UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No: 18-20989 CR Altman

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JOHNNY GROBMAN, et. al.,
Defendant.
_____/

DEFENDANT GROBMAN'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION FOR RELEASE PENDING SENTENCING

Defendant Johnny Grobman, by and through Philip L. Reizenstein Esq., and Jacqueline Arango, Esq., hereby file this Reply to the Government's Response in opposition [DE: 390] to the Defendant's Motion for release pending sentencing.

Introduction: The Government concedes Mr. Grobman is a first time, non-violent offender and that he is not a danger to the community. Its sole argument is that he is a risk of flight because he faces a long sentence and because he is wealthy. As demonstrated below, both arguments fail. The Government also says despite the virus spreading throughout the country and despite the warnings that prisons are literally the most unsafe places to be, Mr. Grobman should wait until the virus actually spreads to FDC before being heard to complain. But by then it will be too late. He should be released now to be with his family during these dangerous and difficult times. Courts all over the country are releasing similarly situated first time

non-violent offenders and on March 26, 2020, Attorney General Barr just authorized the BOP to release first time non-violent offenders who meet certain requirements to home confinement. [Exhibit A].[1] Because Mr. Grobman is not a risk of flight or danger to the community, he too should be released.

Background: This is not a case about a scheme to steal over one hundred million dollars. This is a case about gray market sales of diverted products. Indeed, every company listed as a victim was paid for their products and paid an amount in which they received a profit. The issues at sentencing is whether any company suffered a loss under the guidelines or whether profits of the defendants can be characterized a loss.

In any event, in the very case the Government compares this case to, Judge Middlebrooks held the guidelines as calculated by the Probation Office and the Government over represent the actual harm in these types of gray-market/diversion cases. *See United States v. Javat*, 18-cr-0668, finding a downward variance to 10 years from a level 43 life sentence, the Court stated: "I think other guideline enhancements in this case operate together to produce an unreasonable sentence. And I also have some concerns. . .that the way the fraud guidelines have been ratcheted up by a number of events also lead, at least in this case, to an unreasonable

[1] The Order was released after the Government filed its Response. Although the Order applies to sentenced prisoners, its not unreasonable to argue that prisoners awaiting a sentence face similar dangers to sentenced prisoners by being incarcerated.

sentence." [DE500: 111].

Argument: The Government misapprehends or mischaracterizes the circumstances before this court on this motion. First, Mr. Grobman is not asking this court to "*overturn Judge Altman's detention order*." [DE390: 3]. Judge Altman referred this motion to this court meaning, *a priori*, this is matter appropriate for consideration. Second, the defense has not sought to delay the sentencing "indefinitely" as the government argued [DE390:3]. On Friday March 27, 2020 Judge Altman continued the sentencing date to June 17, 2020 [DE:391].

The Governor of the State of Florida has ordered the quarantine of all visitors from several states.[2] Several states health care systems are on the verge of collapsing. Florida may be on the verge of the virus's exponential explosion as over five hundred cases have been confirmed since Tuesday of this week.[3] A "dramatic challenge is presented by COVID-19, a novel and easily transmitted viral disease that has prompted a rapid reorientation of workplace practices and social life in support of public health. The impact of this recent emergency on jail and prison inmates . . . is just beginning to be felt. Its likely course we cannot foresee. Present information strongly suggests, however, that it may be grave and enduring." *Federal Defenders of New York v. Federal Bureau of Prisons*, ___ F.3d ___, 2020 WL

[2] https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-80.pdf

[3] https://www.fox13news.com/news/coronavirus-cases-in-florida-hit-1977-increase-of-510-since-tuesday

1320886, at *12 (2d Cir. Mar. 20, 2020). Jails and prisons are designed to maximize control of the incarcerated population, not to minimize disease transmission or to efficiently deliver health care. Pretrial detention facilities, including the FDC, are crowded with unsanitary conditions, poor ventilation, lack of adequate access to hygienic materials/cleaning supplies such as soap and water or hand sanitizers, and offer poor nutrition. Moreover, the frequent transfer of individuals from one location to another, and intake of newly detained individuals from the community compounds issues with disease control and complicates the prevention and detection of infectious disease outbreaks.[4]

Johnny Grobman is forty-six years old. He had a team of experienced criminal defense attorneys advising him for a year since his indictment as to the potential penalties of a criminal conviction, yet no issue of potential flight was ever raised. While the Government wants to drag issues of sentencing before this court, the simple fact is that the PSR is wrong. It is an unsophisticated calculation of numbers that does not reflect any understanding of economics and loss. If the Government truly seeks to impose a life sentence upon a first offender in a non-violent case in

[4] https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19/. Federal prison employees say their lives are in danger after a series of bungled instructions and widespread supply shortages amid the coronavirus outbreak. The Bureau of Prisons on Thursday reported that two staff members were presumed positive for COVID-19, marking the first possible cases in the federal prison system. "The agency is in chaos," said Joe Rojas, regional vice president of the Council of Prison Locals, the labor union that represents federal corrections officers.

which no company that sold products to Mr. Grobman can show any financial damage beyond not receiving the maximum amount of profit (as opposed to receiving a lesser but significant profit) then the Government has lost sight of its mandate to "see that justice is done." *Connick v. Thompson*, 563 U.S. 51, 71 (2011) *citing Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). There is no reason to believe Judge Altman will ignore the requirement under 18 USC 3553(a) to issue a sentence sufficient but not greater than necessary after considering, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant." 18. U.S.C. § 3553(a)(1).

The PSR report calculates (without any analysis or underlying support) an offense level for a first time non-violent offender of 43 (life), the highest level in the guideline book and a level reserved for violent terrorists and murderers: (first degree murder, level 43; second degree murder, level 38; assault with intent to commit murder, level 33). The level is higher than for rapists (level 38 or 30), armed robbers, and arsonists (level 24 if there was a risk of death).[5] No first-time offender for a fraud should be confronted with a life sentence. It violates every concept of 18 USC 3553 which requires this court to impose a sentence sufficient, but not greater than

[5] For example, dirty bomber Jose Padilla was sentenced to 17 years in this District. American Taliban John Walker Lindh who was a traitor who fought US soldiers on the battlefield was sentenced to 20 years and released in 2019 after serving 17 years. The Department of Justice recently argued that a 7-9-year guideline sentence for Roger Stone was "excessive and unwarranted under the circumstances" because he was a first time nonviolent offender.

necessary, to comply with the purposes set forth in paragraph (2) of the statute.

Although the government bandies the specter of Mr. Grobman fleeing, they offer no real evidence of flight (beyond a "racing" boat [DE390:8] which can simply be removed to a marina and/or disabled) nor do they refute Mr. Grobman's communities ties. For example, Noemi Grobman- Johnny Grobman's wife, and their three school age daughters can all surrender their passports. The Government dismisses this by arguing "this district has seen numerous defendants flee and never be caught" [DE390: 8].[6] Of course the opposite is also true: this district has seen hundreds of thousands of defendants post bond and never flee and then self-surrender to prison. If the government wishes to proceed with this analysis, then the odds are less than 1% that Mr. Grobman will flee.

And although the Government argues that there are flights to other countries,

[6] The unfairness of comparing Mr. Grobman to any individual not associated with this case is obvious. Would the Government accept an argument by the defense that since their colleagues in the Department of Justice hid evidence in the notorious prosecution of Alaska Senator Ted Stevens, which was revealed only after Senator Stevens was convicted- resulting in the conviction being overturned- that it is reasonable for this court to consider that such nefarious governmental conduct occurred here? See https://www.rollcall.com/2014/10/28/recalling-the-injustice-done-to-sen-ted-stevens-commentary/: "*An independent investigation ordered by presiding Judge Emmet G. Sullivan found that the prosecution was 'permeated by the systemic concealment of significant exculpatory evidence, which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness'*." The defense has in fact already uncovered that the Government presented false testimony though one of their witnesses. In response to Mr. Grobman's Rule 33 Motion for a New Trial [DE366] based in part upon the false testimony of witness Bray, the Government acknowledged that the testimony was untrue, writing that Mr. Bray's testimony was a result of "a mistake, confusion or faulty memory" and was "ambiguous at best." [DE371:9-10].

those countries are for the most part not accepting anyone but their own nationals- and this includes Peru, where although he has family members, Mr. Grobman cannot enter as a visitor.[7]

Financial Assets: The Government's reference to bank accounts that Mr. Grobman has access to comes from the flawed PSR. The defense is not aware of the existence of a Bank of America business account with ten million dollars. All of Mr. Grobman's business accounts were seized pre-trial and remain frozen.[8] The Pretrial Restraining Order [DE 6] listed the business bank accounts Mr. Grobman had with Bank of America that were frozen. Undersigned counsel was present at the PSR interview and believes that the PSR information comes from when the Officer interviewing Mr. Grobman asked him the total balances over the time period of the indictment. What most certainly did not occur is that Mr. Grobman failed to disclose a Bank of America business account with ten million dollars that has not been frozen. No such account exists based on the undersigned counsel's review of the business records and discovery in this case. Undersigned Counsel has conferred with Noemi

[7] https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html

[8] Since the initial seizure, the government has diligently worked with the undersigned counsel to review the accounts, and where appropriate, agree to the release of funds not subject to a pre-trial order of seizure. The point is that not only does counsel recognize the government's efforts in this area, but for purposes of this court considering Mr. Grobman's access to funds, it came as a complete shock that the PSR listed a business bank account with ten million dollars in cash when the government has not seized it, and Mr. Grobman never said such an account existed in his interview with probation.

Grobman and based on speaking with her, and his own knowledge of the case, there are accounts with USB that do have cash approaching 4.6 million dollars. However all of those accounts have been frozen by the Court's Pretrial Order freezing assets. [DE6 & DE50].

Were such accounts to exist and available for use, Mr. and Mrs. Grobman would pledge those amounts for PSB and ten percent bonds. This is why the defense's initial motion was for Noemi Grobman to sign a PSB in excess of her interest in the marital home. This is why the defense reached out to the Government and reached an agreement that Noemi Grobman's interest in marital home, if it was sold at pre-Covid 19 market value, is approximately one million dollars.

The Government is grasping at straws when they argue "Grobman does not suggest a Nebbia condition." [DE390:9]. This is a hollow argument. It should have gone without saying that the defense agrees that all funds posted should be subject to a *Nebbia* review as well as all other standard conditions of bond and special conditions of bond the court may wish to impose.

As to the Government's opposition to the use of funds posted by Alan Grobman's, Johnny Grobman's brother, the Court should note the Government never moved to revoke the $150,000.00 ten percent bond Alan Grobman posted for his brother during the entire year Johnny Grobman remained on bond. Nonetheless, the defense has said the sums for the bond would be posted from a home equity loan.

Reply to Issues Of Covid-19, FDC and the Bureau Of Prisons:

The Government wonders why Mr. Grobman has not sought to be medically isolated. The answer is that there is no such thing as a medical isolation in the FDC other than locking Mr. Grobman into an 8 x 12 foot cell 23 hours a day in the special housing unit (SHU) for what would amount to solitary confinement. And that would not be sufficient to protect Mr. Grobman since he would still interact with FDC staff who may be infected.

The Government paints a distorted, unrealistic, and utopian view of the federal prisons and FDC. The Attorney General of the United States just authorized the Bureau Of Prisons to begin releasing inmates to home confinement.[9] [Exhibit A]. The Government's argument that FDC is safe for confinement runs directly contrary to the Attorney General's concession and acknowledgement that prisons are not safe during this crisis. As noted above, even prison employees are well aware of the dangers facing themselves and inmates which is not being properly and safely addressed. *See,* https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19/ Even Iran has acknowledged that prisoners are particularly vulnerable to the Covid-19 virus.[10]

[9] https://www.usnews.com/news/us/articles/2020-03-26/attorney-general-seeks-to-expand-home-confinement-as-more-inmates-contract-coronavirus.

[10] https://www.usnews.com/news/world-report/articles/2020-03-09/iran-to-release-70-000-prisoners-to-prevent-coronavirus-spread.

Other Courts Have Found the Covid-19 Pandemic a Sufficient Change of Circumstance: The following is a list of other cases throughout the federal jurisdictions where courts have recognized that the pandemic is a change of circumstances sufficient to allow an individual to be released. Of particular note is that many of the cited cases are reconsiderations of previous rulings on bail/detention:

1) *United States v. Avenatti*, No. 8:19-cr-61 (C.D. Cal. Mar. 25, 2020). *Michael Avenatti.* Aafter denying Avenatti's motion for the release, the court *sua sponte* invited Avenatti to reapply for release: "[i]n light of the evolving nature of the Covid-19 pandemic, particularly in the greater New York City area, the Court invites Avenatti to apply *ex parte* for reconsideration of the Court's order" denying release.

2) *United States v. Selna*, 8:16-cr-76-JVS (C.D. Cal. Mar. 26, 2020) *OVID-19 is a "compelling reason" for release.* ("Michaels has demonstrated that the Covid-19 virus and its effects in California constitute 'another compelling reason'" justifying temporary release under § 3142(i).).

3) *United States v. Harris*, No. 19-cr-356 (D.D.C. Mar. 26, 2020) ("The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant's release to home confinement on . . . strict conditions.").

4) *Xochihua-James v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (*sua sponte* releasing detainee from immigration detention "[I]n light of the rapidly escalating public health crisis");

5) *United States v. Selna*, 8:16-cr-76-JVS (C.D. Cal. Mar. 26, 2020) ("Michaels has demonstrated that the Covid-19 virus and its effects in California constitute 'another compelling reason'" justifying temporary release under § 3142(i).).

6) *United States v. Jaffee*, No. 19-cr-88 (D.D.C. Mar. 26, 2020) (releasing defendant with criminal history in gun & drug case, citing "palpable" risk of spread in jail and "real" risk of "overburdening the jail's healthcare resources"; "the Court is . . . convinced that incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant's release to home confinement");

7) *United States v. Harris*, No. 19-cr-356 (D.D.C. Mar. 26, 2020) ("The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant's release to home confinement on . . . strict conditions.");

8) *United States v Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020) (citing "chaos" inside federal prisons in sua sponte extending time to self-surrender: "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided");

9) *United States v. Perez*, No. 19 CR. 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (releasing defendant due to the "heightened risk of dangerous complications should he contract COVID-19");

10) *United States v. Stephens*, 2020 WL 1295155, __F. Supp. 3d__ (S.D.N.Y. Mar. 19, 2020) (releasing defendant in light of "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic");

11) *In re Manrigue*, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020) ("The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.");

The government argues that all is well at FDC and there is no risk to Mr. Grobman. All is not well. And Mr. Grobman, who was being medically treated for being pre-diabetic, and who has an immuno-deficiency disorder,

fits within the high-risk category of individuals susceptible to the most serious of side-effects of the Covid-19 virus. There is a combination of release conditions that will assure this court that Mr. Grobman will return.

Respectfully submitted, S/*Philip L. Reizenstein* Philip L. Reizenstein, Esq. Florida Bar No. 634026 Reizenstein & Associates, PA. 2828 Coral Way Suite 540 Miami, FL, 33145 (305) 444-0755 PhilReizenstein@protonmail.com	AKERMAN LLP Three Brickell City Centre 98 Southeast Seventh Street, Suite 1100 Miami, Florida 33131 Telephone: (305) 374 5600 Facsimile: (305) 374 5095 By: /s/ Jacqueline Arango JACQUELINE M. ARANGO Florida Bar No. 664162 jacqueline.arango@akerman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record listed in the Service List below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

S/Philip L. Reizenstein
Philip L. Reizenstein, Esq.
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