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Cruel and Unusual Punishment: How the Ongoing War on Drugs and Discrimination in Healthcare Created a Viable Eighth Amendment Claim for Black Inmates During the COVID-19 Pandemic

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CRUEL AND UNUSUAL
PUNISHMENT: HOW THE ONGOING
WAR ON DRUGS AND
DISCRIMINATION IN HEALTHCARE
CREATED A VIABLE EIGHTH
AMENDMENT CLAIM FOR BLACK
INMATES DURING THE COVID-19
PANDEMIC

Vincent Jones[†]

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INTRODUCTION

The COVID-19 pandemic revealed that black people in this country are not only disproportionately represented in prisons but are also disproportionately vulnerable to deadly diseases. The discrimination black people in the United States have faced during the ongoing War on Drugs, while simultaneously dealing with discrimination in our nation’s healthcare system, has created a viable claim under the Eighth Amendment for black inmates during the COVID-19 pandemic. This note will explain how the War on Drugs continues to target the black community by disproportionately incarcerating its people for mostly non-violent drug offenses. In doing so, the racist policies and enforcement of the drug war have combined with the deep-rooted racism of our nation’s healthcare system to create a medically vulnerable class of black inmates that are disproportionately vulnerable to COVID-19.

Part I will explain why prisons are overpopulated with black inmates by explaining how the War on Drugs has been used to target the black community. This section will include brief discussions of the key policies of the war, militarized policing and drug raids, the power of prosecutors and the Supreme Court, the difficulties of life after prison, and discuss how the War on Drugs is ongoing.

Part II will begin by explaining how black people enter prisons as a medically vulnerable class due to healthcare discrimination. Then, the discussion will shift to the impact of COVID-19 on prison inmates by exposing the issues with overcrowding in prisons, availability of masks and vaccines, the substandard healthcare in prisons, the dangers of high prison traffic, infection rates in jails and detention centers, and the need for early release for “higher-risk” inmates. Next, this section will demonstrate the ethical issues of the CARES Act and explain how it leaves inmates trapped in uncertainty over who is selected for home confinement and if they will be required to return back

to prison once the pandemic has concluded. This section will conclude by discussing how the causes of action by inmates against their prison institutions for Eighth Amendment violations began.

Part III will discuss the Eighth Amendment and how it has been recently applied to inmate claims against prison officials during the pandemic. Part IV will present the argument for how black inmates can overcome the “deliberate indifference” barrier to a successful Eighth Amendment claim and secure their release from prison institutions for home confinement to safely serve the remainder of their prison sentences. Part V will present the argument for the need of compassionate release motions by the director of the Bureau of Prisons for black inmates that have been disproportionately and unjustifiably incarcerated as a result of the War on Drugs.

PART I: THE WAR ON DRUGS AND ITS TARGETED ATTACK ON THE BLACK COMMUNITY

The “War on Drugs” began during the Nixon Administration.¹ From the very beginning, Richard Nixon made “law and order” the central theme of his campaign.² Even in his speeches, Nixon called on voters to reject the “lawlessness” of the civil rights movement and embrace “order.”³ After winning the presidency, President Nixon announced in a 1971 press conference that he was declaring a War on Drugs, and stated drugs were “public enemy number one.”⁴ In 1973, he created the Drug Enforcement Administration (“DEA”), and tasked it with policing illegal drug use and drug smuggling into the United States.⁵ Although President Nixon did not openly admit his War on Drugs was racially motivated, his administration’s policies made it clear. As stated by Michelle Alexander in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,

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1. *War on Drugs*, HISTORY (May 31, 2017), https://www.history.com/topics/crime/the-war-on-drugs#section_4 [https://perma.cc/XQK7-5UPN].
 2. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, at xv (10th Ann. Ed. 2020).
 3. *Id.* at 58.
 4. HISTORY, *War on Drugs*, *supra* note 1.
 5. *Id.*

“throughout the 1970s the conservative party gave ‘lip service’ to the goal of racial equality, but actively resisted desegregation and civil rights enforcement.”⁶ This is further evidenced in a 1994 interview with President Nixon’s domestic policy chief, John Ehrlichman who said in an interview published in Harper Magazine in 2016:

We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did.⁷

This blatant racism against black people by Ehrlichman and the Nixon Administration demonstrates how the War on Drugs was actually created as a weapon to destroy the black community.

The war continued to explode into the 1980s under the Reagan Administration.⁸ Ironically, at the time President Raegan declared his continuation of the war, less than 2% of Americans viewed drugs as the most important issue facing the nation.⁹ Under the Reagan Administration, the budgets for federal law enforcement agencies grew exponentially.¹⁰ For example, between 1980-1984 the FBI antidrug funding increased from \$8 million to \$95 million, the Department of Defense anti-drug allocations increased from \$33 million in 1981 to 1,042 million in 1991, and during the same period the DEA antidrug spending grew from \$86 million to \$1,026 million.¹¹ A key moment that occurred during the Raegan Administration that was used to gain public

6. ALEXANDER, *supra* note 2, at 59.

7. Dan Baum, *Legalize It All: How To Win The War on Drugs*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [https://perma.cc/F8MP-RK6Q].

8. ALEXANDER, *supra* note 2, at 62.

9. *Id.* at 62.

10. *Id.*

11. *Id.*

support for his War on Drugs, was the death of a young African American basketball player named Len Bias.¹²

University of Maryland basketball star Len Bias collapsed in his dorm room from cocaine intoxication.¹³ As a name recognized across the nation at the time, Bias was drafted second in the 1986 draft by the Boston Celtics and died only two days later.¹⁴ After a false media report that his death was caused by crack cocaine, public concern over the new drug skyrocketed.¹⁵ Suddenly, the stories and imagery of members of the black community as “crack babies,” “gang bangers,” or “predators” began flooding television networks and newspaper articles.¹⁶ It took years for the claims that crack was “instantly addictive” or a “plague” to be proven false or misleading.¹⁷ Many still believe the death of Len Bias and this wave of misinformation led to a public outcry for stricter drug laws that prompted Congress to pass the Anti-Drug Abuse Act of 1986.¹⁸

The momentum of the war from the Raegan Administration was used by George H.W. Bush to secure his place as the next President of the United States. As stated by Michelle Alexander in her book the *New Jim Crow*, “President Bush Sr. did not hesitate to employ implicit racial appeals to mobilize poor and working-class white people who were once loyal to the Democratic Party.”¹⁹ Fear of “predatory” black men was again weaponized in the media, such as with the infamous Willie Horton ad, to garner

12. *Id.* at 66.

13. Jeff Zillgitt, *Opinion: The Len Bias Story Remains One of the Saddest ‘What-Ifs’ in Sports History*, USA TODAY (June 26, 2020), <https://www.usatoday.com/story/sports/nba/columnist/jeff-zillgitt/2020/06/26/len-bias-1986-nba-draft-death-cruel-story-sports-history/3260046001/> [<https://perma.cc/2242-4N3E>].

14. *Id.*

15. ALEXANDER, *supra* note 2, at 66.

16. *Id.*

17. *Id.*

18. Jonathan Gelber, *How Len Bias’s Death Helped Launch the US’s Unjust War on Drugs*, THE GUARDIAN (June 29, 2021), <https://www.theguardian.com/sport/2021/jun/29/len-bias-death-basketball-war-on-drugs> [<https://perma.cc/RHD6-WQ4R>].

19. ALEXANDER, *supra* note 2, at 68.

support from white people for tough on crime policies.²⁰ In 1989 President Bush declared drug use as “the most pressing problem facing our nation,” and shortly after, a poll conducted by the *New York Times/CBS* found that 64% agreed with that statement.²¹ This was a drastic change from only 2% of the public being concerned with drugs in the early 80s.

At this time, the key to the White House was continuing the War on Drugs, regardless of political party affiliation. While the war had largely been waged by the Republican Party, Democratic candidates were just as eager to carry on the assault on the black community to regain power. Presidential candidate Bill Clinton vowed that he would never permit any Republican to be tougher on crime than him.²² True to his word, the drug war exploded during the Clinton Administration, and he once said, “I can be nicked a lot, but no one can say I am soft on crime.”²³ In fact, his administration’s policies resulted in the largest increases in federal and state inmate populations of any president in American history.²⁴

a. The Key Policies of the War

The policies that were implemented during the early stages of the War on Drugs were the legal justification for the continued mass incarceration of the black community. As mentioned earlier, the Anti-Drug Abuse Act of 1986 implemented during the Reagan era, is responsible for establishing mandatory minimum sentences for possession of specific amounts of cocaine and creating a 100:1 disparity between the distribution of powder and crack cocaine.²⁵ For example, five grams of crack cocaine carried a minimum 5-year federal prison sentence, while it would take 500 grams of

20. *Id.*

21. *Id.*

22. *Id.* at 70.

23. *Id.* at 71.

24. *Id.*

25. *ACLU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986 Deepened Racial Inequity in Sentencing*, ACLU (Oct. 26, 2006), <https://www.aclu.org/press-releases/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity> [<https://perma.cc/K4TB-NP35>].

powder cocaine to carry the same sentence.²⁶ Prior to the enactment of mandatory minimums, the average federal drug sentence for black people was only 11% higher than it was for white people.²⁷ Four years later the average was 49% higher. At the time, 80% of crack users were black, resulting in them facing disproportionate punishment for using a different form of the same cocaine drug as white people.²⁸ The 100:1 ratio remained in place until 2010, when the passage of The Fair Sentencing Act changed the ratio to 18:1.²⁹

Another major piece of legislation that was implemented during this era was the Violent Crime Control and Law Enforcement Act of 1994, also known as the “crime bill.”³⁰ Signed into law by President Clinton, this \$30 billion crime bill created new federal capital crimes, mandated life sentences for those with three violent felonies (or “three strikes”).³¹ While scholars may differ on whether the crime bill should be considered solely responsible for the jump in mass incarceration in the 90s, few would disagree that the act contributed to it. In fact, in 2015 Bill Clinton conceded that he “signed a bill that made the problem worse,” in reference to the crime bill.³²

b. Militarized Policing and Drug Raids

After establishing the rules of the war, the police play a substantial role in enforcing them. Military policing tactics and equipment have been unleashed on black communities in full force during this war. In a report conducted by the ACLU, it stated, “it is widely known that policing tactics across the country often

26. *Id.*

27. *Id.*

28. *Id.*

29. *The Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> [<https://perma.cc/KC3X-5A6L>] (last visited Mar. 20, 2023).

30. Meghan Keneally, *What’s Inside the Controversial 1994 Crime Bill That’s Plaguing Hillary Clinton on the Campaign Trail*, ABC NEWS (Apr. 11, 2016), <https://abcnews.go.com/Politics/inside-controversial-1994-crime-bill-plaguing-clinton-campaign/story?id=38313757> [<https://perma.cc/8SQK-NWL2>].

31. *Id.*

32. Keneally, *supra* note 30.

unfairly target communities of color.”³³ According to the Cato Institute, in 1997, the Pentagon provided more than 1.2 million pieces of military equipment to local police departments.³⁴ Paramilitary policing in the form of special weapons and tactics (SWAT) teams were hardly used prior to the drug war but are now used to conduct approximately forty thousand drug raids each year.³⁵ SWAT officers are heavily armored and often use battering rams to breach homes late at night to serve warrants for mostly low-level drug possession offenses.³⁶ The ACLU found that Black and Latino people are disproportionately impacted by SWAT raids.³⁷

In addition, innocent people have been killed during these drug raids, and those that survive are often traumatized from the experience.³⁸ Between 1989 and 2001, at least 780 cases of flawed raids reached the appellate level.³⁹ In 2014, the ACLU reported that SWAT raids that occurred between 2011 and 2012 resulted in seven deaths and forty-six people injured.⁴⁰ Even as recently as 2020, black people continue to be the victim of botched drug raids, such as in the tragic killing of Breonna Taylor.⁴¹ The unspoken truth is racial bias plays a significant role in the preferences of law enforcement during the ongoing War on Drugs. Black people suffer from these aggressive law enforcement tactics more than white people, not because they sell, use, or purchase

33. *War Comes Home: The Excessive Militarization of American Policing*, ACLU, at 35 (June 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police> [<https://perma.cc/GRJ2-A732>].

34. ALEXANDER, *supra* note 2, at 68.

35. Hannah Cooper, *War on Drugs Policing and Police Brutality*, SUBSTANCE USE & MISUSE, at 4 (2015).

36. *Id.*

37. ACLU, *War Comes Home*, *supra* note 33.

38. ALEXANDER, *supra* note 2, at 95.

39. *Id.*

40. ACLU, *War Comes Home*, *supra* note 33.

41. *Breonna Taylor is Killed by Police in Botched Raid*, HISTORY (Mar. 10, 2021), <https://www.history.com/this-day-in-history/breonna-taylor-is-killed-by-police> [<https://perma.cc/7LXY-MUMV>].

drugs more, but because they are targeted by police more.⁴² As Michelle Alexander said in her book, “the notion that the majority of drug trafficking occurs in poor neighborhoods is false; it occurs everywhere else in America as well.”⁴³ Thus, the police could just as easily raid a home in search of drugs in an affluent suburb, as they could a home in a low-income community. The reality is, they choose not to.

c. The Power of Prosecutors and the Supreme Court

The United States is the world leader in incarceration and holds approximately 2.1 million people behind bars as of 2019.⁴⁴ Activist, author, and professor Angela Davis once wrote that, “prisons relieve us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism.”⁴⁵ In 2017, African Americans represented only 12% of the U.S. adult population, but 33% of the sentenced prison population.⁴⁶ On the other hand, white people accounted for 64% of the adult population, but only 30% of the prison population.⁴⁷ Prosecutors exercise immense discretion in determining who will be charged, what the charges will be, whether there will be plea bargaining, or if they will show any leniency. During the ongoing drug war, this broad discretion has been frequently abused by prosecutors in pursuing tougher sentences for black people.⁴⁸ In

42. ALEXANDER, *supra* note 2, at 123; *see also Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, THE HAMILTON PROJECT (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice [https://perma.cc/9M8B-AHU4].

43. ALEXANDER, *supra* note 2, at 124.

44. John Gramlick, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [https://perma.cc/SH7Z-8695].

45. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 12 (2003).

46. Artika R. Tyner, *The Racial Wealth Gap: Strategies for Addressing the Financial Impact of Mass Incarceration on the African American Community*, 28 GEO. MASON L. R. 885, 886 (2021).

47. *Id.*

48. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, J. POL. ECON. 1320, 1323 (2014).

fact, the Drug Policy Alliance, a drug policy reform organization, found in 2018 that prosecutors are twice as likely to pursue a mandatory minimum sentence for black people as for white people charged with the same offense.⁴⁹ Whether it is conscious or unconscious biases, it has been shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the person charged with the crime.⁵⁰

The Supreme Court has made it extremely difficult to address racial bias in the criminal legal system, especially during the drug war. After the Court required a showing of discriminatory purpose for equal protection violations in its decision in the 1987 case *McCleskey v. Kemp*, the subsequent claims of discrimination in crack-cocaine sentencing laws failed.⁵¹ In addition, an attempt to challenge racial disparities in selective prosecution also failed in the 1996 case, *United States v. Armstrong*.⁵² In *Armstrong*, the Court held that a defendant must show discriminatory effect by demonstrating similarly situated individuals of other races were not prosecuted. To prove this, the defense needed this evidence from the prosecution.⁵³ The prosecution however, refused to turn this evidence over, and thus, the defendant failed on his claim.⁵⁴ The high standard to prove racial bias established by these two cases continues to impact the drug war to this day. Few defendants have been able to meet these requirements in their claims.

49. *The Drug War, Mass Incarceration and Race*, THE DRUG POLICY ALLIANCE (Jan. 25, 2018), <https://drugpolicy.org/resource/drug-war-mass-incarceration-and-race-englishspanish> [<https://perma.cc/KPC3-CGW6>].

50. ALEXANDER, *supra* note 2, at 147.

51. *McCleskey v. Kemp*, 481 U.S. 279 (1987); ALEXANDER, *supra* note 2, at 140.

52. *United States v. Armstrong*, 517 U.S. 456 (1996); Paul Butler, *Race and Adjudication*, ARIZ. STATE UNIV.: ACAD. FOR JUST., https://law.asu.edu/sites/default/files/pdf/academy_for_justice/10_Reforming-Criminal-Justice_Vol_3_Race-and-Adjudication.pdf [<https://perma.cc/P9KL-8MKH>].

53. Butler, *supra* note 52, at 222.

54. *Id.*

d. *The Difficulties of Life After Prison*

Once an individual becomes ensnared in the criminal legal system, it is hard to ever be completely free of it. The challenges of reentry for black ex-offenders are the main reason their recidivism rate is higher than white ex-offenders.⁵⁵ These “collateral consequences⁵⁶,” often include disenfranchisement, public service ineligibility, student loan restrictions, child custody restrictions, employment restrictions, housing restrictions, and felon registration laws.⁵⁷ The communities into which former black inmates return to often lack the necessary resources to support a successful reintegration.⁵⁸ The inability to find legitimate employment frequently results in ex-offenders turning to illegitimate means of making a living to support themselves and their families.⁵⁹ In fact, 75% of formerly incarcerated individuals are still unemployed one year after their release.⁶⁰

The trauma of navigating these obstacles impacts the families of ex-offenders too. Children who have an incarcerated parent are five times more likely to go to prison during their lifetime than children who do not have an incarcerated parent.⁶¹ What this inevitably creates is a cycle of trauma that is continuously passed down to the next generation. University of St. Thomas School of Law professor Artika R. Tyner wrote in her article on addressing the *Racial Wealth Gap*, that “children with an incarcerated parent are at a high risk of negative outcomes such as poverty, mental health problems, behavioral problems, homelessness,

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55. Jason M. Williams et al., *“It’s Hard Out Here if You’re a Black Felon”: A Critical Examination of Black Male Reentry*, 99 PRISON J. 437, 439 (2019).
56. Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [<https://perma.cc/87W2-6GNX>].
57. Williams et al., *supra* note 55, at 438.
58. *Id.* at 439.
59. *Id.*
60. Tyner, *supra* note 46, at 891.
61. Tyner, *supra* note 46, at 893.

engagement with the foster care system, and often, their own incarceration.”⁶²

Newly released inmates and their families are also burdened with tremendous debt. For example, pay-to-stay laws are enforced by the majority of states.⁶³ Implemented during the peak of the War on Drugs in the 80s and 90s to increase revenue, these laws require inmates to pay for their time behind bars in the form of either direct payments for services provided, such as medical co-pays, or through the state suing incarcerated people for these costs in civil court.⁶⁴ This debt adds financial ruin to the list of other setbacks ex-offenders struggle to deal with after already being punished in prison.

e. The War on Drugs is Ongoing

After 50 years, the War on Drugs has not ended. If the goal of America’s longest war was to eliminate illegal drug usage, it should be considered a complete failure. In 2021, the Prison Policy Initiative reported that one in five people are currently incarcerated for a drug offense.⁶⁵ However, the Substance Abuse and Mental Health Services Administration reported the number of illegal drug users rose to 13% for users 12 years or older in 2019, nearing the same percentage it was 40 years ago.⁶⁶ In 2020, overdose deaths in the United States exceeded 90,000, compared

62. Chaseray Griffin, *Foreward: Children of Incarcerated Parents: Ending the Cycle of Trauma*, 63 *LOY. L. REV.* 389 (2017).

63. *At \$249 Per Day, Prison Stays Leave Ex-Inmates Deep in Debt*, NBC CONN. (Aug. 27, 2022), <https://www.nbcconnecticut.com/news/local/at-249-per-day-prison-stays-leave-ex-inmates-deep-in-debt/2860653/> [<https://perma.cc/N2BR-C2EX>].

64. Barnini Chakraborty, *Prisoners Saddled With Huge Bills Following Release*, WASH. EXAM’R (Aug. 29, 2022) <https://www.washingtonexaminer.com/news/prison-huge-bills-cost-release-pay-stay> [<https://perma.cc/N2BR-C2EX>]; *see also* April D. Fernandes et al., *Forcing People to Pay for Being Locked Up Remains Common*, WASH. POST (May 2, 2022) <https://www.washingtonpost.com/outlook/2022/05/02/forcing-people-pay-being-locked-up-remains-common/> [<https://perma.cc/EU4L-SPHD>].

65. Nathaniel Lee, *America has Spent Over a Trillion Dollars Fighting the War on Drugs. 50 Years Later, Drug Use in the U.S. is Climbing Again*, CNBC (2021), <https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html> [<https://perma.cc/LBM2-2U38>].

66. *Id.*

to the 70,6630 deaths the previous year.⁶⁷ Since it began in 1971, the drug war cost our nation's taxpayers over a trillion dollars in drug enforcement, and yet, the only real achievement of the war is the destabilization of black communities and the mass incarceration of its people.⁶⁸

In 2019, the FBI reported that more than a quarter of the drug-related arrests were black adults.⁶⁹ In 2021, it was reported that nearly 80% of the people in federal prison and 60% of people in state prison for drug offenses were Black or Latino.⁷⁰ It was also reported in 2021 by the Washington Post that black people are six times as likely as white people to be incarcerated on drug charges, even though they both use illegal drugs at the same rate.⁷¹ Moreover, a disparity still remains in the sentencing for crack and powder cocaine offenses.

This is true despite the available research that disproves the original theory, formulated by the Nixon and Reagan administrations, that crack cocaine is more dangerous than powder cocaine. As stated by Michelle Alexander in her book, "it didn't matter, when the drug war was taking off, that nearly all the sensationalized claims that crack cocaine was some kind of 'demon drug,' drastically more harmful than powder cocaine, were false or misleading."⁷² In 2021, the Congressional Research Service concluded "whether consumed in powder or crack form, cocaine produces the same type of physiological and psychotropic effects."⁷³ The only clear difference between the two forms is in how the drug is administered, which determines how quickly the high is reached and how long it lasts.⁷⁴

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. David Farber, *The War on Drugs Turns 50 Today. It's Time to Make Peace*, WASH. POST (2021) <https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/> [<https://perma.cc/W22A-EKBB>].

72. ALEXANDER, *supra* note 2, at xv.

73. CONG. RSCH. SERV., *COCAINE: CRACK AND POWDER SENTENCING DISPARITIES* (2021).

74. *Id.*

According to the U.S. Sentencing Commission, the average prison sentence for trafficking powder cocaine is now 66 months, while the average sentence for trafficking crack cocaine is 74 months.⁷⁵ As mentioned earlier in this note, Congress passed the Fair Sentencing Act in 2010 which reduced the disparity in sentencing between the two forms of cocaine from 100:1 to 18:1.⁷⁶ The act also eliminated the five-year mandatory minimum for possession of crack cocaine.⁷⁷ Despite this improvement from drug sentencing at the peak of the war, the severe penalties remain largely unchanged for the crime of trafficking crack-cocaine. Our criminal legal system is still willing to accept drastically different sentences for two forms of the same drug. The only ratio that should exist is 1:1.

In her book, Michelle Alexander wrote, “this war radically altered the life course of millions, especially black men who were the primary targets in the early decades of the war. Their lives and families were destroyed for drug crimes that were largely ignored on the other side of town.”⁷⁸ Both versions of cocaine can create an addiction that can lead to serious health problems. The 2020 National Survey on Drug Use and Health estimates that about 5.2 million people used either form of cocaine within the past year.⁷⁹ Further, the National Center for Health Statistics reported there were 15,883 drug overdose deaths involving cocaine in 2019.⁸⁰ While cocaine is the most commonly discussed drug of the War on Drugs, the disparity in marijuana enforcement has had a similar impact on the black community.

One of the myths that Michelle Alexander sought to debunk in her book, *The New Jim Crow*, was that the drug war was principally concerned with dangerous drugs.⁸¹ “To the contrary, arrests for marijuana possession- a drug less harmful than tobacco or alcohol- accounted for nearly 80 percent of the growth in drug

75. *Id.*

76. ACLU, *The Fair Sentencing Act*, *supra* note 29.

77. *Id.*

78. ALEXANDER, *supra* note 2, at xxvii.

79. *Id.*

80. *Id.*

81. ALEXANDER, *supra* note 2, at 76.

arrests in the 1990s.”⁸² In 1991 there were over 200,000 arrests from marijuana possession.⁸³ That number jumped to 600,000 by 1997 and peaked at 800,000 in 2007.⁸⁴ A 2013 report by the American Civil Liberties Union (ACLU) showed that black people are 3.73 times more likely to be arrested for marijuana possession than white people are.⁸⁵

In April of 2020, The ACLU published an updated version of their original 2013 report that tracked marijuana arrests from 2010- 2018.⁸⁶ This report found that in every state that has legalized or decriminalized marijuana possession, black people are still more likely to be arrested for possession than white people.⁸⁷ In some states, black people were up to six, eight, or almost 10 times more likely to be arrested than white people for possession.⁸⁸ In 31 states, racial disparities were actually larger in 2018 than they were in 2010.⁸⁹ This is true despite comparable marijuana usage rates between black and white people.⁹⁰ A Deputy Director at the Brookings Institution and Senior Advisor on Cannabis Public Policy, John Hudak, wrote in his book, *Marijuana: A Short History*, that “the minority-targeted War on Drugs, and especially the war on marijuana, is really a war on Black and Brown America.”⁹¹ While the attitudes towards the legalization of marijuana have changed significantly in recent years, what remains the same is the racist enforcement of drug policies on the black community.

Until this point, the focus of this note has been to explain how the War on Drugs continues to be one of the main catalysts

82. *Id.*

83. JOHN HUDAK, *MARIJUANA: A SHORT HISTORY* 175 (2d ed. 2020).

84. *Id.*

85. *Id.*

86. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform> [<https://perma.cc/9MMJ-68P6>].

87. *Id.* at 8.

88. *Id.*

89. *Id.*

90. *Id.* at 7.

91. HUDAK, *supra* note 83, at 167.

behind the mass incarceration of black people over the past 50 years. Because of this war, our nation's prisons and jails are filled with a medically vulnerable class of people due to the racism and discrimination in the healthcare services provided to black people. Part II of this note will argue the disproportionate incarceration of black people for drug offenses has now forced them to be disproportionately vulnerable to diseases in prisons, such as COVID-19, due to the discrimination in our nation's healthcare system they face before even entering prison.

PART II: THE IMPACT OF COVID ON AN ALREADY
VULNERABLE CLASS OF INMATES

The racist structure and financing of the federal government's healthcare system can be traced back as early as the 1870s.⁹² During the period commonly referred to as the Jim Crow era, the federal government enacted laws that supported the occupational segregation of minority workers in low wage jobs and excluded them from laws that increased wages and offered collective bargaining.⁹³ These benefits would ultimately result in sick leave and health insurance for other non-minority workers.⁹⁴ The Medicare and Medicaid programs were implemented during the Civil Rights era to address some of these issues that restricted healthcare access for minorities.⁹⁵ However, early policy decisions shaped by racism embedded inequity into these programs, such as the federal government giving states tremendous flexibility in how they chose to fund their programs or limit eligibility.⁹⁶

Despite small progress in recent years, structural racism continues to shape modern health policy, and in doing so, limiting equitable access to healthcare.⁹⁷ Most Americans still receive health care through their employer-sponsored insurance, but because the majority of minorities are employed by low-wage

92. Ruqaiijah Yearby et al., *Structural Racism in Historical and Modern US Health Care Policy*, 41 HEALTH AFF. 187, 188 (2022), <https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2021.01466> [<https://perma.cc/UU6B-DGL6>].

93. *Id.* at 187.

94. *Id.*

95. *Id.* at 188.

96. *Id.*

97. *Id.* at 189.

jobs, their health insurance does not provide adequate coverage.⁹⁸ This results in higher out-of-pocket expenses that most minorities struggle to afford.⁹⁹ A study conducted by the National Academy of Medicine (NAM) reported that “racial and ethnic minorities receive lower-quality health care than white people.”¹⁰⁰ In addition, NAM also found that this is true even when insurance status, income, age, and severity of conditions are comparable.¹⁰¹ In an excerpt from her book, *Critical Race Theory: A Primer*, author Khiara Bridges wrote, “the list of structural factors that make people of color sicker than their white counterparts is long.”¹⁰² She went on to say that “we must recognize that individuals with implicit bias practice medicine within and alongside structures that compromise the health of people of color.”¹⁰³

There is ample evidence that suggests black people receive lower quality care in our healthcare system compared to white people. For example, minority patients are less likely to receive evidence based cardiovascular care, kidney transplants when indicated, age-appropriate diagnostic screening for breast and colon cancer, timely treatment related to cancer and stroke, appropriate mental health treatment, and adequate treatment when presenting suffering from pain compared to white patients.¹⁰⁴ Another reason black people suffer from poorer health care compared to white people is because there is a shortage of physicians, surgeons, and mental health advisors in their communities as a result of the “flight” and closure of hospitals and healthcare providers that ultimately move to predominately white communities.¹⁰⁵ After being discriminated against in the

98. *Id.*

99. *Id.*

100. Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, AM. BAR ASS’N, [https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/\[https://perma.cc/RD3K-8DR2\]](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/[https://perma.cc/RD3K-8DR2]) (last visited Mar. 20, 2023).

101. *Id.*

102. *Id.*

103. *Id.*

104. Yearby et al, *supra* note 92, at 191.

105. *Id.* at 192.

criminal legal system and the healthcare system at the same time, it seems the only thing that could emphasize the disparities faced by black people in this country is a global pandemic.

In December of 2019, a deadly virus appeared in Wuhan, China that would change the world forever.¹⁰⁶ Primarily spread through physical contact and airborne aerosols, the COVID-19 virus had over 208 million confirmed cases across the globe and 4.3 million deaths by August 2021.¹⁰⁷ For a short period of time, the world stood still as nations slowly began to adjust to the new normal. Countless businesses closed their doors permanently during the pandemic, while others were forced to develop innovative ways to bring in revenue. Even the practice of law had to adapt by using tools such as Zoom to safely conduct courtroom hearings remotely. Precautions such as wearing a mask, vaccinations, social distancing, and quarantining, have all been proven to be effective methods of preventing the spread of the virus.¹⁰⁸ While the outside world strived to rebuild their lives during the pandemic, those incarcerated in our nation's prison system have not been able to adapt so easily.

A recent study has shown that, although the prison population as a whole is vulnerable to COVID-19, "people of color are both disproportionately represented in prisons and are disproportionately affected by COVID-19" compared to other races of people.¹⁰⁹ An article published in 2020 by the *New York Times* stated, "systematic racism doesn't just evidence itself in the criminal legal system. It's something that we're seeing take lives not just in urban America, but rural America where people deserve an equal opportunity to live, get health care, COVID testing, and tracing."¹¹⁰ As of November 2021, native, black and

106. Mainul Haque et al., *The Response to COVID 19 Across Countries and the Implications for Future Pandemics*, 20 *BANGLADESH J. MED. SCI.* 7 (2021).

107. *Id.*

108. *Id.*

109. Kaitlyn Sims et al., *Prisons and COVID-19 Spread in the United States*, 111 *AJPH RSCH. & ANALYSIS* 1534 (2021).

110. Richard Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequality of Coronavirus*, *N.Y. TIMES* (July 5, 2020) <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/F8TH-SXL7>].

latino people have all suffered from higher rates of hospitalizations and deaths related to COVID-19 compared to white people.¹¹¹ In February of 2022, an article in the Health Affairs Journal titled, *Structural Racism In Historical And Modern US Health Care Policy* stated, “the US healthcare system is structured to advantage the white population – the racial group in power – and disadvantage racial and ethnic minority populations.”¹¹²

Therefore, it is a reasonable argument to make that black inmates enter the prison system as victims of the discriminatory policies of the War on Drugs and are also uniquely disadvantaged and vulnerable health-wise as inmates from healthcare discrimination. This reality coupled with the lack of personal hygiene supplies and poor sanitary conditions in prisons only increases their vulnerability to infections and diseases.¹¹³ The COVID-19 virus exposed this ugly truth as it spread throughout our nation’s prisons and jails. Unfortunately, the vast majority of these institutions were unprepared to manage the spread of the disease.

a. Managing the Spread of COVID-19 in Prisons

On November 30, 2020, nearly 252,000 incarcerated individuals and prison staff tested positive for COVID-19.¹¹⁴ By the end of 2021, The New York Times reported that over 2,700 people died in connection to COVID-19 in U.S. prisons, jails, and immigration detention centers.¹¹⁵ To make matters worse, some deaths were not included in that total because hospitalized inmates were officially released from custody before they died.¹¹⁶ Prison and jail officials defended this complex system of tallying by stating, “including the deaths of people who had recently been

111. Yearby et al, *supra* note 92 at 187.

112. *Id.*

113. Ariel Berkowitz, *Unmasking the Truth- The Cruel and Unusual Punishment of Prisoners Amidst the COVID-19 Pandemic*, 37 *TOURO L. R.* 347, 350 (2021).

114. Sims et al., *supra* note 109.

115. Maura Turcotte et al., *The Real Toll From Prison Covid Cases May Be Higher Than Reported*, *N.Y. TIMES* (Aug. 30, 2021), <https://www.nytimes.com/2021/07/07/us/inmates-incarcerated-covid-deaths.html> [<https://perma.cc/ZSW4-P22K>].

116. *Id.*

in their care would be impractical.”¹¹⁷ The Centers for Disease Control and Prevention recommends that any death in which COVID-19 is listed as “a contributing cause” be deemed a coronavirus death even if other causes are noted.¹¹⁸ Unfortunately, state and local officials have not been consistent in their implementation of the CDC recommendations and have relied on varying methods for reporting possible COVID-19 cases.¹¹⁹

Thus, it is difficult to present an accurate count of how many people have died or are infected with the COVID-19 virus in our prison system. What we do know, however, is that thousands of people are currently incarcerated with limited resources to protect themselves from a deadly virus. Issues such as overcrowding, the availability of masks and vaccines, the substandard health care in prisons, prison traffic, the spread in jails and other detention centers, and the need for early release for higher risk populations have only increased the vulnerability of black inmates.

1. Overcrowding

Overcrowding in prisons significantly increases the likelihood that prison inmates will be exposed to the COVID virus because of the inability of inmates to properly socially distance. At the height of the pandemic, the Prison Policy Initiative reported in 2020 that 41 states were operating at 75% or more of their capacity, and at least nine of those states were operating at more than 100%.¹²⁰ As mentioned earlier, there are over 2 million people incarcerated in the United States.¹²¹ Findings in 2018 concluded that black individuals comprise nearly half of the prison population sentenced for drug offenses, in large part due to the War on Drug policies implemented in the 1970s.¹²² While the issue

117. *Id.*

118. *Id.*

119. *Id.*

120. Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and At This Time of Social Distancing, How Overcrowded Are They Now?*, PRISON POL’Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/> [<https://perma.cc/B9HN-LGJZ>].

121. Sims et al., *supra* note 109, at 1534.

122. Alyssa Goldman, *How Much Would Eliminating Drug Crimes Decrease Racial/Ethnic Gaps in Criminal Conviction?* 76 SOC. SCI. RSCH. 65 (2018).

of overcrowding is not a new one, the COVID pandemic has highlighted how unprepared prisons were to protect inmates from the outbreak of a deadly virus.

On March 25, 2020, the CDC released guidelines for the mitigation of the COVID-19 spread in correctional settings.¹²³ For example, it defined quarantine as “the practice of separating individuals who have had close contact with someone with COVID-19 to determine whether they develop symptoms or test positive for the disease.”¹²⁴ The use of quarantine in correctional institutions is a commonly used mitigation strategy, and often the response to high case counts.¹²⁵ Unfortunately, none of the 53 state prison systems that were studied adopted all the guidelines recommended by the CDC into their practices.¹²⁶ Because of the inconsistent implementation of the original CDC guidelines and publication of quarantine policies, it is difficult to determine how effective either has been in stopping the spread.¹²⁷

A method of quarantine that has raised a number of ethical questions is the use of solitary confinement in prisons for the purposes of quarantining infected inmates.¹²⁸ While this does provide a temporary solution, scholars and advocates have warned that the overuse of solitary confinement for COVID-19 quarantine in the same spaces that are normally used for punishment can have negative long-lasting physical and mental consequences.¹²⁹ This can also lead to inmates becoming disincentivized from reporting COVID-19 symptoms to avoid solitary confinement and the inability to communicate with loved ones during quarantine.¹³⁰

123. Morgan Maner et al., *COVID-19 in Corrections: Quarantine of Incarcerated People*, PLOS ONE (Oct. 5, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0257842> [<https://perma.cc/5QK2-CKVF>].

124. *Id.* at 2.

125. *Id.* at 7.

126. *Id.* at 4.

127. *Id.*

128. *Id.* at 8.

129. *Id.*

130. *Id.*

2. Availability of Masks and Vaccines

Only 4 of 53 state prison systems are reported to provide masks for incarcerated individuals.¹³¹ This number could potentially be higher, but due to inconsistent reporting, the data are difficult to uncover. This also holds true for vaccinations in prisons. The public policy think tank Prison Policy Initiative found that “data on vaccine administration and booster shots are rare. Only 22 states and the federal system provide vaccination data for incarcerated people and only 15 states and federal prisons provide vaccination data for staff.”¹³² Despite the difficulty in finding updated data, in August of 2021, UCLA Law Behind Bars Data Project reported that 64% of incarcerated individuals are vaccinated, but only 47% of prison staff have received at least one dose of a vaccine.¹³³

3. Substandard Health Care in Prisons

The discussion over inadequate health conditions in prisons is not a new topic. As a response to complaints of inadequate health care services, the National Commission on Correctional Health Care (“NCCCHC”) published guidelines for prisons to follow in 1999.¹³⁴ However, it was last reported in 2014 that a minority of the 4,575 correctional institutions across the U.S. have volunteered to become accredited using these standards.¹³⁵ In 2020, the NCCCHC released surveys, review courses, and online certifications for prisons to complete, but they were suggested “only if prisons had concerns about their own facilities.”¹³⁶ The NCCCHC also provided a suggested framework that included

131. *Id.* at 6.

132. Widra, *supra* note 120.

133. Erika Tyagi & Joshua Manson, *Prison Staff are Refusing Vaccines. Incarcerated People are Paying the Price*, UCLA L. COVID: BEHIND BARS DATA PROJECT (Aug. 12, 2021), <https://uclacovidbehindbars.org/prison-staff-vaccine-refusals> [<https://perma.cc/G2WU-ZYY3>].

134. Berkowitz, *supra* note 113, at 350.

135. Josiah D. Rich et al., *The Need for Higher Standards in Correctional Healthcare to Improve Public Health*, 30 J. GEN. INTERNAL MED. 503 (2014).

136. *Id.*

COVID-19 guidelines for correctional facilities.¹³⁷ Unfortunately, none of the guidelines provided to correctional facilities are mandatory, and thus correctional facilities can follow less stringent standards.¹³⁸ In other words, prison administrators have tremendous autonomy in creating their own health and safety guidelines for their prisons.

In July of 2020, the CDC released guidelines for correctional and detention facilities in three main sections: (1) Operational Preparedness; (2) Prevention; and (3) Management of COVID-19.¹³⁹ Under these guidelines, individuals suspected of having COVID are to be placed under medical isolation.¹⁴⁰ The difficulty with this, however, is the majority of prisons do not allow prisoners to visit the emergency room whenever they desire.¹⁴¹ They must first seek out a prison guard for assistance, which can be a challenge.¹⁴² Further, most prisons do not have hospitals within their facility to help provide proper medical care to sick or injured inmates.¹⁴³ To make matters worse, the ratio of clinical staff to prisoners is unjustifiably low.¹⁴⁴

4. Prison Traffic

Prisons are more than just cages for the convicted. Dozens of prison staff and employees come to work in these facilities every day. While prisons are designed to keep people locked away, there is a surprisingly consistent amount of traffic in and out of prisons. With visitation, transfers, and staff leaving or entering the building daily, the risk of exposure to the virus is dramatically increased.¹⁴⁵ This is especially true in prisons with low staff vaccination rates. In fact, research has shown that COVID-19 cases are 9% higher in counties with a prison.¹⁴⁶ In addition, there

137. Berkowitz, *supra* note 113, at 360.

138. *Id.*

139. *Id.* at 361.

140. *Id.*

141. *Id.* at 363.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

have been reports of prisoners who have already tested positive for the COVID-19 virus but still are being transferred to different prisons, further increasing the risk of exposure to the virus.¹⁴⁷

5. Jails and other Detention Centers

While the main focus of this section has been on the spread of COVID-19 in prisons, the risk of exposure to the virus in jails and detention centers is equally problematic. Jails are significantly different from prisons in their design because they are only intended to hold people for several days or weeks at the most. Roughly thirteen million people pass through jails in the United States every year, and jails are located in almost every county.¹⁴⁸ In June of 2021, 80% of the largest COVID-19 outbreaks came from detention centers such as jails.¹⁴⁹

In response, certain measures were taken to decrease jail populations by local officials such as police issuing citations instead of arrests, courts reducing cash amounts for bail, and prosecutors declining to charge people for “low level offenses.”¹⁵⁰ But as research has shown, these changes to decrease jail populations did not last long as the calls for “business as usual” grew louder.¹⁵¹ In a sample of 415 jails across the country, 83% have shown an increase in their population and 28% have reported higher populations in February 2022 than in March of 2020.¹⁵² This dramatic growth in population shows almost a

147. Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed to Get Out*, NPR (Mar. 7, 2022, 5:00 AM), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get-> [<https://perma.cc/CQ7K-2XAY>].

148. Megha Ramaswamy et al., *Recommendations for Delivering COVID-19 Vaccine in Jails: Evidence from Kansa, Iowa, Nebraska, and Missouri*, 111 AM. J. PUB. HEALTH 1035, 1035 (2021).

149. *Id.*

150. Emily Widra, *State Prisons and Local Jails Appear Indifferent to COVID Outbreaks, Refuse to Depopulate Dangerous Facilities*, PRISON POL’Y INITIATIVE (Feb. 10, 2022), https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/ [<https://perma.cc/4VBB-8FJ9>].

151. *Id.*

152. *Id.*

deliberate indifference to the thousands of COVID-19 cases linked to individual county jails.¹⁵³

Unfortunately, jails are not the only type of detention centers that have struggled with controlling the virus in high populations of detainees. In January of 2022, it was announced that the number of coronavirus infections among immigrants detained at U.S. Immigration and Customs Enforcement (ICE) detention centers had surged by 520%.¹⁵⁴ By January 14th, there were 1,766 immigrants being monitored or isolated at ICE detention facilities due to confirmed coronavirus infections.¹⁵⁵ According to ICE's records, 48,246 detainees have received at least one dose of a coronavirus vaccine that they began distributing in November of 2021. However, 37.6% of immigrant detainees who have been offered the vaccine by the agency have declined it.¹⁵⁶ This high percentage of denials is especially concerning when one considers that government records show there were 5,200 immigrants in ICE detention as of late December whose health issues or age placed them at higher risk of getting ill or dying if they contracted the virus.¹⁵⁷

6. Early Release for Higher-Risk Populations

The COVID-19 virus can impact each person infected with it differently. For example, some infected people can have no symptoms at all, while others can become so sick, they must be immediately hospitalized and require a breathing machine.¹⁵⁸ Members of the “higher risk” population are more susceptible to severe complications with the virus than the general population.¹⁵⁹

153. *Id.*

154. Camilo Montoya-Galvez, *Coronavirus Infections Inside U.S. Immigration Detention Centers Surge by 520% in 2022*, CBS NEWS, <https://www.cbsnews.com/news/immigration-detention-covid-cases-surge/> [<https://perma.cc/TVW3-NHFB>] (last updated Jan. 14, 2022, 4:44 PM).

155. *Id.*

156. *Id.*

157. *Id.*

158. MAYO CLINIC, *COVID-19: Who's at Higher Risk of Serious Symptoms?*, (Sept. 27, 2022), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-who-is-at-risk/art-20483301> [<https://perma.cc/CN5X-CF8B>].

159. *Id.*

The Mayo Clinic determined that the higher-risk population includes people who have lung problems, heart disease, brain and nervous system conditions, diabetes or obesity, a weakened immune system, cancer, kidney or liver disease, mental health conditions, down syndrome, or are 65 or older.¹⁶⁰

In March of 2020, former Attorney General William Bar sent a memo to the Bureau of Prisons (“BOP”) Director acknowledging that some vulnerable inmates would be safer under home confinement in certain circumstances.¹⁶¹ The memo included a non-exhaustive list of factors that the BOP Director could use in selecting inmates for home confinement, such as: the age of the inmate, level of security used to confine the inmate, the inmate’s prison conduct, and the danger the inmate posed to the community.¹⁶² One day after the delivery of this memo to the Attorney General, former President Trump signed the CARES Act into law.¹⁶³ This act was designed to broaden the group of people the BOP could release on home confinement.¹⁶⁴

In April, William Bar sent another memo to the BOP stating, “for all inmates you deem suitable for home confinement, you are directed to immediately process them for transfer, following a 14-day quarantine, into the residence to which the inmate is being transferred.”¹⁶⁵ In addition, the memo stated, “Given the speed with which this disease has spread through the general public, it is clear that time is of the essence. Please implement this memorandum as quickly as possible and keep me closely apprised of your progress.”¹⁶⁶ As of March of 2022, there have been more

160. *Id.*

161. MEMORANDUM FROM THE ATTORNEY GEN. TO DIR. OF BUREAU OF PRISONS ON PRIORITIZATION OF HOME CONFINEMENT AS APPROPRIATE IN RESPONSE TO COVID-19 PANDEMIC (Mar. 26, 2020).

162. *Id.*

163. Anderson & Jingnan, *supra* note 147.

164. *Id.*

165. MEMORANDUM FROM THE ATTORNEY GEN., TO DIR. OF BUREAU OF PRISONS ON INCREASING USE OF HOME CONFINEMENT AT INSTITUTIONS MOST AFFECTED BY COVID-19 (Apr. 3, 2020).

166. *Id.*

than 38,000 people released to home-confinement, and 6% of that number were released as a direct result of the CARES Act.¹⁶⁷

b. The Ethical Issues of the CARES Act

Under the CARES Act, the previously used 10% exception, which allowed home confinement eligibility for inmates with only six months remaining on their sentence, was temporarily removed.¹⁶⁸ The intention behind this was to reduce the exposure to COVID-19 in prisons by increasing the pool of eligible inmates that could serve the remainder of their sentence in home confinement.¹⁶⁹ However, there was consistent uncertainty circling the inmate selection process for home confinement.

Eligibility for release under the Act was originally for minimum-security inmates with no disciplinary issues or violent priors, but over time, it expanded, allowing prison wardens to make referrals.¹⁷⁰ Interestingly, the demographics, such as age, race or gender, of the thousands of people released under the Act are virtually non-existent. This makes it difficult to discern whether the “at-risk” or minority populations, particularly African Americans, have had the opportunity to benefit from this new policy. To add even more complexity to the Act, there is an unexpected twist to the home confinement program. Before leaving office in January of 2021, the Justice Department under the Trump Administration issued a final memo requiring those

167. Anderson & Jingnan, *supra* note 147.

168. Walter Pavlo, *Federal Inmates Eligible for Home Confinement Under CARES Act Pled for Their Release from Prison*, FORBES (July 21, 2021, 12:13 PM), <https://www.forbes.com/sites/walterpavlo/2021/07/21/federal-inmates-eligible-for-home-confinement-under-cares-act-pled-for-their-release-from-prison/?sh=478a35a14afc> [https://perma.cc/95J6-W4XC].

169. Ashish Prashar, *This Group Has a Lot to Lose When the Covid Emergency Ends*, CNN, <https://www.cnn.com/2021/09/30/opinions/cares-act-home-confinement-biden-prashar/index.html> [https://perma.cc/2BUC-GLCF] (last updated Sept. 30, 2021, 12:22 PM).

170. Paulina Smolinski, *Inmates on Home Confinement Could Be Sent Back to Prison After the Pandemic: Why Make Us Go Back and Do It Again?* CBS News (Sept. 3, 2021, 1:07 PM), <https://www.cbsnews.com/news/inmates-home-confinement-covid-pandemic-return/> [https://perma.cc/FSW7-XRAE].

inmates released under the CARES Act to return to prison once the COVID-19 pandemic had been declared officially over.¹⁷¹

This memo has raised numerous issues that have yet to be fully addressed by government officials. To begin, many of the released inmates have rejoined their families and taken full advantage of this second chance at life. Some have found stable employment and the majority have not violated the terms of their release.¹⁷² Jessica Jackson, chief advocacy officer at Reform Alliance, a non-profit dedicated to sentencing reform, was quoted asking “what are you accomplishing?”¹⁷³ She went on to say, “I don’t know many jobs out there who are willing to wait for somebody to come back.”¹⁷⁴ Indeed, the logic behind such an immoral arrangement which intends to drag people back to prison who have already been deemed a non-threat to society and who have also found a way to reintegrate themselves into society seems contradictory to the foundation of the criminal legal system.

This begs the question: Is the American criminal legal system designed to punish people for the rest of their lives for their mistakes, or do we intend to reintegrate our formerly incarcerated people back into society once they have paid their dues? Especially black families that have been destroyed by the drug war and mass incarceration that now have a chance to be made whole again. Not to mention that it costs roughly \$37,000 a year to incarcerate someone in federal prison, and home confinement saves millions in tax dollars.¹⁷⁵

The Biden Administration has taken small steps toward addressing the concerns around the return policy of the CARES Act. In September of 2021, the White House spokesperson announced the Biden Administration would begin the clemency

171. *Id.*

172. *NCLA Refutes BOP’s Attempt to Dismiss Home Confinement Lawsuit for Medically Vulnerable Inmate*, NCLA (Oct. 26, 2021), <https://nclalegal.org/2021/10/ncla-refutes-bops-attempt-to-dismiss-home-confinement-lawsuit-for-medically-vulnerable-inmate/> [<https://perma.cc/K7KS-8SW8>].

173. Smolinski, *supra* note 170.

174. *Id.*

175. Prashar, *supra* note 169.

process for certain inmates released to home confinement.¹⁷⁶ This process will begin with a review of nonviolent drug offenders with four years or less to serve.¹⁷⁷

c. The Beginning of Inmate Claims under the Eighth Amendment

As COVID-19 cases rapidly increase in jails and prisons, so do the lawsuits by inmates claiming cruel and unusual punishment for substandard prison conditions.¹⁷⁸ The United States Supreme Court first applied the Eighth Amendment to prison conditions in 1976, in the case of *Estelle v. Gamble*.¹⁷⁹ In this case, an inmate sustained a back injury while performing prison work, and after receiving what he felt was inadequate treatment, he subsequently brought an action for cruel and unusual punishment against prison officials and the chief medical officer for failing to provide adequate medical treatment.¹⁸⁰

When the case reached the Supreme Court, it concluded that “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.”¹⁸¹ In addition, the Court required a prisoner to “allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs,” for there to be a violation of the Eighth Amendment.¹⁸² This case affirmed that the failure to provide basic medical care to an inmate violates the Eighth Amendment prohibition against cruel and unusual punishment.¹⁸³ This protection also requires

176. Jason Hoffman & Christina Carrega, *Administration to Start Clemency Process for Some Federal Inmates on Home Confinement Due To Covid Conditions*, CNN (Sept. 13, 2021, 7:22 PM), <https://www.cnn.com/2021/09/13/politics/clemency-covid-biden-administration/index.html> [<https://perma.cc/H8QZ-XCVW>].

177. *Id.*

178. Berkowitz, *supra* note 113, at 351.

179. *Id.*

180. *Estelle v. Gamble*, 429 U.S. 97, 98 (1976).

181. *Id.* at 104.

182. *Id.* at 106.

183. Rich et al., *supra* note 135, at 503.

that prisoners be afforded a minimum standard of living. was remanded back to the court of appeals.¹⁸⁴

Five years later, the Supreme Court in *Rhodes v. Chapman* was presented with the question of whether housing two inmates in a single cell at the Southern Ohio Correctional Facility was cruel and unusual punishment.¹⁸⁵ At the core of the complaint, the inmate alleged that the “double celling,” or putting two inmates in a cell, confined cellmates too closely.¹⁸⁶ In its decision, the Court held that, “to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”¹⁸⁷ In addition, the Court stated, “the Constitution does not mandate comfortable prisons.”¹⁸⁸ At the conclusion of the case, the Supreme Court held that the prison facility did not offend constitutional norms and that “double celling” is not per se impermissible.¹⁸⁹

The next Supreme Court case, *Wilson v. Seiter*, addressed poor prison conditions.¹⁹⁰ In this case, the inmate’s complaint alleged overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically-ill inmates.¹⁹¹ In its reasoning, the Court applied the “deliberate indifference” standard created in *Estelle*.¹⁹² In determining the intent of prison officials, the Court stated, “if the pain inflicted is not formally meted out as punishment, some mental element must be attributed to the inflicting officer before it can qualify under the Eighth Amendment.”¹⁹³ Further the Court held, “an intent requirement is either implicit in the word ‘punishment’ or

184. *Id.*

185. *Rhodes v. Chapman*, 425 U.S. 337, 337 (1981).

186. *Id.* at 340.

187. *Id.* at 347.

188. *Id.* at 349.

189. *Id.* at 368.

190. *Wilson v. Seiter*, 501 U.S. 294 (1991).

191. *Id.* at 296.

192. *Id.* at 297.

193. *Id.* at 300.

it is not; it cannot be alternately required and ignored as policy considerations might dictate.¹⁹⁴ Ultimately, the Court vacated and remanded the case for reconsideration because the lower courts improperly applied the standard of “maliciously and sadistically for the purpose of causing harm” instead of “deliberate indifference”.¹⁹⁵

Finally, in 1994, the Supreme Court in *Farmer v. Brennan* provided additional interpretation of the holding in *Estelle*. The petitioner inmate was a transsexual female diagnosed with a rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex and who typically seeks medical treatment to bring about a permanent sex change.¹⁹⁶ The complaint alleged that respondents, the prison authorities, placed petitioner in its general population despite knowledge that the penitentiary had a violent environment, a history of inmate assaults, and that petitioner, as a transsexual who projected feminine characteristics, would be particularly vulnerable to sexual attack by other inmates. Petitioner alleged this amounted to a deliberate indifference to her safety.¹⁹⁷ In its holding, the Court denied the petitioner’s argument.¹⁹⁸ Writing for the majority, Justice Souter stated, “a prison official may only be held liable under the Eighth Amendment for denying humane conditions of confinement if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”¹⁹⁹

The Supreme Court has used the previously mentioned cases to establish the foundation for claims of cruel and unusual punishment by prison inmates. Since the start of the pandemic, there have been dozens of new cases filed by inmates concerned with the lack of safety procedures implemented by their prison institutions. Unfortunately, the deliberate indifference standard has prevented many of their claims from succeeding.

194. *Id.* at 301–02.

195. *Id.* at 302, 306.

196. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

197. *Id.* at 831.

198. *Id.* at 847.

199. *Id.*

PART III: EIGHTH AMENDMENT CLAIMS OF CRUEL AND
UNUSUAL PUNISHMENT DURING COVID-19

To argue for the need of successful claims of “cruel and unusual punishment,” it is important to analyze the original purpose of the Eighth Amendment. While it is impossible to know exactly what was in the mind of James Madison when he was drafting the Bill of Rights, there is historical evidence that suggests the purpose of this particular Amendment was intended to “protect against discriminatory imposition of severe punishments.”²⁰⁰ In addition, the text of the Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”²⁰¹ Fast forward a few centuries, and these words seem to be insignificant in how the majority of courts have handled the habeas petitions of inmates during the COVID-19 pandemic. Visiting Assistant Professor at the Ohio State University Moritz College of Law, Michael L. Zuckerman wrote, “what COVID made plain was that being locked inside a government compound with a lot of people can itself pose a substantial risk of harm, and leaving people locked inside there, despite knowing that fact can and should give rise to a colorable Eighth Amendment claim.”²⁰²

The courts have largely held that prisoners are unable to meet both the objective and subjective requirements of the Eighth Amendment claim, despite the COVID outbreak in prisons.²⁰³ More specifically, inmates have been unable to prove they are both (1) incarcerated under conditions posing a substantial risk of serious harm, and (2) that the prison officials knew of and disregarded an excessive risk to inmate health or safety.²⁰⁴ As stated by the Supreme Court in *Farmer*, “what the prison official

200. Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1150 (2014).

201. Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. STATE L. REV. 441, 456 (2021).

202. Michael Zuckerman, *When the Conditions are the Confinement: Eighth Amendment Habeas Claims During Covid-19*, 90 CIN. L. R. (2021).

203. *Id.* at 45.

204. *Id.*

actually knew is a question of fact subject to demonstration, including circumstantial evidence.”²⁰⁵

To overcome the second requirement, also known as the subjective requirement, litigants must prove that prison authorities knew of the risk and still did not do enough to keep inmates safe during the pandemic.²⁰⁶ However, “prison officials who actually knew of the risk to inmate health and safety may be found free from liability if they responded reasonably to the risk. Even if the harm was ultimately not averted.”²⁰⁷ This quote from the *Farmer* holding has led to most courts being satisfied with whatever COVID plan prisons have in place.²⁰⁸ Whether the plan is actually being fully implemented by the institution or successfully preventing the spread of the virus appears to be less important to judges in the following habeas cases based upon the *Farmer* standard.

For example, in the April 2020 case *Valentine v. Collier*, the inmates in a Texas prison filed a class action lawsuit against the warden and the prison executive director for violations of the Eighth Amendment.²⁰⁹ They alleged that the defendants acted with deliberate indifference to plaintiffs’ health and safety in violation of the Eighth Amendment in light of the dangers of COVID-19 for a geriatric prison population.²¹⁰ The district court entered a preliminary injunction and concluded that the defendants were deliberately indifferent. They ordered the defendants to do things such as provide access to hand sanitizer, hand soap, disposable hand towels, new gloves, and masks.²¹¹ Yet, on appeal, the 5th Circuit did not find that the prison officials were deliberately indifferent in their actions during the pandemic, and thus there was no Eighth Amendment violation.²¹²

Similarly, in *Swain v. Junior*, the Eleventh Circuit ruled in May of 2020 that the inmates failed to demonstrate that the

205. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

206. Zuckerman, *supra* note 202, at 45.

207. *Farmer*, 511 U.S. at 844.

208. Zuckerman, *supra* note 202, at 46.

209. *Valentine v. Collier*, 993 F.3d 270, 277 (5th Cir. 2021).

210. *Id.* at 278.

211. *Id.* at 279.

212. *Id.* at 284.

defendant was deliberately indifferent under the Eighth Amendment.²¹³ The plaintiffs in the case were medically vulnerable inmates at the Metro West detention center who were concerned about their exposure to the virus while incarcerated.²¹⁴ The plaintiffs asserted that Miami-Dade County inadequately responded to COVID-19 and violated their constitutional rights.²¹⁵ The court determined that the detention center implemented a satisfactory amount of safety measures to curb the virus.²¹⁶ The court cited an expert report stating, “the defendants are doing their best to balance social distancing and regulations applicable to the facility.”²¹⁷ In addition, the court held that lapses in uniformly implementing social-distancing polices cannot be considered deliberately indifferent when there is no finding that the lapses were approved or ignored by the defendants.²¹⁸

Finally, in June of 2020, the Sixth Circuit in *Wilson v. Williams* vacated the district court’s preliminary injunction because it found the petitioners did not show a likelihood of success on the merits of their Eighth Amendment claim.²¹⁹ The petitioners were inmates in Elkton Federal Correctional Institution, and they filed a petition on behalf of themselves and future inmates to obtain release from custody to limit their exposure to the COVID-19 virus.²²⁰ They argued that the defendant’s approach and procedures were limited in effectiveness due to the dorm-style housing, thus making it impossible to maintain physical distance.²²¹ They also alleged that the supplies, such as masks and soap, were too limited, and the essential worker inmates who were required to circulate throughout the prison were at a heightened risk of exposure to the virus because they were forced to interact with others outside of their housing

213. *Swain v. Daniel*, 958 F.3d 1081, 1088–89 (11th Cir. 2020).

214. *Id.* at 1085

215. *Id.*

216. *Id.* at 1090.

217. *Id.* at 1089.

218. *Id.*

219. *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020)

220. *Id.* at 832–33.

221. *Id.* at 834.

unit.²²² However, the Sixth Circuit ultimately found that the prison authorities responded reasonably to the virus by implementing measures such as a six-phase action plan to stop the spread in their facility and, therefore, responded reasonably.²²³

In his dissenting opinion, Chief Judge Cole stated that the “defendants cast their overall response to COVID as a multiphase action plan. While it may sound good on paper, it means little until we look behind the curtain and examine whether the plan’s phases move the prison closer to keeping inmates safe.”²²⁴ He continues: “such examination reveals that the six-phase plan to address COVID is far less impressive than its title suggests.”²²⁵ Chief Judge Cole also points out that in the nineteen days that passed between the Attorney General’s directive to utilize home confinement, “the record does not reflect a substantial effort on the part of the defendants to evaluate the 837 medically vulnerable inmates for home confinement.”²²⁶ He concludes by saying “I am left with the inescapable conclusion that the defendant’s failure to make use of its home confinement authority constitutes sufficient evidence for the district court to have found that the petitioners were likely to succeed on their Eighth Amendment claim.”²²⁷

With few exceptions, courts have been satisfied with the bare minimum by prison authorities to meet the *Farmer* standard of a reasonable response to prevent the spread of the virus. Fortunately, there are two cases where petitioners successfully brought habeas claims and sufficiently proved that their rights were violated under the Eighth Amendment by prison institutions. The first case was brought by four inmates at the FCI Danbury prison in *Martinez-Brooks v. Easter*.²²⁸ The petitioners alleged that the prison officials were making limited use of their home confinement authority granted by the Attorney General and that they also failed to take adequate safety

222. *Id.* at 835.

223. *Id.* at 841.

224. *Id.* at 848.

225. *Id.*

226. *Id.* at 847.

227. *Id.*

228. *Martinez-Brooks v. Easter*, 459 F. Conn Supp. 3d 411, 416 (2020).

measures to protect inmates from the outbreak.²²⁹ The district court ultimately agreed and granted a temporary restraining order.²³⁰ Additionally, the court issued an order requiring the warden of the prison to adopt an accelerated evaluation process for inmates eligible for home confinement and other forms of release.²³¹

In his decision, Judge Michael Shea noted that out of the 1,000 inmates in the facility, only 159 had been reviewed for home confinement and only 21 were actually released, despite Attorney General William Barr emphasizing the urgency in his April 3rd memo for facilities to utilize this power to curb the spread of the virus.²³² In addition, the court found that the criteria being used to evaluate inmates for home confinement evidenced a disregard for serious health risks faced by vulnerable inmates.²³³ Per Judge Shea: “For the medically vulnerable inmates at the FCI Danbury, this failure bolsters the court’s conclusion that petitioners have shown a likelihood of success on their claim of the defendant’s being deliberately indifferent in violation of the Eighth Amendment.”²³⁴ Judge Shea also noted that the prison warden had not approved any of the 241 compassionate release requests it had received since the beginning of the pandemic.²³⁵ “I find that the warden’s handling of compassionate release requests bolsters the finding of deliberate indifference.”²³⁶ In this case, the prison officials did not appeal, and the parties promptly negotiated a settlement that would allow for expanded use of home confinement pursuant to the court’s order.²³⁷

In the second successful federal COVID-19 habeas case, a district court in California granted the petitioner’s motion for preliminary injunction in *Torres v. Milusnic*.²³⁸ In this case, the

229. *Id.* at 415.

230. *Id.*

231. *Id.*

232. *Id.* at 427.

233. *Id.* at 442.

234. *Id.* at 444.

235. *Id.* at 429.

236. *Id.* at 441.

237. Zuckerman, *supra* note 202, at 20.

238. *Torres v. Milusnic*, 472 F. Supp. 3d 713, 746 (2020).

petitioners were federal inmates incarcerated at the FCI/USP Lompoc prison facility.²³⁹ Their complaint asserted unconstitutional conditions of confinement in violation of the Eighth Amendment.²⁴⁰ In their preliminary injunction request, they asked the court to require respondents to expedite review and determination of eligibility of Lompoc inmates for home confinement, compassionate release, and to also improve the conditions for inmates in Lompoc in light of COVID.²⁴¹

In his decision, Judge Consuelo Marshall stated, “the petitioners showed that they are at a substantial risk of exposure to COVID-19, which is inconsistent with contemporary standards of human decency.”²⁴² He also noted that “the evidence demonstrates the defendant’s have ignored, and therefore have likely been deliberately indifferent, to the known urgency to consider inmates for home confinement. Especially those most vulnerable to severe illness or death if they contract the COVID-19 virus.”²⁴³ Ultimately, the court granted the petitioners motion for a preliminary injunction.²⁴⁴

Similar to the previously discussed FCI Danbury prison, the Lompoc prison warden was not taking full advantage of the compassionate release and home confinement authority granted by the CARES Act which was strongly encouraged by the Attorney General. While these cases present only small victories compared to the many loses inmates have suffered during the pandemic, there are still some key takeaways. First, prisons are not urgently considering the importance of releasing the medically vulnerable class of inmates. Second, courts have found that a lackadaisical use of the home confinement and compassionate release authority can be considered a violation of the Eighth Amendment.

The final takeaway is that virtually no prison has the resources or available space to manage the virus on their own, making it impossible for them to truly abide by the CDC recommendations to prevent the spread. Therefore, it is clear that

239. *Id.* at 718.

240. *Id.*

241. *Id.*

242. *Id.* at 727.

243. *Id.* at 738.

244. *Id.* at 746.

while the COVID-19 virus continues to spread within prisons, no inmate is safe from exposure. This remains especially true for black inmates that are already a medically vulnerable class, largely due to systemic racism in healthcare.²⁴⁵ The next section will explain how black inmates can succeed on their Eighth Amendment claim considering both the incarceration disparity during the War on Drugs and the failure of prisons to adequately protect them from the COVID virus.

PART IV: CREATING A SUCCESSFUL EIGHTH AMENDMENT CLAIM FOR BLACK INMATES

As of March 2022, there are now over 582,000 reported COVID-19 cases in prisons.²⁴⁶ Based on the court's decision in *Martinez-Brooks v. Easter*, black inmates have a legitimate habeas claim where they can contend that the fact of their confinement in prison itself amounts to an Eighth Amendment violation under the circumstances arising during the COVID-19 pandemic.²⁴⁷ To be more specific, the circumstances at issue are that most prison institutions have been unable to maintain the necessary health and safety resources to sufficiently protect inmates from the virus.²⁴⁸ In addition, overcrowding and limited space make CDC recommended social distancing impossible. Because of this, satisfying the objective component of the Eighth Amendment claim or showing that inmates are incarcerated under conditions posing substantial risk of serious harm should not be a challenge.²⁴⁹ The difficulty lies in the subjective component of deliberate indifference, which requires a showing that prison authorities knew of and consciously disregarded an

245. Deborah Barfield Berry, *Health Issues for Blacks, Latinos and Native Americans May Cause Coronavirus to Ravage Communities*, USA TODAY (Mar. 31, 2020, 7:36 AM), <https://www.usatoday.com/story/news/nation/2020/03/30/coronaviruscases-could-soar-blacks-latinos-and-native-americans/2917493001/> [https://perma.cc/4H9B3434].

246. *The COVID Prison Project*, <https://covidprisonproject.com> [https://perma.cc/5QE7-4UGC] (last visited Jan. 25, 2023).

247. *Martinez-Brooks*, 459 F. Supp. 3d at 442–43; see also Torres, 472 F. Supp. 3d at 725.

248. Berkowitz, *supra* note 113, at 363.

249. *Farmer*, 511 U.S. at 834.

excessive risk to the lives of black inmates.²⁵⁰ But based on the information presented in this note, black inmates should be able to overcome this obstacle as well.

It is well documented that African Americans generally have underlying health issues that are often the result of systematic racism and limited access to health care such as asthma and heart disease, making them more vulnerable to complications with COVID-19.²⁵¹ “Long before the pandemic, black people have experienced health disparities; including lack of access to quality care and health insurance.”²⁵² Therefore, black inmates should be considered a medically vulnerable class under the CDC risk factors which list illnesses, including heart disease, that are more likely to cause the patient to be very sick or die from COVID-19 exposure.²⁵³ In his April 3rd memo, William Barr directed prison authorities to “immediately review all inmates that have COVID-19 risk factors.”²⁵⁴ In addition, he told prison officials that “your review should include all at-risk inmates.”²⁵⁵ Even the *Easter* court pointed out that the Attorney General directed the Bureau of Prisons to “move with dispatch in using home confinement to move vulnerable inmates out of these institutions.”²⁵⁶

To date, there is no record of any prison officials using race as a factor in their home confinement review during the pandemic, despite the well-established research that suggests that black people are a medically vulnerable group. In *Easter*, Judge Shea found that the petitioners showed a likelihood of success on their claim of deliberate indifference in violation of the Eighth Amendment by demonstrating the prison warden failed to transfer medically vulnerable prisoners to home confinement in

250. *Id.*

251. Berry, *supra* note 245.

252. *Id.*

253. CTRS. FOR DISEASE CONTROL AND PREVENTION, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/6BV8-7SQA>] (last updated Dec. 6, 2022).

254. OFF. OF ATTORNEY GEN., MEMORANDUM FOR DIRECTOR OF BUREAU OF PRISONS: INCREASING USE OF HOME CONFINEMENT AT INSTITUTIONS MOST AFFECTED BY COVID-19 (Apr. 3, 2022).

255. *Id.*

256. *Martinez-Brooks*, 459 F. Supp. 3d at 426.

any meaningful numbers.²⁵⁷ Therefore, because black inmates are a medically vulnerable class due to systemic racism in our nation's healthcare system and are also disproportionately at risk of contracting COVID-19 in prisons, largely because of the policies of the War on Drugs, they have a claim under the Eighth Amendment against prison wardens and other prison officials that have not prioritized their release for home confinement during the COVID-19 pandemic.

PART V: COMPASSIONATE RELEASE

As explained by the district court in *Martinez-Brooks v. Easter*, under 18 U.S.C. § 3582(c)(1)(A), compassionate release occurs when “a sentencing court may, upon the motion of the Director of the Bureau of Prisons, or the motion of the defendant, reduce a defendant’s term of imprisonment if it finds that extraordinary and compelling reasons warrant such a reduction.”²⁵⁸ Judge Shea in this case also noted that the Bureau of Prisons has not updated the standard for compassionate release to include the current pandemic and the risk of infections in prisons.²⁵⁹

While there has been an increase in court-granted compassionate release from 24 inmates in 2018 to 1,805 inmates in 2020, there are no records or reports indicating the Bureau of Prisons has been using this authority to grant early release to black inmates that have been disproportionately and unjustifiably incarcerated as a result of the War on Drugs.²⁶⁰ Because the Bureau of Prisons has not updated the standard for compassionate release to include health concerns in prisons during the COVID-19 outbreak, keeping a medically vulnerable class of people incarcerated that were also the victims of racially motivated and discriminatory drug laws should be more than sufficient to meet the “extraordinary and compelling reason” for a compassionate release motion from the Director of the Bureau of Prisons on behalf of black inmates.

257. *Id.* at 441.

258. *Id.* at 428.

259. *Id.*

260. Pavlo, *supra* note 168.

CONCLUSION

The purpose of this note was to provide the reader with three main takeaways. First, the War on Drugs is still being used to enforce racist and discriminatory drug policies to target and incarcerate black people at a high rate. While this war is not televised as much as it was under the Nixon, Reagan, and Clinton administrations, the war is still ongoing. Billions of dollars are spent each year on drug enforcement, and the trafficking of crack cocaine still carries hefty penalties. In addition, the disproportionate enforcement of marijuana drug policies on black people does not receive as much attention as cocaine did during the War on Drugs at its peak, but it has had an equally devastating impact on the black community. While progress has been made in the disparity in sentencing between crack and powder cocaine and the legalization of marijuana, the racist enforcement of drug policies still impacts black people more than any other race of people. The 18:1 ratio disparity between crack and powder cocaine needs to be changed into a 1:1 ratio because there is no justifiable reason for treating two versions of the same drug differently.

The second important takeaway is that black inmates are a medically vulnerable class and should receive priority consideration for home confinement due to the health risks associated with COVID-19 in prisons. The COVID-19 virus has a higher risk of causing death and severe illness in the black community because of their pre-existing medical vulnerability that stems from discrimination in the healthcare system. Although prison inmates as a whole are at risk of contracting the virus due to the inconsistent implementation of health and safety policy protocols, black inmates suffer the greatest risk of exposure to the virus.

The third takeaway is that compassionate release should be a tool used by the Director of the Bureau of Prisons to release black inmates that have suffered disproportionate and discriminatory prison sentences as a result of the War on Drugs. The “extraordinary and compelling reason” standard set by the Bureau for this form of early release should be easily met by the black inmates that have been forced to suffer unjustifiable prison sentences during the War on Drugs while there is also a deadly virus spreading in our nation’s prisons.

It is imperative that black inmates succeed on their Eighth Amendment claims of cruel and unusual punishment with the

arguments presented in this note to prevent them from suffering the inescapable death sentence that is incarceration during a pandemic.