

NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ROY LEE DYKES

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Peter L. Goldman
SABOURA, GOLDMAN & COLOMBO, P.C.
211 North Union Street
Suite 100
Alexandria, Virginia 22314
(703) 684-6476 Telephone
(703) 373-1941 Facsimile

Counsel for Petitioner

QUESTION PRESENTED

I. Whether the Fourth Circuit erred by failing to find that the District Court erred in denying Mr. Dykes' Motion for Release on Bond pending appeal?

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
RULE 14.1(b) STATEMENT.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	4
I. THE FOURTH CIRCUIT ERRED IN DENYING MR. DYKES' MOTION FOR BOND DURING THE PENDENCY OF APPEAL.....	4
II. THE DANGERS POSED BY COVID-19 TO MR. DYKES MANDATE THAT THIS COURT RELEASE MR. DYKES, UNDER CONDITIONS	6
CONCLUSION.....	8
APPENDIX I.....	9
APPENDIX II.....	10

TABLE OF AUTHORITIES

CASES	PAGE
<i>United States v. Keaton</i> , No TDC-18-0215, ECF No. 84 (D.Md., April 23, 2020).....	7
<i>United States v. Williams</i> , 2020 WL 3073320 (D. Md.).....	6
STATUTES	
18 U.S.C. Sec. 3142.....	4
18 U.S.C. Sec. 3143 (b) (1)	5
18 U.S.C. Sec. 3582 (c) (1) (A)	6
21 U.S.C. Sec. 846 and 841 (b) (1) (A) (viii)	2
21 U.S.C. Sec. 841 (b) (1) (C), and 841 (b) (2)	2
28 U.S.C. Sec. 1254 (1)	1
MEMORANDUMS	
Memorandum of the Attorney General, March 26, 2020.....	7

RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ROY LEE DYKES

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I. The opinion of the United States District Court for the Western District of Virginia is attached hereto as Appendix II.

JURISDICTION

The Judgment of the United States Court of Appeals for the

Fourth Circuit was entered on November 16, 2020. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

On March 27, 2018, an Indictment was filed charging Mr. Dykes and co-defendant Leila Hector with: Conspiracy to Distribute and Possess with Intent to Distribute methamphetamine, heroin, oxycodone, and alprazolam, in violation of 21 U.S.C. Sec. 846 and 841(b)(1)(A)(viii), 841(b)(1)(C), and 841(b)(2).

On May 22, 2018, a Superseding Indictment was filed charging Mr. Dykes and ten (10) co-defendants, including Ms. Hector. Mr. Dykes was charged with:

Count I: Conspiracy to Distribute and Possess with Intent to Distribute methamphetamine, heroin, oxycodone, and alprazolam, in violation of 21 U.S.C. Sec. 846 and 841(b)(1)(A)(viii), 841(b)(1)(c), and 841(b)(2);

Counts II-XVIII: Conspiracy to Distribute and Possess with Intent to Distribute methamphetamine, heroin, oxycodone, cocaine, and alprazolam, in violation of 21 U.S.C. Sec. 841(a)(1), (b)(1)(B)(viii), 841(b)(1)(C), and 841(b)(2).

A trial was conducted in the United States District Court for the Western District of Virginia at Big Stone Gap, before the Honorable James P. Jones, from September 16-20, 2019 (Criminal Case No. 2:18CR00003-JPJ-001). On June 20, 2019, the jury returned a

verdict of guilty against Mr. Dykes on Counts I-XVIII, and not guilty on Count XVIII.

On October 4, 2019, Mr. Dykes filed a Motion for a New Trial ("MNT"). On October 21, 2019, the Government filed an Opposition to the MNT. On December 11, 2019, the District Court denied the MNT.

On January 10, 2020, Mr. Dykes filed a *pro se* Motion For a New Trial. At Mr. Dykes' sentencing on January 15, 2020, the District Court announced orally that Mr. Dykes' *pro se* Motion for a New Trial was denied. In March 10, 2020, the District Court filed an Opinion and Order setting forth the grounds for the denial of Mr. Dykes' *pro se* MNT.

Mr. Dykes was sentenced on January 15, 2020. Mr. Dykes was sentenced as follows: 325 months on each of Counts 1,2,4,7,9,12,13, 14 and 16; 240 months on each of counts 3,5,10,15,17 and 18; and 120 months on each of counts 6,8; all to run concurrently for a total of 325 months.

Mr. Dykes filed timely Notices of Appeal on: September 27, 2019; and January 23, 2020; *see also* District Court Order "[t]he defendant's counsel filed a timely notice of appeal from the final judgment on January 23, 2020." The Main Appeal is pending before this Court in Case Nos.: 19-4957; 20-4052; 20-6414; and 20-6467.

Mr. Dykes filed a timely Notice of Appeal of the denial of Bond.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in denying the Petitioner's Motion for Appeal Bond, based on his age, health issues, and the dangers associated with COVID-19.

I. THE FOURTH CIRCUIT ERRED IN DENYING MR. DYKES' MOTION FOR BOND DURING THE PENDENCY OF APPEAL.

On May 18, 2020, Mr. Dykes filed a *Pro Se* Motion for Appeal Bond. In his Bond Motion, Mr. Dykes cited the following reasons in support of his request for release pending appeal:

- * Mr. Dyke submits that he is not a risk if flight or danger to the community; see 18 U.S.C. Sec. 3142;

- * By seeking a Bond pending Appeal, Mr. Dykes is not seeking to delay the appeal;

- * Mr. Dykes invoked the dangers of Covid-19 while incarcerated. He is 62 years old. He currently weighs 285 pounds. He suffers from high blood pressure, nerve issues and other health problems;

- * It is beyond dispute that Mr. Dykes is at *high risk* for Covid-19;

- * Mr. Dykes want to assist in his appeal. Because of Covid-19, he has limited movement at FCI Gilmer (West Virginia), and no access to the law library;

- * Mr. Dykes believes that as a result of any or all of the

issues he is raising in his main Appeal with this Court, he will receive a new trial;

* Mr. Dykes proposes that he be released to a suitable Third Party Custodian, and on electronic monitoring by the appropriate District Court.

On June 25, 2020, the District Court issued an Opinion and Order, denying Mr. Dykes' Bond Motion. The District Court cited Mr. Dykes' detention at the beginning of the case (before a Magistrate Judge and on appeal to the District Court) based on substantial evidence and a prior criminal record.

The Court further cited his conviction on 18 counts, and that the Government's case was "overwhelming." Mr. Dykes admitted to his drug sales at trial. Mr. Dykes had proffered a public authority defense based on his contact with a DEA Agent, Ronnie Baffo. The District Court acknowledged that Mr. Dykes was now 62 years old, suffered from high blood pressure, and took prescription medication for hypertension and arthritis.

The District Court, citing 18 U.S.C. Sec. 3143(b)(1) of the Bail Reform Act, found that there were no conditions that could ensure the safety of the community or his future appearance in court. The Court said there were no substantial questions of law or fact apparent in the appeal.

Mr. Dykes filed a *Pro Se* Motion for Reconsideration of Appeal

II. THE DANGERS POSED BY COVID-19 TO MR. DYKES MANDATE THAT THIS COURT RELEASE MR. DYKES, UNDER CONDITIONS.

The following facts are beyond dispute. Mr. Dykes is 62 years old. (DOB: February 5, 1958.) He is obese. He weighs at least 270 pounds. He suffers from high blood pressure, hypertension, and sciatic nerve issues. Mr. Dykes is a prime candidate for Covid-19, especially confined in an FCI.

Under 18 U.S.C. Sec. 3582(c)(1)(A), District Court judges around the country are releasing inmates in this era of Covid-19. For example, in *United States v. Williams*, 2020 WL 3073320, the Honorable Paul W. Grimm of the United States District Court for Maryland released a defendant based upon his obesity.

Regarding high blood pressure and hypertension, Federal District Courts have granted Motions for Compassionate Release in at least fifty (50) cases. A study published in the Journal of the American Medical Association (JAMA) found that among 5700 patients in New York City who were hospitalized with Covid-19, the most common underlying medical conditions were hypertension (56.6 percent), obesity (41.7 percent) and diabetes (33.8 percent). Sefiya Richardson, et al., *Presenting Characteristics, Comorbidities, and Outcomes Among 5700 Patients Hospitalized in the*

Bond on July 9, 2020. The District Court denied the MFR
in a Minute Order dated July 9, 2020.

New York City Area, JAMA, available at :
<https://jamanetwork.com/journals/jama/fullarticle/2765184>.

As the Honorable Theodore D. Chuang (United States District Court of Maryland) noted in an opinion ordering the release of a defendant from the Central Treatment Facility in Washington, D.C., "as of March 2020, three-fourths of individuals who died from Covid-19 in Italy had hypertension." *United States v. Keaton*, No TDC-18-0215, ECF No. 84 at *5 (D.Md., April 23, 2020).

Finally, this Court and certainly the Government should be mindful to heed the instructions from Attorney General William P. Barr.

The Attorney General, *recognizing the extraordinary health crisis caused by Covid-19*, stated in part:

[t]here are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities. I am issuing this Memorandum to ensure that we utilize home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in our custody.

I am hereby directing you to prioritize the use of *your various statutory authorities* to grant home confinement for inmates in BOP facilities seeking transfer in connection with the ongoing COVID-19 pandemic.

(Memorandum of the Attorney General, March 26, 2020, p. 1.)

(Emphasis added.)

III. CONCLUSION

The Petitioner respectfully requests that this Court grant Certiorari, reverse the decision of the Fourth Circuit, and allow the Petitioner to submit the name and address of a suitable Third Party Custodian, and grant Mr. Dykes/Bond and release pending his Appeal, on Home Detention and via Electronic Monitoring.

Respectfully submitted,

/S/

Peter L. Goldman, Esq.
SABOURA, GOLDMAN & COLOMBO, P.C.
211 North Union Street, Suite 100
Alexandria, VA 22314
(703) 684-6476 (o)
(703) 373-1941 (f)
pgoldmanatty@aol.com
Counsel for Appellant
Roy Lee Dykes

APPENDIX I

FILED: November 16, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4364
(2:18-cr-00003-JPJ-PMS-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROY LEE DYKES

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 Agee with the concurrence of Judge Motz and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX II

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA

v.

ROY LEE DYKES,

Defendant.

)
)
) Case No. 2:18CR00003-001
)

) **OPINION AND ORDER**
)

) By: James P. Jones
) United States District Judge
)

Roy Lee Dykes, Pro Se Defendant.

The defendant, Roy Lee Dykes, whose appeal is pending, has filed a pro se Motion for Appeal Bond. For the reasons that follow, the motion will be denied.

Following his indictment in this court, Dykes was detained by the magistrate judge pending trial, based upon the strength of the government's evidence, as well as his extensive criminal history, including a 1979 conviction for armed robbery, 1986 convictions for three counts of credit card fraud, two separate convictions in separate jurisdictions in 1993 for burglary and a 1993 conviction for willful obstruction of law enforcement officers by use of threats or violence. He also had a 1991 conviction for failure to appear and two convictions, one in 1986 and another in 2006 for probation violations. On appeal de novo to the undersigned district judge, the magistrate judge's detention order was affirmed. The defendant has

remained in custody since then. He is now confined at the Bureau of Prison facility FCI Gilmer, in Gilmer, West Virginia.

After a five-day jury trial, the defendant and his spouse were convicted on September 20, 2019, of conspiracy to distribute or possession with intent to distribute controlled substances. Dykes was also convicted by the jury of one count of distributing or possessing with intent to distribute various controlled substances, as well as seventeen counts of distributing or possessing with intent to distribute methamphetamine, heroin, cocaine, oxycodone, and alprazolam. On January 15, 2020, he was sentenced by this court to a total term of imprisonment of 325 months. A written judgment incorporating this sentence was entered on January 16, 2020.

The government's case against Dykes was overwhelming. Dykes confessed his extensive drug trafficking activities to law enforcement agents after his arrest, and the government introduced video and audio of Dykes' sales of drugs to an undercover officer. Controlled substances and large amounts of cash were seized from him and his codefendant spouse. Dykes testified at trial (after being advised by the court of his right not to do so), admitted his drug trafficking, but claimed that someone he believed was a federal DEA agent in Georgia named Ronnie Baffo had enlisted him to make trips to Virginia to sell drugs provided to him by Baffo, although he conceded that he may have been duped by this person.¹ In rebuttal, the

¹ He had not disclosed this information in his confession after his arrest, although

government showed that there was no agent with that name in the DEA and that no arrangement as described by Dykes had ever been approved.

Dykes is now 62 years old. He was a college athlete at the University of Georgia but lost his scholarship when he was arrested for robbery. According to his Presentence Investigation Report (PSR), dated December 16, 2019, ECF No. 638, he said he was in “fair health,” although suffering from high blood pressure, sciatic nerve issues and left knee problems. He took prescription medication for his hypertension and his arthritis. He reported undergoing surgery for prostate cancer in 2016.

The Federal Rules of Criminal Procedure provide that a sentence of imprisonment must be stayed if an appeal is taken and the defendant is released pending disposition of the appeal. Fed. R. Crim. P. 38(b)(1). The Federal Rules of Appellate Procedure provide that the decision regarding release must be made in accord with the applicable provisions of the Bail Reform Act. Fed. R. App. P. 9(c). That Act provides, in pertinent part, that the court:

[S]hall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer find--

prior to trial his retained counsel had filed a “Notice of a Public Authority Defense,” ECF No. 263, in which it was alleged that Dykes had been acting under the authority of either the ATF or the DEA and the agent’s name was “‘Ronnie’, last name unknown to the defendant.” *Id.*

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in--

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1).

I am unable to make the requisite findings contained in any of these subsections. Dykes is serving a lengthy sentence after multiple convictions based on overwhelming evidence of guilt. Based upon his history and current circumstances, I find that there are no conditions of release that would ensure the safety of the community or his future appearance in court. There are no substantial questions of law or fact apparent in his appeal.

Dykes references the current Covid-19 pandemic. However, the Bureau of Prisons reporting show no current cases among inmates or staff at Gilmer FCI, where Dykes is incarcerated, <https://www.bop.gov/coronavirus/> (lasted visited June 24, 2020). While uncontrolled high blood pressure may be a risk factor, Ernesto L. Schiffrin et al., *Hypertension and COVID-19*, Am. Journal of Hypertension, vol. 33,

issue 5, p. 373–74 (Apr. 6, 2020), no extraordinary circumstances exist here that would justify staying the defendant’s sentence.

For these reasons, the defendant’s motion, ECF No. 775, is DENIED.

It is so **ORDERED**.

ENTER: June 25, 2020

/s/ JAMES P. JONES
United States District Judge