—found that Reem’s record indicated zero prior  
27 failures to appear. PSR (dkt. 1-2) at 89. The prosecutor, however, maintained that Reem  
28 in fact had four such failures. At the Dec. 22 hearing, Reem introduced evidence tending

1 to show that he had made 23 required court appearances and missed two. Tr. of Dec. 22  
2 hearing (dkt. 27-1) at 2–3. Reem also introduced evidence tending to show that he was  
3 unable to make those two appearances because he had been in custody in another  
4 jurisdiction at the time. Id. After reviewing the evidence, the prosecutor conceded that  
5 Reem had never willfully failed to appear at a court-ordered hearing, consistent with the  
6 finding contained in the PSR. Id. at 11.

7 Nevertheless, the Superior Court in its written order found that Reem’s record  
8 revealed “at least four bench warrants,” only two of which were excused. Superior Court  
9 Order (dkt. 27-2) at 2. This implies that Reem had two unexcused failures to appear—a  
10 fact that the state had conceded was untrue. The Superior Court offered this determination  
11 as one of the facts supporting its finding that there were no reasonable alternatives to  
12 detention that could sufficiently mitigate Reem’s risk of flight. Id.

13 As explained above, defendants are not entitled to trial-type evidentiary standards at  
14 pre-trial detention hearings. A court may rely on proffers, and may require evidence to be  
15 produced only selectively. However, due process requires courts to employ procedures  
16 that meet minimum standards of reliability. See, e.g., LaFontaine, 210 F.3d at 131. Here,  
17 the Superior Court, in the face of competent evidence produced by the defense, not to  
18 mention the finding of its own pre-trial reporting system, relied on nothing more than a  
19 bare assertion by the state that Reem had willfully neglected to attend previous court  
20 hearings. In other words, it relied on evidence that lacked any indicia of reliability, and  
21 disregarded competent competing evidence. Thus, the Superior Court plainly failed to  
22 employ adequate procedural safeguards. This failure was inconsistent with Reem’s right  
23 to due process of law.

#### 24 25 **IV. CONCLUSION**

26 After initially granting the writ, this Court imposed an indefinite stay twice in these  
27 proceedings in order to allow the state to provide a constitutionally adequate detention  
28 hearing. In other words, it granted the writ conditionally, which is appropriate where the

1 state's error may be remedied by following different procedures. See Harvest v. Castro,  
 2 531 F.3d 737, 741 (9th Cir. 2008). "Conditional orders are essentially accommodations  
 3 accorded to the state, in that conditional writs enable habeas courts to give States time to  
 4 replace an invalid judgment with a valid one." Id. at 742 (internal quotation marks and  
 5 citations omitted). Here, the state has twice failed to correct the constitutional deficiencies  
 6 in its order. Accordingly, Reem must be released. Id. ("The consequence when the State  
 7 fails to replace an invalid judgment with a valid one is 'always release.'" (quoting  
 8 Wilkinson v. Dotson, 544 U.S. 74, 87 (2005) (Scalia, J., concurring))). The state puts forth  
 9 no reason why Reem's case is exceptional, such that it should be granted a third  
 10 opportunity to rectify the constitutional defect in its order. See id. at 746 (noting that  
 11 excusable neglect may represent valid reason to reopen conditional writ under Federal  
 12 Rule of Civil Procedure 60(b)).

13 Accordingly, the Court **ORDERS** Reem released from custody within 24 hours—  
 14 that is, by **5 p.m. on March 13, 2018**. While the Superior Court may hold another hearing  
 15 to impose non-monetary conditions of release on Reem pending trial, it may not continue  
 16 to detain him, and may not "release" him subject to posting bail, given the Superior  
 17 Court's finding that he has no ability to pay bail in any amount.

18 California may argue that the procedures identified in this order are unduly onerous.  
 19 However, the state's interest in efficient bail proceedings does not trump defendants'  
 20 constitutional rights. Accordingly, the motion to withdraw the stay and grant the writ  
 21 unconditionally is **GRANTED**.

22 **IT IS SO ORDERED.**

23 Dated: March 12, 2018



24 CHARLES R. BREYER  
 25 United States District Judge