

NO. _____

In The
Supreme Court of the United States

◆

ROBERT HUGHES WILKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

◆

PETITION FOR WRIT OF CERTIORARI

◆

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Dated: November 13, 2020

QUESTION PRESENTED

- I. Whether the Circuit Court Erred Failing To Reverse District Court's Denial of Pretrial Release Conditions to Health Compromised Pretrial Detainee on Interlocutory Appeal During a Pandemic.

PARTIES TO THE PROCEEDING

Other than the Petitioner and the United States, the following are the only other parties to this proceeding.

STATEMENT OF RELATED CASE

John Arch Brodie, Jr., No. 7:19-CR-100-D-2, United States District Court, Eastern District of North Carolina. Judgment entered March 5, 2020.

Sonia Latrese Curbelo, No. 7:19-CR-100-D-2, United States District Court, Eastern District of North Carolina. Judgment entered March 5, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Hughes Wilkins respectfully petitions this Court for a writ of certiorari to review the interlocutory order and judgment of the Fourth Circuit Court of Appeals affirming the district court denial of pretrial conditions of release from confinement during a pandemic which threatens his compromised health.

OPINION AND ORDER BELOW

The Fourth Circuit Court of Appeals' interlocutory order (Pet. App. 1a) is unpublished. The District Court's order denying pretrial release (Pet. App. 4a) is unpublished.

JURISDICTION

The order of the Fourth Circuit Court of Appeals was entered on July 2, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendment [applicable to the States] to the U.S. Constitution provide that "No person ... shall be deprived of life, liberty, or property, without due process of law...". The Fourteenth Amendment directs no State "shall...deny to any person within its jurisdiction the equal protection of the laws." The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

Petitioner is being held in pretrial custody in a North Carolina state jail facility, Bladen County, awaiting trial proceedings in the Eastern District of North Carolina on federal drug charges. He applied for pretrial release to the District Court, averring serious compromising health conditions which would subject him to serious injury or death during the coronavirus pandemic, COVID-19, presently affecting the United States and for which there is no vaccine available. He alleged his conditions of confinement prevent him from protecting himself from infection, and that should he become infected he would likely suffer a highly dangerous outcome in light of his compromised health.

On 8 June 2020 the District Court denied relief. (*See*, Appx. 4a) Petitioner thereafter noticed interlocutory appeal of that pretrial release order, and the Circuit Court affirmed the order of the District Court. (*See*, Appx. 1a)

This is *arguably* a matter of first impression. Because no prior pandemic has caused the type of imminent national threat to the health and safety of pretrial detainees in local jail facilities who are awaiting trial in federal court, no precedent affords advice on the decision of the District Court denying relief. However, Petitioner made credible claims of seriously compromised health issues before the District Court, and there is no reasonable question related to the risk of infection from COVID-19 on vulnerable populations or severe potential outcomes. The District Court failed to treat Petitioner's risk with sufficient gravity, against the

Government's assessment of his dangerousness and likelihood of conviction of his drug offenses at trial.

Because the Circuit Court on expedited interlocutory appeal did not engage in any on record analysis to weigh the risk to Petitioner's life against the criteria used by the District Court to deny him the opportunity to protect himself on community release prior to trial, the Order failed to explain denial of relief where Petitioner's safety is concerned as against the potential threat of his release utilized by the district court to deny his request. Petitioner is requesting primary consideration of his compromised health conditions at risk during a pandemic in a jail where he is unable to reasonably protect himself from infection, and requests reasonable conditions of pretrial release to ensure his safety.

Therefore, Court should grant certiorari.

STATEMENT OF THE CASE

1. Procedural Background - On 7 June 2019, a Seven Count indictment was filed in the Eastern District of North Carolina charging Mr. Wilkins, Mr. Brodie, and Ms. Curbelo with drug offenses. Specifically as to Petitioner, Count 1: Conspiracy to distribute and possess with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1); Count 3: Distribution of heroin in violation of 21 U.S.C. § 841(a)(1); Count 4: Aid and abet possession with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1); Count 5: Aid and abet possession of firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A); and Count 7: Possession of firearm by a conviction felon in violation of 18 U.S.C. § 922(g)(1) and § 924.
2. Petitioner has not been arraigned. [Note: The last scheduled arraignment for 11/12/2020 was terminated upon Order on 11/5/2020 for appointment of new CJA counsel (at DE 174).]
3. On 16 April 2020 Petitioner moved the District Court for pretrial release conditions, citing serious health conditions (under seal) and the global pandemic, COVID-19 (at DE 128).
4. Without in-person hearing, the District Court denied the motion for pretrial release on 8 June 2020 (at DE 138).
5. Petitioner noticed interlocutory appeal 12 June 2020.

6. Petitioner's expedited Memorandum brief was filed in the Fourth Circuit Court of Appeals on 22 June 2020, raising denial of pretrial release for health threat as error.
7. On 2 July 2020 the Circuit Court entered an Order on the issue affirming the decision of the district court regarding release. En banc request not accepted.

REASONS FOR GRANTING THE PETITION

I. *The Circuit Court Erred Denying Relief at Substantial Risk to the Health of Petitioner.*

Petitioner argued below that 18 U.S. Code § 3145(c) affords him relief in these “exceptional” circumstances presented by the global pandemic, COVID-19, directly threatening him because of his compromised health conditions while housed in a local jail and unable to act to protect himself from infection. The statute upon which he relied reads as follows:

Review and appeal of a release or detention order, which states:

- (c) Appeal from a release or detention order. An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2) , and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1) , may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

In this case, the detention hearing was waived by Wilkins (DE 29) before the Magistrate on 7/01/2019. COVID-19 arrived in the United States in early 2020. Wilkins sought review of his release conditions on 4/16/2020 with the district court after the pandemic arrived in the United States and before his arraignment.

In response, the Government first contended that Wilkins was not entitled to have the issue of detention “reopened” under the statute for conditions known to him at the time of the waiver of the detention hearing, in reliance upon 18 U.S.C. § 3142(f), which states in relevant part:

. . .

“The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.”

See, DE 132, Government Motion [opposing], p.7. Otherwise, the Government contended, if heard, Wilkins should not be released in light of their contact (no witness appearing by affidavit or otherwise) with the facility representing there was no COVID-19 infection and protective measures were in place (pg. 8-9); [Petitioner’s] medical history reflects he is at present clinically stable (p.9); [Petitioner’s] tenuous contacts with North Carolina and flight risk (p. 10); the facts of the instant criminal case (p. 10); and [Petitioner’s] criminal history (p. 11).

Wilkins, through counsel, first contended that it was the pandemic, COVID19, comprising the “changed circumstances” giving rise to the necessity for immediate pretrial release. (*Referencing*, D.E. 128, pp. 1-2, SEAL (“[T]he novel coronavirus that causes COVID-19 has spread across the globe infection and death rates continue to climb. There is no known cure. Development of a vaccine is likely at least 12 months away. ... nearly 2 million people worldwide have been infected by the disease and nearly 125,000 have died....Governor Roy Cooper declared North Carolina under a state of emergency on March 10, 2020, and ordered all mass gatherings to cease and schools to close...[and normal court operations ceased]. The [jail where defendant is housed] is unequipped either to prevent transmission of COVID-19 among detainees and staff or to isolate and treat individuals who become infected. Mr. Wilkins’ on-

going pretrial detention poses an imminent threat to his life and to the health and safety of the community from a deadly infectious disease.”) This represented a changed circumstance affecting his decision to waive the detention hearing prior to the pandemic, and a newly rising threat to his safety with those pre-existing conditions. Since that argument, no immunization has been developed, and the United States is experiencing a second wave of heightened infections without control.

As result, Petitioner argued in the Circuit Court that his constitutional presumptions should allow release under these circumstances.

18 U.S. Code § 3142. Release or detention of a defendant pending trial provides as follows:

(j) Presumption of Innocence.—

Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Petitioner contended below that the arguments relating to his current criminal case do not control, *unless* they directly address the purposes in the Bail Reform Act. This is so because the law favors release. Because all people accused of a crime are considered innocent until proven guilty, other courts have recognized that pretrial release should be denied only in “rare circumstances.” United States v. Sanchez-Martinez, 2013 WL 3662871 (D. Col. 2013); United States v. Dany, 2013 WL 4119425 (N.D. Cal. 2013)(*persuasive authority*). While the weight of evidence against the defendant is a factor the Court will consider, courts have generally afforded this factor the least weight. *See, e.g., United States v. Stanford*, 630 F. Supp. 751, 755 (S.D. Tex.), *aff’d*, 341 F. App’x 979 (5th Cir. 2009)(*citing United States v. Winsor*, 785

F.2d 755, 757 (9th Cir. 1986) and United States v. Barnett, 986 F. Supp. 385, 393 (W.D. La. 1997).

The principles recognized are constitutional in nature, and particularly so where, as here, the continued custody presents a novel and imminent threat to life wholly separate from the reason for the custody itself. In keeping with the most fundamental tenet of criminal law – that each accused person is presumed innocent until proven guilty – the Bail Reform Act of 1984, 18 U.S.C. §§ 3141 *et seq* (hereinafter the “Act”) expressly provides that a defendant shall be detained, after a hearing, only if a judicial officer finds that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” Put differently, pretrial detention is authorized “only upon proof of a likelihood of flight, a threatened obstruction of justice or a danger of recidivism in one or more of the crimes actually specified by the bail statute.” *See, e.g., United States v. Butler*, 165 F.R.D. 68, 71 (N.D. Ohio 1996) (*quoting United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) and *citing United States v. Byrd*, 969 F.2d 106 (5th Cir. 1992); United States v. Ploof, 851 F.2d 7 (1st Cir. 1988).

In making the determination required in the Act, the judicial officer shall take into account the available information concerning the following factors set forth in 18 U.S.C. § 3142(b): (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the

community that would be posed by the person's release. "For pretrial detention to be imposed on a defendant, the lack of reasonable assurance of either the defendant's appearance or the safety of others or the community, is sufficient; both are not required." United States v. Stewart, 19 Fed. Appx. 46, 48 (4th Cir. 2001)(citation omitted). *See also*, United States v. Salerno, 481 U.S. 739, 755 (1987)(Danger to the community alone is a sufficient basis upon which to order pretrial detention.) However, heightened due consideration of the nature and circumstances of the defendant is necessarily required (in this unusual pandemic) in light of the imminent and serious threat detention in close living spaces with others during a pandemic poses to his seriously compromised health and his inability to comply with expert advice on preventing infection in a pandemic while housed in a local jail facility.

Due Process rights recognized by the Supreme Court in Estelle v. Gamble, 429 U.S. 97, 103 (1976) apply to pretrial detainees. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). Those rights are violated if Petitioner is "incarcerated under conditions posing a substantial risk of serious harm," and the "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 834 (1994)(internal citation omitted); *see*, e.g., Hardy v. District of Columbia, 601 F. Supp. 2d 182, 190 (D.D.C. 2009)(violation of constitutional rights of pretrial detainee if the officials "knowingly disregarded a substantial risk of serious harm of which they were aware"), as Wilkins argued below (DE 128, pp. 10-11).

The burden of proof is normally on the Government to obtain a detention order. United States v. Simms, 128 Fed. Appx. 314, 315 (4th Cir. 2005)(safety of community)

or United States v. Stewart, 19 Fed. Appx. 46, 48 (4th Cir. 2001)(assure defendant's appearance at court). However, pursuant to 18 U.S.C. § 3142(e)(3), there is a rebuttable presumption that there are no conditions or combination of conditions that exist which would reasonably assure the appearance of the person as required and the safety of the community. In this case, the burden shifted to Wilkins.

Wilkins presented to the Court medical records which documented his fragile immune system as it relates to susceptibility to contracting COVID-19 and an adverse outcome as a result if he does. He presented two separate third party custodians with whom he could reside in the district until the conclusion of his proceedings. He offered "tools" at the Court's disposal (assumed to mean electronic monitoring, although that was not said), and he offered that the last serious felony he was convicted of was over 11 years ago. (*See*, DE 128, pp. 9-10.)

The Government failed to provide any credible evidentiary showing sufficient to overcome the threat to Mr. Wilkins' health presented by his present pretrial confinement and his unique health circumstances. The Act has been held to be constitutional if the Government could prove that the individual was potentially dangerous to other people in the community, thereby avoiding a 5th Amendment violation and an 8th Amendment violation. *See*, Salerno, 481 U.S. 739 (1987). However, a pandemic threatening life raises a heretofore unconsidered circumstance. Where such specific showing is not made once a rebuttable presumption has been met, the Court should release the defendant on sufficient conditions available to satisfy the Act. That is particularly so where, as here, continued detention actually

demonstrably threatens Petitioner's health or life in a pandemic which remains uncontrolled in the United States.

In its Order denying relief (Appendix 4a), the Court relied heavily – and solely – upon the Government's assessment of Wilkins' charges (pretrial) and dangerousness, as well as the Government's facial assertion that there are no risks in the Bladen County jail of COVID-19 infection (at that time). Since the date of that order, 8 June 2020, North Carolina has seen a surge in coronavirus infections, including in jail facilities, and the United States leads the World in failure to control the pandemic. No inoculation is available. The threat to Petitioner is imminent.

II. *The Question Presented Is Important To Protect Threat to Life.*

The importance of this issue – whether Petitioner is denied an ability to protect himself from exposure to a life-threatening pandemic while in a compromised health condition while awaiting trial – is the equal protection of the law.

III. *The Question Is Squarely Presented.*

The question upon which the lower court opined was directly presented, and the Order is clearly reliant upon the rationale of the district court for its conclusion. *See*, Appendix 1a, Order of the Fourth Circuit Court of Appeals. No reasonable argument could be made that this issue requires further percolation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Deborrah L. Newton

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APPENDIX

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FILED: July 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4317
(7:19-cr-00100-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT HUGHES WILKINS

Defendant - Appellant

O R D E R

Upon review of memoranda relative to this bail appeal, the court affirms the district court's order regarding release.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Niemeyer and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: July 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4317
(7:19-cr-00100-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT HUGHES WILKINS

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4317
(7:19-cr-00100-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT HUGHES WILKINS

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:19-CR-100-D

UNITED STATES OF AMERICA,

v.

ROBERT HUGHES WILKINS,

Defendant.

ORDER

On April 16, 2020, Robert Hughes Wilkins ("Wilkins") moved for release [D.E. 128]. In support, Wilkins cites COVID-19, his medical history, and a proposed release plan. See id. at 2–11. On April 30, 2020, the United States responded in opposition [D.E. 132]. The United States noted that Wilkins is charged with three serious drug offenses and two serious gun offenses, that the Probation Office did not recommend bail, that Wilkins waived his right to a detention hearing in July 2019, that the evidence against Wilkins is overwhelming, that Wilkins has made calls from jail seeking to obstruct justice, that Wilkins has confessed numerous crimes to state authorities, that Wilkins is a recidivist drug dealer with a violent criminal history, that Wilkins has minimal ties to the Eastern District of North Carolina, that there are no confirmed cases of COVID-19 in the Bladen County jail where Wilkins is housed, that Wilkins is dangerous, and that there are no conditions or set of conditions that will assure the appearance of Wilkins and the safety of the community. See id. at 2–11; cf. Pretrial Services Report [D.E. 21].

The court agrees with the government's arguments. Wilkins's motion [D.E. 128] is DENIED.

SO ORDERED. This 8 day of June 2020.


JAMES C. DEVER III
United States District Judge