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July 3, 2020

BY ECF

Hon. Valerie E. Caproni
United States District Court
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *United States v. Michael Schlisser*
17-cr-86 (VEC)
**(Reply in Further Support of
Motion for Compassionate Release)**

Dear Judge Caproni:

I write in reply to the government's letter, dated June 26, 2020, in opposition to Mr. Schlisser's motion for compassionate release.

As Mr. Schlisser acknowledged in his motion, his conduct was "serious," "egregious" and deserving of a substantial prison term. Doc#66 at 5-6. The victim letters submitted by the government reflect the undeniable, continuing pain felt by the victims due to Schlisser's past conduct. Nevertheless, compassionate release motions are appropriately directed to judges, and for good reason: a disinterested and impartial judge is in the best position to consider and weigh the entire range of factors necessary for deciding such a motion, including, *inter alia*, the effect of any intervening post-incarceration factors such as an inmate's health. As this Court observed in *United States v. Ebberts*, 432 F.Supp.3d 421 (S.D.N.Y. 2020), in deciding a compassionate release motion a Court should honor

Congress's stated intent of increasing the availability of compassionate release. The Court thus finds that, in considering the section 3553(a) factors, it should assess whether those factors

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outweigh the "extraordinary and compelling reasons" warranting compassionate release, particularly whether compassionate release would undermine the goals of the original sentence.

Ebbers, 432 F. Supp.3d at 430-31 (granting compassionate release to Bernie Ebbers after having served 13 years of a 25 year sentence despite the fact that as a “result of his crimes, investors and shareholders lost hundreds of millions, perhaps billions, of dollars, and thousands of WorldCom employees lost their jobs and savings” and after hearing from more than 500 victims whose “strong feelings” did not “necessarily fade away with the passage of time.”).

Whatever the Court believed about Mr. Schlisser and his conduct at the time of his sentencing, it is doubtful that the Court intended to include, as part of Schlisser’s sentence, his exposure to a substantial risk of serious illness or even death. The government’s letter confirms that the risk to Otisville inmates of a COVID-19 infection is real. Letter of AUSA Hanft (“GL”) at 3 (noting that as of June 26, there were over 20 inmates that tested positive requiring the entire Otisville Camp to be moved either into isolation or quarantine). Indeed, to protect himself from that risk, Mr. Schlisser attempted, unsuccessfully, to obtain a furlough release from the BOP. When that effort failed, Schlisser was compelled to make this motion.

Moreover, Mr. Schlisser is not requesting a “get out of jail free” card. Instead, he asks to be released to home confinement, which many “[o]ffenders feel . . . is at least, if not more, punitive than prison.” USSC Staff Discussion Paper, “Sentencing Options Under the Guidelines” at 20 (citing Jan Petersilia, *When Probation Becomes More Dreaded Than Prison*, Federal Probation, March 1990 at 23-7).

The government principally opposes Mr. Schlisser’s motion on the ground that, in the government’s view, Mr. Schlisser being in a high-risk category for COVID-19 infection is not a threshold “extraordinary” circumstance warranting release on compassionate release grounds. The government is mistaken. District courts from across the country have recognized that the risk of contracting COVID-19 for someone like Mr. Schlisser is an “extraordinary” circumstance justifying compassionate release.

For example, in *United States v. Ladson*, 2020 WL 3412574 (E.D. Pa. June 22, 2020), the government admitted that an inmate who “presents a risk factor identified by the CDC as increasing the risk of an adverse outcome from COVID-19 presents” fits within the meaning of USSG 1B1.13 since his condition is

a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility,” as stated in note 1(A), as, due to his comorbidities, such a defendant may be less able to protect himself against an unfavorable outcome from the disease.

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Ladson, 2020 WL 3412574 at *6 (quoting USSG 1B1.13, comment. (n.1(A)(ii)(I)). Similarly, in *United States v. Fabris*, 2020 WL 3481708 (N.D. Cal. June 26, 2020), the district court granted compassionate release to an inmate suffering from “severe asthma” since, according to CDC Guidelines, the inmate was “at risk for suffering severe illness if he contracted Covid-19.” *Fabris* noted the government’s agreement “that these circumstances present ‘an extraordinary and compelling reason’ warranting compassionate release.” See also, *United States v. Fowler*, 2020 WL 3034714 (N.D. Cal. June 6, 2020) (granting compassionate release to an inmate who was suffering from “chronic asthma” because such a condition “presents an extraordinary and compelling reason” warranting compassionate release). The CDC Guidelines provide the same exact warning for those who suffer asthma and those in Mr. Schlisser’s condition, i.e., having those conditions “may increase your risk of severe illness from COVID-19.”¹

The government’s argument that the BOP in general, and FCI Otisville specifically, can and “are actively managing the risks presented by COVID-19” (GL at 6) is inaccurate. Despite the fact that the facility was, at one point, virus-free, the government acknowledges that the facility in the past two weeks has experienced a substantial outbreak, demonstrating the inadequacy of the steps taken until now. Even more troubling, in counsel’s understanding, five quarantined inmates were taken on Thursday (July 2) to the Delta Unit (FCI Otisville’s medical unit) because testing administered this past Tuesday (June 30) revealed that they had contracted the virus *while in quarantine*. The sad reality is that Otisville officials have been unable to control the spread of the virus, thus jeopardizing the health of at-risk inmates like Mr. Schlisser. *United States v. Rodriguez*, 2020 WL 3051443, *3 (S.D.N.Y. June 8, 2020) (the “Court credits that the BOP is doing the best it can” but concluding that those measures were still inadequate to protect the defendant). As *Ladson* noted in granting compassionate release to an Otisville inmate, “[a]s of June 16, 2020 the five largest known clusters of COVID-19 in this country grew inside correctional institutions.” *Ladson*, 2020 WL 3412574 at *4 (granting compassionate release to an inmate convicted of armed robbery because he was suffering from type-2 diabetes and hypertension).

Indeed, the government does not dispute that the BOP considered Mr. Schlisser’s health condition to be a serious enough risk factor that Mr. Schlisser was initially designated for release to home confinement. Nor does the government dispute that Mr. Schlisser’s treating physician at Otisville recommends that his condition warrants compassionate release.

To date, Mr. Schlisser has served approximately 29 months. GL at 3. Mr. Schlisser has not sat on his laurels while in prison. For example, after taking the “Doing Time with the Right Mind” course, Mr. Schlisser was appointed on five occasions to act as the facilitator in giving the

¹ Compare https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#asthma with https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#serious-heart-conditions

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facilities' 12-week course "Positive Mental Attitude." With good time he has served all or nearly all of the full sentence called for by the USSG range contained in the plea agreement, and found by the Court at sentencing.² Based on the seriousness of the offense, including the fact that this was Mr. Schlisser's second offense, Your Honor recognized that an upward departure was necessary for added deterrence. In counsel's view, releasing Mr. Schlisser to a period of three years' home confinement will still accomplish that goal. Mr. Fromen claims that Mr. Schlisser will, if released, "do it again." Mr. Schlisser respectfully disagrees. Nevertheless, a strict and substantial term of home confinement will ensure that Mr. Schlisser does not have such an opportunity. *See, e.g., Rodriguez*, 2020 WL 3051443, *4 (finding that after modifying a sentence to include a term of 6 months' home confinement the risk posed to the defendant's health "and the possibility of a revocation of supervised release adequately ensure his expected compliance with the condition and sufficiently mitigate any risk to the community that he might otherwise pose").

Finally, should the Court grant Mr. Schlisser's motion and release him to home confinement, Mr. Schlisser will reside at home with his wife only, and both he and his wife will observe strict quarantine procedures.³

In sum, for the foregoing reasons, as well as those in Mr. Schlisser's moving papers, his motion for compassionate release should be granted.

In the event the Court determines not to grant Mr. Schlisser's motion for compassionate release, we respectfully request that the Court recommend to the BOP that Mr. Schlisser be released on furlough until the current dangerous conditions pass. *See United States v. Schlifstein*, 2020 WL 2575633 (S.D.N.Y. May 21, 2020) ("nothing in the furlough statute prevents this Court from recommending that the BOP exercise its discretion to grant Defendant temporary release. Temporary release would reduce the threat posed to him and to all inmates at USP Lewisburg by COVID-19, while also ensuring that Defendant serves the full sentence that the Court very recently concluded he deserves"); *United States v. Wells*, 19-CR-212 (VEC) (S.D.N.Y.

² At sentencing, Your Honor found that the applicable USSG range (before any upward variance) was 30 to 37 months. Statement of Reasons at 1.

³ The government's suggestion that Mr. Schlisser is incapable of caring for himself because he allegedly committed two minor infractions while in custody is baseless. Mr. Schlisser was cited for very briefly removing his mask during prayer services to kiss his phylacteries, despite the fact that he was also wrapped in a prayer shawl, which is akin to a mask. That citation is on appeal within the BOP. The second incident, i.e., leaving his cell in disarray, which in counsel's understanding was expunged on appeal to the region, involved an incident where "several newspapers, personal papers and books were left piled on the stool between his locker and his lower bunk." GL, Exhibit B at 7. According to Mr. Schlisser, "the Jewish newspapers and other papers were left on the stool to be made available to other Jewish inmates." *Id.*

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April 29, 2020) (authorizing defendant “to inform the Bureau of Prisons that his request [for furlough] comes with the strong recommendation of this Court”).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "S. Yurowitz", is positioned above the printed name.

Steven Y. Yurowitz

SYU/hms