



government counsel spoke with the CLC Attorney for USP-Atwater, Jolene Harcrow. The representations in this brief concerning conditions at USP-Atwater are based on facts reported by Ms. Harcrow. As discussed in more detail below, USP-Atwater has not reported *a single internal case of COVID-19* as of July 28, 2020.

### Legal Standard and Posture of the Case

To be eligible for compassionate release, defendant must demonstrate the existence of “extraordinary and compelling reasons.” 18 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. Under USSG § 1B1.13, “extraordinary and compelling reasons” include, among other things, terminal illness and medical conditions “that substantially diminish[] the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.” *Id.*

On April 24, 2020, defendant filed his first Emergency Motion for Compassionate Release. On May 6, 2020, in denying defendant’s motion, the Court noted the following:

1. Defendant failed to present adequate evidence of his “moderate to severe” asthma;
2. Defendant failed to demonstrate that the “Camp” unit of USP-Atwater presented a greater risk of exposure to COVID-19 than the overall community; and
3. Defendant provided no persuasive evidence demonstrating that the COVID-19 precautions at USP-Atwater were insufficient.

### Argument

#### I. BOP’s Efforts

As an initial matter, the Court should be aware that the Attorney General has directed BOP to prioritize transferring inmates to home confinement in appropriate circumstances when those inmates are vulnerable to COVID-19 under the Centers for Disease Control and Prevention (“CDC”) risk factors, discussed in more detail below. The government was unable to obtain

information about defendant's status in this release program as of the date of this motion but will endeavor to do so prior to the hearing.

II. Defendant's Health

On July 17, 2020, the CDC issued revised guidance regarding risk factors that might increase the likelihood of severe outcomes from COVID-19.<sup>2</sup> The CDC guidance includes a list of conditions known to make a person more susceptible to severe complications from COVID-19, and a second list of conditions that *might* make a person more susceptible to severe complications. *Id.* Defendant has not sufficiently demonstrated that he has any of the health conditions that would qualify him for compassionate release under current guidance from the CDC.

According to the CDC, people with the following risk factors are at increased risk of severe illness from COVID-19: cancer, chronic kidney disease, COPD, immunocompromised state from solid organ transplant, obesity (BMI of more than 30), serious heart conditions, sickle cell disease, and type-2 diabetes. *Id.* It is DOJ's current policy to not oppose compassionate release for defendants who have one or more of these conditions, but defendant has not provided sufficient evidence that he actually has one of these conditions. First, defendant's evidence of obesity is tenuous, at best. Indeed, defendant claims he was 234 pounds when he reported to prison, but weighed only 192 pounds on May 13, 2020. Exhibit E at 8. Then, on July 1, 2020, after surely learning that the CDC had recently revised its list of severe risk factors to include BMIs of more than 30, defendant's weight suddenly increased to 218 pounds. Defendant's motion at 31. The Court should view this evidence with skepticism. Second, defendant's evidence of COPD and cancer is entirely speculative and only thinly supported by a declaration from a physician who has

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<sup>2</sup> [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](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), last accessed July 30, 2020.

never examined defendant. If defendant provided definitive evidence of COPD or cancer, under current DOJ guidelines, the government may concede that an extraordinary and compelling reason exists to justify his release, but that is not the case.

The government disagrees with defendant's assertion that USP-Atwater is not providing him with adequate diagnostic testing. According to Ms. Harcrow, Health Services has ordered a CT-scan to assess defendant's potential abdominal cancer, and the procedure will occur in or about the first two weeks of August. According to Ms. Harcrow, the delay, if any, in scheduling the scan is attributable to concerns about the risk of exposure to COVID-19 in the community outside USP-Atwater, as the scan must be conducted at an independent medical facility in Merced County.

Defendant has two conditions from the CDC's second list—asthma and smoking—that *might* make him at increased risk for severe illness from COVID-19, but given the lack of data and certainty regarding these conditions, the government submits that these conditions alone do not present an extraordinary and compelling reason for compassionate release. Moreover, defendant's evidence is of a past asthma diagnosis. He has not provided the Court with any evidence, other than his own assertions regarding his inhaler use, that he is presently suffering from asthma or any respiratory ailment. The government notes that USP-Atwater Health Services has no documentation indicating that defendant reported any respiratory conditions upon his arrival at the facility in November 2019, and defendant did not report any wheezing or shortness of breath that would be an indicator of a respiratory condition during any of his several trips to the medical department to obtain inhalers since then. See Exhibit E at 6, 8, and 11.

The timing of defendant's complaints to the medical department calls into question the sincerity of his representations. According to documents provided by defendant, his first documented request for an inhaler occurred on April 22, 2020, two days before filing his first

motion for compassionate release, and his inhaler use only increased thereafter. Exhibit F at 5. In addition, in his April 22, 2020 request, defendant wrote “starting to get a little shortness of breath.” *Id.* However, when he was seen on April 29, 2020, the treating physician noted that defendant “has not reported any wheezing or shortness of breath since he arrived at the Camp.” Exhibit E at 6. Without additional independent documentation that defendant is currently suffering from asthma (or COPD), the Court should not find that an extraordinary and compelling reason exists.

### III. Conditions in California vs. USP-Atwater

In determining whether defendant qualifies for compassionate release in the context of a global public health pandemic, the Court should compare defendant’s risk of exposure inside USP-Atwater with his risk of exposure during home confinement. The data continue to favor keeping defendant in prison.

As of July 28, 2020, California is experiencing a surge in COVID-19 cases. It is currently the state with the largest number of positive cases in the nation.<sup>3</sup> On July 28th alone, California reported 6,000 new cases of COVID-19 and 73 additional fatalities, raising the total number of positive cases in the state to 466,550 and total fatalities to 8,518.<sup>4</sup> Alameda County, where defendant has indicated he will reside if granted home confinement, has reported 10,645 positive COVID-19 cases as of July 28, 2020.<sup>5</sup> This is over three times the 3,292 positive cases identified in Merced County, where USP-Atwater is located. *Id.*

To be sure, California is implementing restrictions to control the spread of the virus, but these only serve to emphasize the seriousness of the outbreak. On July 13, 2020, the California Department of Public Health (“CDPH”) issued a statewide order rolling back California’s planned

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<sup>3</sup> <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

<sup>4</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>, last accessed July 28, 2020.

<sup>5</sup> [https://public.tableau.com/views/COVID-19CasesDashboard\\_15931020425010/Cases?%3Aembed=y&%3AshowVizHome=no](https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?%3Aembed=y&%3AshowVizHome=no), last accessed July 28, 2020.

reopening schedule.<sup>6</sup> CDPH mandated the closure of all indoor seating at bars, restaurants, and entertainment venues statewide. *Id.* Additional restrictions have been mandated for counties—including Alameda County and Merced County—which currently appear on the CDPH’s County Monitoring List.<sup>7</sup> This list includes counties that the CDPH has identified as experiencing alarming resurgences in COVID-19 cases. *Id.*

By contrast, USP-Atwater has implemented strict controls that have thus far *prevented a single positive COVID-19 case from occurring inside or entering the facility*. According to Ms. Harcrow, as of July 28, 2020, USP-Atwater reported nine positive cases of COVID-19: three inmates and six staff.<sup>8</sup> Defendant places great import on the rise in cases at Atwater, writing, “[t]his is exactly the wildfire speed with which the virus spreads in the confines of prison.” Defendant’s motion at 7. Had defendant dug into the numbers, however, he would have surely learned that *not a single one of the individuals who tested positive* was ever inside either facility at USP-Atwater. The three inmates who tested positive for COVID-19 were part of a group of approximately twenty inmates transferred to the Atwater facilities. All twenty inmates were placed in quarantine for fourteen days, and were not released into the prison until after they received two negative COVID-19 tests, 24-hours apart. Of the six staff members who tested positive for COVID-19, three are currently positive and three have recovered. But critically, *not one* of these staff members ever set foot inside USP-Atwater following their positive tests. All were infected while deployed in support of the federal government’s monitoring of recent protests. Upon their return to USP-Atwater, each staff member was tested for COVID-19 in accordance with BOP procedures, and those who

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<sup>6</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>

<sup>7</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx>

<sup>8</sup> BOP’s public website, updated daily, reflects all COVID-19 positive cases in BOP owned and operated facilities. <https://www.bop.gov/coronavirus/>, last accessed July 31, 2020.

received positive results were immediately sent home. The officers cannot return to work until they complete a quarantine period and receive two negative tests.

It is reasonable to conclude that releasing defendant from USP-Atwater, where there have been *zero internal* COVID-19 cases, into the community, where cases are increasing daily, would increase his risk of exposure to the virus, something he purports to want to avoid. Under these circumstances, compassionate release is not appropriate.

#### IV. USP-Atwater Prevention Measures

Despite defendant's litany of doomsday predictions, USP-Atwater is currently a facility that has COVID-19 well under control through the use of strict procedures, discussed below, to prevent the virus from entering the facility in the first place.

##### a. Testing

USP-Atwater follows the BOP's testing recommendations, which are based on CDC testing guidance.<sup>9</sup> As directed by the BOP and the CDC, USP-Atwater has worked in conjunction with the Department of Public Health in Merced County to develop a testing approach suited for the current risk in the Merced County community. Merced County has recommended that USP-Atwater refrain from universal testing of the prison population because there are *zero internal positive cases* of COVID-19, a recommendation that corresponds with CDC guidance.

All new inmates reporting to USP-Atwater's facilities are tested upon arrival. As of July 28, 2020, USP-Atwater has tested seventy-two inmates, all from different housing units of USP-Atwater. All have returned negative results except the three inmates discussed above. All incoming and outgoing inmates are quarantined for two weeks and tested twice, 24-hours apart, before they are released into the general population or into the greater community. Any inmate presently

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<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html>

displaying symptoms of COVID-19 is immediately tested. The Health Services administrator has indicated that should an internal inmate test positive for COVID-19, he would recommend that all inmates be tested as a precaution. However, that scenario has yet to occur. Health Services has indicated that due to the rapid surge of cases in nearby communities, they may consider universal testing at a future date.

b. COVID-19 Safety Policies

USP-Atwater is adhering to the BOP's Modified Operations guidelines for COVID-19, which significantly restrict inmate movement and visitation.<sup>10</sup> Every inmate has been issued a mask, which they are required to wear any time they leave their assigned bunks. Inmates have received incident reports for failing to abide by the mask policies. Likewise, all staff personnel are required to wear masks. Each staff member undergoes temperature screenings in the USP-Atwater lobby prior to each workday, and all inmates receive temperature screenings prior to reporting for volunteer work assignments. Any individual with an elevated temperature is not permitted to work that day and must immediately isolate. Furthermore, sanitation crews clean all bathrooms, floors, and common areas at the "Camp" multiple times a day, and additional sanitation crews have been implemented since the beginning of the COVID-19 pandemic.

Defendant's accusations regarding the lack of sanitary supplies are meritless. Inmates can receive soap through a multitude of channels. Inmates are issued supplies from laundry, which is responsible for distributing soap, shampoo, razors, and the like, on a regular basis. Additionally, there is a biweekly sanitation issue distributed by the facility's counselor to the unit officer, which includes soap. The counselor also maintains a stock of surplus supplies, including soap, in her

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<sup>10</sup> [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp)



office area that is provided freely and immediately upon request. Finally, inmates may purchase soap at the commissary using their allocated budgets.

The Court of Appeals for the Third Circuit correctly stated, that “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread.” *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). Defendant has provided evidence of nothing more than *risk* that is being well managed by the professionals at USP-Atwater. Accordingly, compassionate release is not appropriate.

#### Conclusion

Defendant undoubtedly wants to be released from prison, but his personal preference on where he should pay his debt to society is not relevant to the Court’s analysis. The Court must instead evaluate whether defendant’s current health, or the current conditions at USP-Atwater, justify his release in the context of a global public health pandemic. Defendant has not provided evidence that he is in anything but good health, nor has he provided any evidence that USP-Atwater is not managing the pandemic well. Defendant has therefore not demonstrated that extraordinary and compelling circumstances warrant compassionate release. The United States respectfully requests that the Court deny defendant’s motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31st, 2020, a copy of the foregoing document has been sent via ECF to counsel of record for the defendant.

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