THE EPIDEMIC CONFINED WITHIN THE PANDEMIC — THE AMERICAN PRISON SYSTEM MUST VIEW OPIOID USE DISORDER AS A HEALTH CRISIS DURING THE COVID-19 PANDEMIC AND BEYOND

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INTRODUCTION

The COVID-19 pandemic has exposed a myriad of vulnerabilities in the prison healthcare system. Prison healthcare has long lagged behind that available to nonincarcerated individuals, but the severity of this lag has been obfuscated behind high walls and barbed wire. The novel virus has cast new light on how profoundly ill-equipped the prison health care system is to handle a health crisis. As spread of the virus is more likely when individuals are in prolonged contact with one another close proximity, those incarcerated in correctional facilities are at a greater risk of contracting COVID-19 due to their close living arrangements.[1] Once the virus enters a secure facility, incarcerated individuals are reliant on prison administration and staff to enact and follow Centers for Disease Control (CDC) guidelines.[2] For prisoners, "[i]t is not a matter of *if*, but *when,* coronavirus shows up . . ."[3] Beyond hypotheticals, the data paints a dismal picture: in the summer of 2020, prisoners' infection rates outpaced those of the general American

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[1] *See* Laura Hawks et al., *COVID-19 in Prisons and Jails in the United States*, 180(8) JAMA INTERNAL MED. 1041-42 (2020), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271 ("The infrastructure of most prisons and jails is [] conducive to spreading disease. Moreover, people who are incarcerated will be at higher risk of exposure, as correctional officers and other staff frequently leave the facility and then return. In prisons and jails, social distancing is typically a physical impossibility.").

[2] *See Guidance for Correctional & Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

[3] *Guidance for Preventive and Responsive Measures to Coronavirus for Jails, Prisons, Immigration Detention and Youth Facilities*, VERA INSTITUTE FOR JUSTICE 1 (Mar. 18, 2020), https://www.vera.org/downloads/publications/coronavirus-guidance-jails-prisons-immigration-youth.pdf.

public by more than 150%.[4] Additionally, prisoner mortality rate as a result of the coronavirus is four times as high when compared to prison staff who test positive for the virus.[5] As state governments implement COVID-19 vaccine rollout plans, inmate vaccination availability and priority is an increasingly debated topic.[6] As such, the pandemic has prompted inmates in both federal and state penitentiaries to petition for release from custodial detention.[7]

In the initial months of the COVID-19 pandemic, prisoners with serious health concerns turned to the previously seldom-used remedy[8] of compassionate release.[9] Federal law allows a court to grant a motion to

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[4] Katie Park et al., *Tracking the Spread of Coronavirus in Prisons,* THE MARSHALL PROJECT (Apr. 24, 2020, 3:05 PM), https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons.

[5] *Id.* (citing *COVID-19 Coronavirus*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus/ (last visited Mar. 30, 2021)).

[6] As of January 2020, six states—Massachusetts, Connecticut, Delaware, Maryland, Nebraska, and New Mexico—have prioritized inmate vaccinations while others have deprioritized them. *See* Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans*, PRISON POLICY INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/. However, forty-four states have declined to prioritize prison workers and inmates on vaccination schedules. *Compare* Austin Sarat, *Here's Why Inmates Should Get Vaccinated Against COVID-19 Before the Rest of Us*, USA TODAY (Dec. 11, 2020), https://www.usatoday.com/story/opinion/policing/2020/12/11/heres-why-inmates-should-get-covid-19-vaccine-before-rest-us-column/3871449001/, *with* Jordan Wilkie, *Deprioritized: NC Prison Inmates Not Getting COVID Vaccine So Soon, Questions Remain About Distribution*, CAROLINA PUB. PRESS (Jan. 11, 2021), https://carolinapublicpress.org/41335/deprioritized-nc-prison-inmates-not-getting-covid-vaccine-so-soon-questions-remain-about-distribution/.

[7] Keri Blankinger et al., *Thousands of Sick Federal Prisoners Sought Release as Covid-19 Spread. Nearly All Were Denied*, NBC NEWS (Oct. 7, 2020, 6:00 AM), https://www.nbcnews.com/news/us-news/thousands-sick-federal-prisoners-sought-release-covid-19-spread-nearly-n1242193.

[8] Compare to the 145 prisoners granted compassionate release in 2019. Charles R. Breyer, Commissioner, *The First Step Act of 2018: One Year of Implementation*, U.S. SENT'G COMMISSION (Aug. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

[9] In order to qualify for compassionate release, an inmate must demonstrate why the factors specified in 18 U.S.C. § 3553(a) justify a reduction in sentence in his particular case. With regard to COVID-19 compassionate release petitions, most courts explicitly address all four factors §§ 3553(a)(2)(A-D): the "need to provide just punishment"; the need "to protect the

reduce a federal prison inmate's sentence if "extraordinary and compelling" circumstances exist.[10] Between the outbreak of COVID-19 in the United States and the fall of 2020, over 1,600 compassionate prison releases were granted to prisoners over health concerns.[11]

The rapid-spreading and potentially fatal nature of the novel coronavirus poses a threat for prisoners with underlying health conditions commensurate with "extraordinary" circumstances.[12] As such, inmates in a federal prison with underlying health conditions have an avenue to escape the deadly pandemic by petitioning for compassionate release under 18 USC § 3582(c)(1)(A).[13] However, case law is muddled when it comes to answering the novel question of which underlying health conditions may qualify an inmate for compassionate release.[14] While case law catches up, incarcerated individuals with severe underlying health conditions caused by opioid use disorder (OUD), and more broadly, substance abuse disorder (SUD) face potentially fatal outcomes.[15] This article will first to explain one option explored by authorities due to the severity of underlying conditions

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public from further crimes of the defendant"; and the particular defendant's likelihood of recidivism, or their "history and characteristics."

[10] 18 U.S.C. § 3582(c)(1)(A)(i). Before the First Step Act of 2018, only the Bureau of Prisons could file a motion for sentence reduction. Under the First Step Act, a defendant also may now file a motion for sentence reduction. Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[11] Breyer, *supra* note 8.

[12] In order to qualify for compassionate release, a prisoner must satisfy the factors detailed in 18 U.S.C. § 3553(a). Even still, district courts may deny relief even if "extraordinary and compelling" reasons would otherwise justify relief. *See., e.g.,* United States v. McGuire, 822 F. App'x 479, 480 (6th Cir. 2020); United States v. Rodd, 966 F.3d 740, 747-48 (8th Cir. 2020).

[13] 18 U.S.C. § 3582(c)(1)(A) (providing in relevant part: "[T]he defendant . . . may reduce the term of imprisonment . . . after [the court] . . . finds that— (i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison . . . for the offense or offenses for which the defendant is currently imprisoned, and . . . that the defendant is not a danger to the safety of any other person or the community . . ."

[14] *Compare* United States v. Shulick, No. 16-428, 2020 WL 3250584 (E.D. Pa. June 16, 2020) (finding that release was not warranted for inmate with obesity and asthma), *with* United States v. Rodriguez, No. 3:17-cr-4477-BTM, 2020 WL 4592833 (S.D. Cal. Aug. 5, 2020) (granting compassionate release for inmate with obesity and asthma).

[15] *See* Marcia Meldrum, *Opioids' Long Shadow*, 22 AMA JOURNAL OF ETHICS 729 (2020).

caused by OUD. This note will also emphasize the importance that courts should place on OUD prisoners seeking compassionate release, especially if the facility the inmate is housed in does not provide medically assisted treatment to ease the effects of withdrawal. Courts should recognize the devastating compounding effects of the opioid epidemic within the coronavirus pandemic, and grant compassionate release requests to those suffering in prison with opioid use disorder as an underlying condition.

I. OPIOID USE DISORDER IMPACT ON THE PRISON POPULATION AND THE UNITED STATES

Individuals with opioid abuse disorder (OUD) face heightened COVID-19 risks due to diminished lung capacity and overall detriment to respiratory health.[16] These comorbidities not only increase risk of serious infection and complications, but also are associated with greater functional impairment and increased health care costs.[17]

The toll that the opioid epidemic has taken on the United States cannot be overstated. On October 26, 2017, President Donald J. Trump directed the Department of Health and Human Services to declare the opioid epidemic a national public health emergency.[18] Such a directive was overdue.[19] In recent decades, opioid overdose has risen rapidly, increasing

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[16] *COVID-19 Resources*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/drug-topics/comorbidity/covid-19-resources ("Because opioids negatively impact lung and heart health, people who use opioids at high doses may be more susceptible to COVID-19 and the illness may be more severe.").

[17] *See Co-Occurring Substance Use Disorder and Physical Comorbidities*, NAT'L INST. ON DRUG ABUSE (Apr. 9, 2020), https://www.drugabuse.gov/publications/research-reports/common-comorbidities-substance-use-disorders/part-2-co-occurring-substance-use-disorder-physical-comorbidities (showing that prison healthcare systems already stretched to max are unlikely to be able to supply specialized care at cost).

[18] *Ongoing Emergencies & Disasters*, CTRS. FOR MEDICARE AND MEDICAID SERVICES (last updated Jan. 23, 2020, 1:29 PM), https://www.cms.gov/About-CMS/Agency-Information/Emergency/EPRO/Current-Emergencies/Ongoing-emergencies.

[19] While the directive was overdue, Americans have been prescribed opiates for more than a century. The "long shadow" of opioids in American history traces back to the widespread prescription of laudanum and morphine throughout the 19th and early 20th centuries. *See e.g.* Meldrum, *supra* note 15, at 279 (describing the prevalence of opioid addiction in the medical field in early America that gave rise to the Harrison Act of 1914, prohibiting the sale of opioids without a prescription).

by nearly 200% between 1999 and 2014.[20] In 2018, 128 people died every day in the United States as a result of an opioid overdose.[21] In 2019, that number rose to 130 people per day.[22] Between 1999 and 2016, more than 350,000 people died from an overdose of opioids, including prescription and illegally-obtained opioids.[23] The annual death toll from prescription opioid overdoses has risen by a staggering degree, quadrupling from 4,030 deaths in 1999 to 16,651 in 2011.[24] Between 2015 and 2016 opioid overdose rates rose by twenty-eight percent resulting in over 42,000 deaths.[25]

This uptick in deaths is driven in part by newly available supplies of illicit fentanyl and other synthetic opioids.[26] One of these synthetic opioids, fentanyl (also prescribed under the names Abstral, Duragesic, Ionsys, or Subsys), is designed and manufactured to help patients with terminal illnesses that cause acute pain spikes, such as end-stage cancer.[27] Unlike

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[20] Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths — United States, 2000–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051e1.pdf [https://perma.cc/PM3S-AWZ4].

[21] *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (Jan. 2019), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis [https://perma.cc/ZLY5-ESWM].

[22] *Id.*

[23] Puja Seth et al., *Overdose Deaths Involving Opioids, Cocaine, and Psychostimulants—United States, 2015–2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 349, 351 (2018).

[24] Li-Hui Chen, *QuickStats: Number of Deaths From Food Poisoning, Drug Poisoning, and Drug Poisoning Involving Opioid Analgesic—United States, 2019–2020*, 62 MORBIDITY & MORTALITY WKLY. REP. 217, 234 (2013).

[25] Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths--United States, 2013-2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 1419, 1421 (2019).

[26] A synthetic opioid is a chemical compound manufactured in a laboratory designed to act on the brain in the same way as natural opioids that are extracted from the seed pod of certain varieties of poppy plants. *See Synthetic Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, (last updated Mar. 19, 2020) https://www.cdc.gov/drugoverdose/data/fentanyl.html [https://perma.cc/D5L7-62QN]; *see also* Julie O'Donnell et al., *Notes from the Field: Overdose Deaths with Carfentanil and Other Fentanyl Analogs Detected – 10 States, July 2016 – June 2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 767-68 (2018).

[27] *Opioids for Cancer Pain*, AM. CANCER SOC'Y (last updated Jan. 3, 2019), https://www.cancer.org/treatment/treatments-and-side-effects/physical-side-effects/pain/opioid-pain-medicines-for-cancer-pain.html.

OxyContin slow-release formula, fentanyl is up to 100 times stronger than morphine.[28] A fatal dose of fentanyl can occur with as little as 700 micrograms.[29] For illegal drug manufacturers, illicit fentanyl is cheaper to produce and, in order to make a larger profit, is often pressed into shapes that mimic the more expensive Purdue Pharmaceutical's trademark OxyContin pills.[30] Thus, an unsuspecting opioid user may inadvertently become addicted to dangerous, illicit fentanyl.[31]

People with opioid dependencies may deliberately turn to synthetic opioids, like fentanyl or heroin,[32] when the source of opioid pills dries up or the severity of the addiction requires stronger opioids to feel the same pain-killing effects. In 2015, an estimated 20.8 million Americans suffered from substance abuse disorders with an estimated 591,000 Americans having a heroin use disorder.[33]

COVID-19 has had other detrimental effects on other attempts to combat the opioid epidemic, including police departments suspending the practice of administering naloxone over concerns that officers would contract the virus.[34] At the outbreak of the virus, states waffled about whether

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[28] *Fentanyl*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Mar. 19, 2020), https://www.cdc.gov/drugoverdose/opioids/fentanyl.html.

[29] D. Adam Algren et al., *Fentanyl-Associated Fatalities Among Illicit Drug Users in Wayne County, Michigan (July 2005-May 2006)*, 9 J. OF MED. TOXICOLOGY 106, 109 (2013).

[30] *See Synthetic Opiods*, DRUG ENFORCEMENT ADMINISTRATION (Apr. 2020), https://www.dea.gov/sites/default/files/2020-06/Synthetic%20Opioids-2020.pdf.

[31] O'Donnell, *supra* note 26, at 767.

[32] Heroin is a "semi-synthetic" opioid in that it is chemically processed from morphine, which is a natural opiate derived from poppy seeds. *What's the Difference Between Heroin, Fentanyl, Morphine and Oxycodone?*, DRUG POLICY ALLIANCE, https://drugpolicy.org/drug-facts/difference-heroin-fentanyl-morphine-oxycodone (last visited Mar. 21, 2021). Heroin has long presented serious risks to users, but these risks have grown as heroin now commonly contains fentanyl. *Heroin*, CENTRE FOR ADDICTION AND MENTAL HEALTH, https://www.camh.ca/en/health-info/mental-illness-and-addiction-index/heroin (last visited Mar. 21, 2021).

[33] Jonaki Bose et al., *Key Substance Use and Mental Health Indicators in the United States*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION 2, 24 (Sep. 2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015Rev/NSDUH-FFR1-2015Rev/NSDUH-FFR1-2015Rev/NSDUH-National%20Findings-REVISED-2015.pdf [https://perma.cc/Z3M4-VNEN].

[34] Peter Grinspoon, *A Tale of Two Epidemics: When COVID-19 and Opioid Addiction Collide*, HARVARD MEDICAL SCHOOL: HARVARD HEALTH PUBLISHING (Apr. 20, 2020, 2:30

opioid treatment programs were essential services that would remain open or non-essential services that would be shut due to infection concerns.[35] While all states have reopened these clinics,[36] subsequent "waves" of virus threaten to shut them down once again,[37] leaving addicts with devastating and potentially lethal disruptions in treatment.[38] Other states have stressed the necessity of a quick response to the severe risks that arise at the intersection of the opioid epidemic and the COVID-19 pandemic; the Attorney General of New Jersey announced an administrative order, valid for the remainder of the coronavirus crisis, requiring physicians to prescribe naloxone to patients regularly taking higher doses of opioids.[39]

PM), https://www.health.harvard.edu/blog/a-tale-of-two-epidemics-when-covid-19-and-opioid-addiction-collide-2020042019569.

[35] *Compare Ensuring Access to Care in Opioid Treatment Programs*, AMERICAN SOCIETY OF ADDITION MEDICINE (June 30, 2020), https://www.asam.org/Quality-Science/covid-19-coronavirus/access-to-care-in-opioid-treatment-program ("Opioid Treatment Programs (OTPs) must remain stable sources of treatment for patients taking methadone or buprenorphine for opioid use disorders. The COVID-19 crisis has not ended and appears to be worsening the opioid crisis."), *with* United States v. Safehouse, 468 F. Supp. 3d 687, 703 (E.D. Pa. 2020) (citing public policy reasons for upholding a stay order against Safehouse, a supervised injection site, because the city of Philadelphia "[was] confronted with a public health crisis even larger than the opioid epidemic . . . imposing extreme demands on the City's resources and employees. . . . The nerves of citizens are frayed by fear and uncertainty, and that was true before the death of Mr. [George] Floyd and the widespread protests that arose in its aftermath."). *See also* Jodi Manz and Eliza Mette, *State Strategies to Maintain Opioid Use Disorder Treatment During the Coronavirus Pandemic*, NAT'L ACADEMY FOR STATE HEALTH POLICY (Mar. 20, 2020), https://www.nashp.org/state-strategies-to-maintain-opioid-use-disorder-treatment-during-the-coronavirus-pandemic/ (summarizing state approaches to medically-assisted treatment).

[36] *See Ensuring Access to Care in Opioid Treatment Programs*, AMERICAN SOCIETY OF ADDICTION MEDICINE (last updated June 30, 2020), https://www.asam.org/Quality-Science/covid-19-coronavirus/access-to-care-in-opioid-treatment-program ("[Opioid Treatment Programs] are healthcare facilities providing vital healthcare services and have been deemed by [the Substance Abuse and Mental Health Services Administration] as essential.").

[37] Lisa Lockerd Maragakis, *Coronavirus Second Wave? Why Cases Increase*, JOHNS HOPKINS MEDICINE (Nov. 17, 2020), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus.

[38] Grinspoon, *supra* note 34.

[39] *See* Steve Janoski, *New Jersey Says Doctors Must Prescribe Narcan Alongside Opioids for At-Risk Patients*, THE RECORD (May 22, 2020),

The opioid epidemic has been arguably overshadowed by the COVID-19 pandemic, straining federal and municipal resources to the max.[40] Incarcerated individuals suffering from OUD are further forgotten behind the walls of the prison. The majority of individuals do not have access to Medication-Assisted Treatment (MAT) to ease the physical and psychological symptoms of withdrawal[41] and are left hoping and waiting that their underlying conditions will survive the viral infection when coronavirus enters the facility.

II. COVID-19 AND COMPASSIONATE RELEASE FROM THE FEDERAL PENAL SYSTEM

Prisons are unable to adequately follow the guidelines prescribed by the CDC.[42] To prevent transmission, the CDC strongly recommends: frequent and thorough hand washing and sanitizing; avoiding touching one's face; avoiding close contact with sick people; social distancing; covering coughs and sneezes; and cleaning and disinfecting frequently.[43] The CDC guideline of wearing a cloth face cover or other face mask has gone all but ignored by many prison systems. The California prison system, for example, provided hundreds of thousands of masks to inmates and prison staff, but

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https://www.northjersey.com/story/news/new-jersey/2020/05/22/nj-doctors-must-prescribe-narcan-opioids-at-risk-patients/5236736002/.

[40] *See, e.g.*, United States v. Safehouse, 468 F. Supp. 3d 687, 703 (E.D. Pa. 2020) (declining to overturn a stay of operation on a methadone clinic during the pandemic because "[t]he opening of Safehouse would require multiple public meetings, the time and attention of the City Health Department, and the allocation of police resources. Even if one assumes a flawless opening process, the operation of Safehouse would . . . necessarily be disruptive.").

[41] *Rhode Island Establishes MAT for Inmates*, MEDICALLY ASSISTED (Mar. 19, 2018), https://medicallyassisted.com/rhode-island-establishes-mat-inmates/.

[42] Christopher Blackwell & Arthur Longworth, *What Coronavirus Quarantine Looks Like in Prison*, THE MARSHALL PROJECT, (Mar. 18, 2020), https://www.themarshallproject.org/2020/03/18/what-coronavirus-quarantine-looks-like-in-prison; Kanya Bennett, *Federal Wardens Must Immediately Flatten the Curve in Our Nation's Prisons,* ACLU NEWS & COMMENT. (Apr. 13, 2020), https://www.aclu.org/news/prisoners-rights/federal-wardens-must-immediately-flatten-the-curve-in-our-nations-prisons.

[43] *Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 4, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

employees have displayed "indifference" to the rules requiring masks despite high death rates.[44]

Overcrowded U.S. prisons hold hundreds of prisoners in close proximity.[45] Some prisons have dormitory-style housing which requires that dozens of prisoners share sleeping quarters.[46] However, prisoners in individual cells share a main ventilation system which circulates air that spreads droplets between cells.[47] Across the board, prisoners do not have regular and consistent access to adequate soap and water to wash their hands.[48] Hand sanitizer and sanitizing alcohol gels are not available to most inmates as the high-alcohol formulas required to kill viruses and bacteria can be considered contraband.[49] Prison systems are already operating over capacity, meaning social distancing is all but impossible.[50] Furthering inmate plight are the recent data that contracting the disease may protect individuals from reinfection for only few months and may not protect individuals from deviant strains of COVID-19,[51] suggesting that prison populations may soon face resurging waves of COVID-19 infection. Facing the uncertainty of the novel virus, at-risk populations turned to the courts for help.

A. Compassionate Release

At the outset of the pandemic, the Department of Justice recognized the vulnerability of federal prisoners without providing for action. Attorney

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[44] Wes Venteicher, *California Prison Staff Showed "Indifference" To Masks Even After COVID-19 Deaths, Report Says*, THE SACRAMENTO BEE (Oct. 26, 2020), https://www.sacbee.com/news/politics-government/the-state-worker/article246728471.html.

[45] Blackwell & Longworth, *supra* note 42.

[46] Nathan James & Michael A. Foster, *Federal Prisoners and COVID-19: Background and Authorities to Grant Release*, CONG. RESEARCH SERV. (Apr. 23, 2020), https://crsreports.congress.gov/product/pdf/R/R46297.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *"Immunity Passports" in the Context of COVID-19*, WORLD HEALTH ORGANIZATION, (Apr. 24, 2020), https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19.

General William Barr issued three memoranda: the first encourages the Bureau of Prisons (BOP) to transfer inmates to home confinement where appropriate,[52] the second emphasizes the need for prompt BOP action,[53] and the third mandates that all prosecutors consider individuals' medical risks during the pandemic.[54] During the initial months of the COVID-19 spread, the prison system's inability to prevent the spread of the virus and follow CDC guidelines resulted in numerous prisoners calling for compassionate release.[55] The most common group pleading for compassionate release was the elderly[56] and those with underlying health conditions.[57] These claims were bolstered by the fact that prison hospitals, with significantly fewer resources than hospitals in the general public, were unable to care for at-risk individuals.[58]

Generally, a district court lacks the authority to modify a defendant's sentence after it has been imposed.[59] For decades, the compassionate release provision of 18 U.S.C.A. § 3582(c) was rarely invoked, and therefore release was rarely granted. Before 2018, only the BOP director could file these "compassionate-release motions."[60] However, under § 3582(c)(1)(A), as amended by the First Step Act of 2018, "[a] court, on a motion by the BOP or by the defendant after exhausting all BOP remedies, may reduce or modify a term of imprisonment, probation, or supervised release after considering

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[52] Memorandum from Att'y Gen. William Barr to Dir. of Bureau of Prisons on Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000.

[53] Memorandum from Att'y Gen. William Barr to Prosecutors on Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic (Apr. 6, 2020), https://www.justice.gov/file/1266901/download.

[54] *Id.*

[55] Jimmy Jenkins & Matt Katz, *'A Ticking Time Bomb': Advocates Warn COVID-19 is Spreading Rapidly Behind Bars,* NPR (Apr. 28, 2020), https://www.npr.org/2020/04/28/846678912/a-ticking-time-bomb-advocates-warn-covid-19-is-spreading-rapidly-behind-bars; Ryan Lucas, *'They're All Really Afraid': Coronavirus Spread in Federal Prisons,* NPR (Apr. 7, 2020), https://www.npr.org/2020/04/07/ 828319691/they-re-all-really-afraid-coronavirus-spreads-in-federal-prisons.

[56] Jaila Jefferson-Bullock, *Let My People Go: A Call for the Swift Release of Elderly Federal Prisoners in the Wake of COVID-19*, 32 FED. SENT. R. 286, 286 (2020).

[57] Jaila Jefferson-Bullock, *The Creation of a Crisis*, 32 FED. SENT'G REP. 257, 258 (2020).

[58] *Id.*

[59] *See* 18 U.S.C. § 3582(c) (2018).

[60] *See United States v. Brown*, 411 F. Supp. 3d 446 (S.D. Iowa 2019).

factors of 18 U.S.C. § 3553(a), if "extraordinary and compelling reasons warrant such a reduction."[61] The statute in relevant part provides:

> c)Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that--
>
> (1)in any case--
>
> (A)the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
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> (i)extraordinary and compelling reasons warrant such a reduction;
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> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

[61] United States v. Chambliss, 948 F.3d 691, 692-93 (5th Cir. 2020) (footnote omitted) (quoting § 3582(c)(1)(A)(i)).

18 U.S.C.A. § 3582.

These changes paved the way for criminal defendants to seek compassionate release for "extraordinary and compelling reasons" under this catchall provision of the modified statute.[62] However, § 3582(c)(1)(A)'s exhaustion requirement is generally considered a "glaring roadblock foreclosing compassionate release."[63] Given the urgency of possible infection and the rate at which COVID-19 spreads through prison populations, some district courts have found the pandemic to "justify[] an exception in the unique circumstances of the COVID-19 pandemic."[64] Some circuit courts have waived exhaustion in the context of COVID-19 and have done so in fact-specific situations where the inmate is in medical distress.[65] However, district courts remain split on whether the urgency of COVID-19 on its face satisfies the exhaustion requirement or if an inmate must exhaust all their administrative remedies at the BOP before considering compassionate release.[66]

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[62] Joe D. Whitley et al., *A Prisoner's Dilemma: COVID-19 and Motions for Compassionate Release*, WESTLAW: PRACTITIONER INSIGHTS AND COMMENTARY, 2020 WL 2762836.

[63] United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020); *see also* United States v. Orellana, No. 4:17-CR-0220, 2020 WL 1853797, at *1 (S.D. Tex. Apr. 10, 2020) (denying motion for compassionate release because Defendant failed to file with the Cumberland Prison warden as prescribed by § 3582(c)(1)(A).).

[64] Valentine v. Collier, 956 F.3d 797, 807 (5th Cir. 2020) (Higginson, J., concurring) (per curiam).

[65] *See, e.g.,* United States v. Perez, 451 F. Supp. 3d 288, 290-91 (S.D.N.Y. 2020) (waiving exhaustion requirement where defendant had two recent surgeries during incarceration with severe side effects and fewer than thirty days remained on sentence); United States v. McCarthy, 453 F. Supp. 3d 520, 525-26 (D. Conn. 2020) (waiving exhaustion requirement where defendant had fewer than thirty days on sentence); *compare* United States v. Pomante, No. 19-20316, 2020 WL 2513095, at *4 (E.D. Mich. May 15, 2020) (waiving exhaustion requirement due to combination of defendant's age and underlying medical conditions, and inability to take adequate measures of protection), *with* United States v. Chang, No. 3:16-CR-326-L, Doc. 80 (N.D. Tex. Apr. 12, 2020) ("While the court understands [defendant's] concerns , § 3582(c)(1)(A)'s statutory exhaustion requirement is mandatory."); United States v. Gomez, No. 2:16-256-2, 2020 WL 2061537, at *1 (S.D. Tex. Apr. 29, 2020) ("[D]efendants . . . still need to initially petition the BOP and, subsequently, fully exhaust their rights to appeal.").

[66] United States v. Chavez, No. 3:18-CR-0426-13-11, 2020 WL 4500633, at *3 (N.D. Tex. Aug. 5, 2020) ("The general circumstances of the COVID-19 pandemic do not form a basis

B. COVID-19 Compassionate Release and Opioid Abuse Disorder

Based on the particular factual circumstances of the case, courts have variably granted or denied release of prisoners claiming enhanced medical concerns.[67] What factual circumstances rise to the level where a district court will eschew the exhaustion requirement and grant compassionate release to home confinement is unsettled.[68] Courts consider the severity of the health concerns coupled with the severity of the conviction, weighed against factors such as duration of sentence remaining, behavior while incarcerated, and likelihood of dangerousness to the public upon release.[69] Serious health concerns are those generally consistent with underlying health conditions recognized by the CDC as likely to aggravate symptoms and increase fatality in a coronavirus infection.[70] However, each of these factors are intensely fact-specific and the weight given to each by a court can vary significantly.

Severity of medical concerns varies at the district court level with little circuit guidance as of November, 2020. For instance, the District Court of New Mexico granted compassionate release for an inmate who was 62 years old, suffered from type 2 diabetes, and was within the final nine months of his sentence for distributing fentanyl and oxycodone.[71] Similarly, the Northern District of New York found that a defendant with hypertension, who had fifty-five months remaining on his prison sentence, was eligible for compassionate release because the sentencing court could not have foreseen the risk of severe illness or death brought on by the pandemic.[72] While age

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for compassionate release."); United States v. Gomez, No. 2:16-256-2, 2020 WL 2061537, at *1 (S.D. Tex. Apr. 29, 2020).

[67] *Compare Perez*, 2020 WL 1546422, at *2-3, *with Gomez*, 2020 WL 2061537, at *1.

[68] *United States v. Chavez*, 2020 WL 4500633, at *2 (comparing differences in circuit decisions).

[69] *See* 18 U.S.C. § 3582(c)(1)(A–B). *See also* 18 U.S.C. § 3553.

[70] *People With Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 26, 2021, 10:37 AM), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions-html.

[71] United States v. Lopez, No. 18-CR-2846, 2020 WL 2489746, at *4 (D.N.M. 2020).

[72] United States v. Roundtree, 460 F. Supp. 3d 224 (N.D.N.Y. 2020).

is a controlling factor in many successful compassionate release petitions,[73] severity of underlying health concerns can outweigh age.[74]

Despite the scientific evidence of the underlying health concerns caused by OUD, whether OUD is considered to be a severe medical concern for which a district court may grant compassionate release was a question of first impression for courts in 2020. This note seeks to shed light on the severity of underlying conditions caused by OUD and emphasize the importance that courts should place on OUD prisoners seeking compassionate release, especially if the facility in which the inmate is housed does not provide medically assisted treatment.

OUD was first recognized as an official diagnosis by the American Psychiatric Association in 2013.[75] This diagnosis combined two previously separate disorders: opioid dependence and opioid abuse, [76] and is a subset of the larger category of substance use disorder.[77] Statistically, some sixty-five

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[73] Jalila Jefferson-Bullock, *Let My People Go: A Call For the Swift Release of Elderly Federal Prisoners in the Wake of COVID-19*, 32 Fed. Sent. R. 286, 287 (2020).

[74] *See, e.g.,* United States v. Fields, No. 2:05-CR-20014-02, WL 3129056, at *2 (W.D. La. 2020) (granting compassionate release for a 37 year old diagnosed with lung sarcoidosis and prescribed prednisone to control breathing, which suppressed his immune system); United States v. Norris, 458 F. Supp. 3d 383 (E.D.N.C. 2020) (granting compassionate release for an inmate with a life-threatening disease, kidney failure that required dialysis three times per week, and who had suffered previous bouts of pneumonia); United States v. Robert Santiago, 2020 WL 3121146 (S.D.N.Y. 2020) (granting compassionate release of defendant who suffered from heart and breathing problems when more than seventy-nine inmates in the facility had already contracted the virus).

[75] Elizabeth Hartney, *Opioid Use Disorder in the New DSM-5*, VERYWELL MIND (Mar. 22, 2020), https://www.verywellmind.com/opioid-use-disorder-22046#:~:text=Opioid%20use%20disorder%20%28also%20referred%20to%20as%20opioid,the%20DSM%20%28DSM-IV-TR%29%3A%20opioid%20dependence%20and%20opioid%20abuse.

[76] *Id.*

[77] The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) is the latest version of the American Psychiatric Association's standard psychological diagnoses. The DSM-5 recognizes substance-abuse disorders stemming from ten separate classes of drugs. Substance-use disorders is distinct from substance-induced disorders, in that a substance-use disorder (like OUD) is a pattern of symptoms resulting from continued, prolonged use of a substance, despite negative side effects. Individuals suffering from a substance-use disorder may develop substance-induced mental disorders, including bipolar disorder, depressive disorder, anxiety disorder, and neurocognitive disorders. *See generally* AM.

percent of inmates in the United States prison population have an active substance abuse disorder.[78] Substance abuse itself is considered a mental illness, as chemical dependency causes distinct physiological changes.[79] Substance use disorders generally are unique health conditions as they afflict both psychological health and physical health.[80] Mental illnesses such as depression and anxiety[81] caused by substance use disorders are associated with greater functional impairments and mortality rates related to physical illness.[82] Individuals afflicted with substance use disorders also often experience comorbid chronic physical health conditions, including chronic pain,[83] heart disease,[84] pulmonary problems,[85] and cancer.[86]

Prescription opioids as a class of drugs can cause serious bodily harm when taken over long periods of time.[87] Several types of opioids have

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PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION: DSM-5 (2013); A. Thomas McLellan, *Substance Misuse and Substance Use Disorders: Why do they Matter in Healthcare?*, 128 TRANS AM. CLIN. CLIMATOL THOMAS ASSN. 112 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5525418/.

[78] *Criminal Justice Drug Facts*, NAT'L INST. ON DRUG ABUSE (June 2020), https://www.drugabuse.gov/publications/drugfacts/criminal-justice.

[79] Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way To Treatment*, 20 NEV. L.J. 547, 576 (2020); *see also* Lauren Villa, *Mental Health and Drug Abuse*, DRUGABUSE, https://drugabuse.com/mental-health-drug-abuse/ (last visited Sept. 27, 2020).

[80] Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way To Treatment*, 20 NEV. L.J. 547, 576 (2020); *see also* Villa, *supra* note 79.

[81] Hee-Ju Kang, Kim S-Y, Bae K-Y, et al., *Comorbidity of Depression with Physical Disorders: Research and Clinical Implications*, 51(1) CHONNAM MED J. 8, 8-18 (Apr. 2015).

[82] Deidre DeJean et al., *Patient Experiences of Depression and Anxiety with Chronic Disease: A Systematic Review and Qualitative Meta-Synthesis*, 13(16) ONT. HEALTH TECH. ASSESS SERVS. 1, 1-33 (2013).

[83] Eric L. Garland et al., *The Downward Spiral of Chronic Pain, Prescription Opioid Misuse, and Addiction: Cognitive, Affective, and Neuropsychopharmacologic Pathways*, 37:10(2) NEUROSCIENCE BIOBEHAVIOR REV. 2597, 2598 (2013).

[84] Marya T. Schulte & Yih-Ing Hser, *Substance Use and Associated Health Conditions throughout the Lifespan*, 35 PUB. HEALTH REV. 1, 1 (2014).

[85] *Id.* at 10.

[86] *Id.*

[87] For example:

intrinsic immunosuppressive effects.[88] Misuse of prescription or synthetic opioids can suppress breathing, exacerbating asthma or potentially leading to hypoxia and suffocation.[89] OUD can exacerbate underlying conditions such as existing lung or heart disease, as well as cigarette and alcohol use.[90] Individuals suffering from OUD who inject either crushed and dissolved prescription tablets or other illicit opioids are at risk for severe health risks associated with unclean injections.[91] However, persons with opioid problems

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> Chronic opioid treatment . . . is associated with diverse adverse effects across many organ systems. These effects range from common adverse events such as constipation and sleep disturbance, to less frequent but potentially lethal outcomes such as respiratory depression. The combination of central nervous system effects...and musculoskeletal sequelae . . . may increase risks of serious factures. Opiate-induced androgen deficiency . . . and infertility may result from opioid effects on the endocrine system. Recent studies also suggest negative cardiovascular effects such as increased risk of myocardial infarction or heart failure, as well as increased pneumonia risk among the elderly, possibly associated with immunosuppression.

AnGee Baldini et al., *A Review of Potential Adverse Effects of Long-Term Opioid Therapy: A Practitioner's Guide, The Primary Care Companion for CNS Disorders* (June 14, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3466038/#:~:text=Results%3AThrough%20a%20variety%20of,%2Dadrenal%20dysregulation%2C%20and%20overdose.

[88] *See* Sascha Dublin et. al, *Use of Opioids or Benzodiazepines and Risk of Pneumonia in Older Adults: A Population-Based Case-Control Study*, 59 J. of AMERICAN GERIATRIC SOCIETY, 1899, 1905 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3223721/ (noting that "[f]urther research about prescription opioids and infection risk is urgently needed" as well as finding an increase in pneumonia in elderly patients on chronic opioid therapy in a clinical setting).

[89] *See* Eugene Kiyatkin, *Respiratory Depression and Brain Hypoxia Induced by Opioid Drugs: Morphine, Oxycodone, Heroin, and Fentanyl*, J. OF NEUROPHARMACOLOGY 151, 219 (2019), https://pubmed.ncbi.nlm.nih.gov/30735692/ (discussing prescription opioid effects on respiratory depression rates in rats).

[90] JongSerl Chun, et. al, *Cigarette Smoking Among Opioid-Dependent Clients in a Therapeutic Community*, 18 AMERICAN J. OF ADDICTION 316, 318-19 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2756535/.

[91] *See* Nicole Napoli, *Opioid Use Associated with Dramatic Rise in Dangerous Heart Infection*, AMERICAN COLLEGE OF CARDIOLOGY (Mar. 6, 2019), https://www.acc.org/about-acc/press-releases/2019/03/06/10/36/opioid-use-associated-with-dramatic-rise-in-dangerous-heart-infection ("Researchers reported overall admission for infective endocarditis at The Ohio State University Wexner Medical Center doubled during the five-year period (2012-2017), with a 436 percent increase in drug-related infections accounting for the majority of the surge in cases."); John Strang et al., *Opioid Use Disorder*, NATURE

who are able to achieve extended periods of abstinence can potentially recover physically and mentally.[92] While there is little research on the long-term effects of opioid abuse on the body, studies show that even those who recover from opioid abuse or OUD are still at risk of an early death, often due to extraneous factors such as "accidental overdose, trauma, suicide, or an infectious disease."[93]

Even opiate users who adhere to their prescriptions risk side effects, including "slow and ineffective breathing, which can lead to decreased oxygen in the blood, brain damage, or death."[94] Chronic respiratory disease is already known to increase overdose mortality risk among people taking opioids, and decreased lung capacity from COVID-19 could lead to similar health effects.[95] Meanwhile, illicit opiate users bear all the health risks plus

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REVIEWS DISEASE PRIMERS, https://www.congresalbatros.org/sites/default/files/2020-11/StrangVolkowetal-OUD-DiseasePrimer-NatureReviews-fin-jan2020.pdf ("Opioid use outside of its appropriate clinical applications...is an important public health issue given the potential . . . health sequelae of drug-use behaviors (for example, HIV and hepatitis C virus (HCV) infection and transmission, bacterial endocarditis, and neonatal abstinence syndrome).").

[92] One famous success story is NFL football player Darren Waller, whose drug use "all started with opiates." *Stories of Recovery: Darren Waller*, LANDMARK RECOVERY (Sep. 10, 2019), https://landmarkrecovery.com/stories-of-recovery-darren-waller/. Another is actress Jamie Lee Curtis, who became addicted to the opiate Vicodin after a cosmetic procedure. Kimberly Zapata, *Jamie Lee Curtis Discussed Her Painkiller Addiction—and How She "Shared Drugs" With Her Dad*, OPRAH MAGAZINE (Nov. 7, 2019), https://www.oprahmag.com/entertainment/a29724348/jaime-lee-curtis-drug-addiction-father-sobriety/. *See also* Yuhui Zhu, et al., *Correlates of Long-Term Opioid Abstinence after Randomization to Methadone Versus Buprenorphine/Naloxone in a Multi-Site Trial*, 13 J. OF NEUROIMMUNE PHARMACOLOGY 488 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6224303/ (finding "that long-term opioid abstinence was associated with improvement in several key domains of health and social functioning, thus substantiating that long-term opioid abstinence is a good indicator of stable recovery.").

[93] Marc Shuckit, *Treatment of Opioid-Use Disorders*, 375 NEW ENGLAND JOURNAL OF MEDICINE 357, 357 (2016) https://www.nejm.org/doi/pdf/10.1056/NEJMra1604339.

[94] *COVID-19 Questions and Answers: For People Who Use Drugs or Have Substance Use Disorder*, CTRS. FOR DISEASE CONTROL (Dec. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations/people-who-use-drugs/QA.html.

[95] *Id.* Individuals suffering or in recovery from an active OUD face additional challenges in the COVID-19 pandemic. These "[s]econdary impacts" include "disruption[] of treatment

potential additional risk factors such as like housing instability and incarceration.[96] If incarcerated, living facilities like jails and prisons are high-risk environments for coronavirus transmission.[97]

C. *Medication-Assisted Treatment is not Widespread and is Not a Viable Alternative to Compassionate Release*

In response to the unique concerns raised by incarceration, OUD, and COVID-19, the Substance Abuse and Mental Health Services Administration advises for the greatest possible outpatient treatment options and advocates for increase take-home medications.[98] The Drug Enforcement Administration has waived the federal requirement of an in-person physician diagnosis prior to prescribing an inmate a controlled substance for OUD relief.[99] However, inmates are in the unique position of dependency on the prison staff for access to medical care. Typically, the only assistance offered

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and recovery services, limited access to mental health services and peer support, disrupted routines, loss of work, and stress," all of which "may lead to increased opioid use and risk of relapse." Lt. Sherry Daker, *Opioids and the COVID-19 Pandemic: Addressing the Opioid Crisis During the COVID-19 Pandemic*, INDIAN HEALTH SERVICE, https://www.ihs.gov/opioids/covid19/ (last visited Mar. 21, 2021). *See also New WBT & Robert Graham Center Analysis: The COVID Pandemic Could Lead to 75,000 Additional Deaths from Alcohol and Drug Misuse and Suicide*, WELL BEING TRUST (May 8, 2020), https://wellbeingtrust.org/news/new-wbt-robert-graham-center-analysis-the-covid-pandemic-could-lead-to-75000-additional-deaths-from-alcohol-and-drug-misuse-and-suicide/.

[96] *COVID-19 Questions and Answers: For People Who Use Drugs or Have Substance Use Disorder*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations/people-who-use-drugs/QA.html.

[97] *Id.*

[98] *Considerations for the Care and Treatment of Mental and Substance Use Disorders in the COVID-19 Epidemic*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (May 7, 2020), https://www.samhsa.gov/sites/default/files/considerations-care-treatment-mental-substance-use-disorders-covid19.pdf.

[99] Previously, an in-person medical evaluation was required by the Controlled Substances Act. *See* 21 U.S.C. § 829(e) (1990). This response to a public health emergency comes as an extension of existing telemedicine exceptions. *See also* 21 U.S.C. § 802(54); Thomas W. Prevoznik, *DEA Qualifying Practitioners*, U.S. DEP'T. JUST. (Mar. 31, 2020), https://www.deadiversion.usdoj.gov/GDP/(DEA-DC022)(DEA068)%20DEA%20SAMHSA%20buprenorphine%20telemedicine%20%20(Final)%20+Esign.pdf.

is medication-assistance treatment (MAT) which is a "FDA-approved pharmacotherapy in combination with counseling and behavioral therapies to treat substance use disorders."[100] MAT for inmates typically consists of one of three available therapies: methadone, buprenorphine, and vivitrol.[101] The World Health Organization has called both buprenorphine and methadone "essential medicines" in combatting OUD.[102] Proponents of MAT argue that MAT not only helps inmates break the cycle of addiction, but also reduces recidivism rates.[103] In the COVID-19 context, MAT can help prevent the crippling fallout of withdrawal, which can have devastating effects on the immune system.[104] In addition to weakening the body's ability to fight off infection, opioid withdrawal also creates sanitary concerns, as an individual going through withdrawal may have profuse sweating, runny nose, vomiting, and diarrhea.[105] Psychologically, withdrawal can cause agitation, anxiety, and insomnia, increasing stress in the individual.[106]

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[100] Jon Berg, *Breaking the Cycle: Medication Assisted Treatment (MAT) in the Criminal Justice System*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (Mar. 15, 2019), https://blog.samhsa.gov/2019/03/15/breaking-the-cycle-medication-assisted-treatment-mat-in-the-criminal-justice-system.

[101] Methadone and buprenorphine (commonly known as Suboxone) are opioids that stave off withdrawal symptoms, while Vivitrol blocks receptors in the brain, preventing drug users from feeling "high" from their drug use. *See id.*

[102] *Effective Treatments For Opioid Addiction*, NAT'L INSTITUTE ON DRUG ABUSE (Nov. 2016), https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction.

[103] *Rhode Island Establishes MAT for Inmates*, MEDICALLY ASSISTED (Mar. 9, 2018), https://medicallyassisted.com/rhode-island-establishes-mat-inmates/#:~:text=First%2C%20MAT%20for%20inmates%20programs%20need%20widespread%20political,to%20implement%20in%20states%20with%20complex%20correction%20systems. *See also* Christine Vestal, *This State Has Figured Out How to Treat Drug-Addicted Inmates*, STATELINE (Feb. 26, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/02/26/this-state-has-figured-out-how-to-treat-drug-addicted-inmates.

[104] *Rhode Island Establishes MAT for Inmates*, *supra* note 103.

[105] COVID-19's transmission through respiratory droplets potentially makes inmates going through withdrawal an increased risk to other inmates and to themselves. *Opiate and Opioid Withdrawal*, MEDLINE PLUS, https://medlineplus.gov/ency/article/000949.htm (last visited Mar. 21, 2021).

[106] *See* Pennsylvania Dep't of Corrs. v. Yeskey, 524 U.S. 206, 213 (1998).

Unfortunately, despite evidence of MAT's effectiveness, federal prisons have been slow to implement it. Several challenges have been raised against prisons who have refused to provide OUD inmates with MAT.[107] OUD is covered by the Americans with Disabilities Act, which the Supreme Court held extends to inmates in federal prisons.[108] Federal prisons, as part of a federal executive agency, are subject to the Rehabilitation Act of 1973, which provides protections against discrimination on the basis of disability.[109] However, in *Pennsylvania Dep't of Corrs. v. Yeskey*, the U.S. Supreme Court found that only Title I and Title II apply to federal prisons.[110] Other challenges have been brought on Eight Amendment grounds, but circuits remain split and no constitutional protection exists.[111]

By denying MAT, prisons exacerbate the risk that COVID-19 poses to former opioid abusers. Inmates, unlike other individuals, are entirely dependent on the treatment options offered by the prison administration at the administration's discretion.[112] Inmates suffering from OUD in a prison that does not offer a MAT program have no statutory or constitutional protections to ensure that they receive care.[113] As such, inmates afflicted with OUD have no protections ensuring that they are able to mitigate their withdrawal symptoms. The lack of MAT programs presents enhanced

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[107] *Id.*

[108] *Id.*

[109] Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

[110] *Yeskey*, 524 U.S. at 206.

[111] *See* Pesce v. Coppinger, 355 F. Supp. 3d 35 (D. Mass. 2018) (District Court granting inmate's motion for a preliminary injunction on the basis that the inmate was likely to succeed on the merits of his claim under both the ADA and the Eighth Amendment).

[112] Not only do inmates not have a right to challenge the healthcare provided by a given facility, over half of all drug courts ruled that methadone or buprenorphine were "not permitted under any circumstances." *Einstein Expert Panel*, U.S. DEP'T OF HEALTH AND HUM. SERVS. 3 (July 31, 2013), https://www.samhsa.gov/sites/default/files/mat-criminal-justice-panel-2011.pdf.

[113] Because SUD and OUD were only formally recognized by the American Psychiatric Association as mental disorders in 2013, caselaw determining whether these disorders fall under the protection of the ADA and other protections is a developing frontier. For a thorough overview of the interplay between the ADA, the Rehabilitation Act of 1973, and varying caselaw, *see* Zahava Blumenthal, *Rights of Prisoners with Disabilities*, 11 COLUM. HUM. RIGHTS L. REV., A JAILHOUSE LAW. MANUAL 852-82 (2017).

problems for prisoners during the COVID-19 pandemic.[114] Without MAT, incarcerated individuals suffering from OUD are forced to endure the potentially fatal consequences of withdrawal.[115]

D. Trapped Without Treatment, Inmates Requests for Compassionate Release are Denied to Individuals Suffering from OUD

Despite OUD being a recognized underlying health concern, former and current OUD sufferers are being denied compassionate release *and* access to medication-assisted treatment. A plethora of illnesses constitute an "extraordinary and compelling reason" for which a prison may release an inmate was a question of first impression for many courts in 2020.[116] Across the board, courts have been unsympathetic and have denied such petitions.[117] This reluctance to see OUD as a true health concern reflects a dated and regressive viewpoint of addiction—one focused on punitive processes rather than rehabilitation. Particularly early in the pandemic, courts declined to grant compassionate release motions on the general grounds of prior drug use plus the enhanced likelihood of contracting COVID-19 in prison.[118] For example, in *United States v. Serna*, the court rejected the argument that a compelling reason for pretrial release was the defendant's increased risk of contracting COVID-19 because of weakened health due to drug use.[119] The

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[114] Joseph Longley, *As Overdoses Spike During Coronavirus, Treating Addiction in Prisons and Jails is a Matter of Life and Death*, AM. CIV. LIBERTIES UNION: NEWS & COMMENTARY (July 22, 2020), https://www.aclu.org/news/prisoners-rights/as-overdoses-spike-during-coronavirus-treating-addiction-in-prisons-and-jails-is-a-matter-of-life-and-death/.

[115] *Id.*

[116] *See id.*; United States v. Duncan, No. 18-40030-01-HLT, 2020 WL 1700355, at *7 (D. Kan. Apr. 8, 2020).

[117] *See* Longley, *supra* note 114; United States v. Serna, No. 19-CR-20079-JAR, 2020 WL 3034823, at *2 (D. Kan. June 5, 2020).

[118] *See* Duncan, 2020 WL 1700355 at *7 (finding that concerns about lack of access to soap, hand sanitizer, and personal protective equipment were valid but noting nationwide shortages of these items inferred that release would not protect the inmate on sanitary grounds alone).

[119] *Serna*, 2020 WL 1700355 at *2.

court denied the defendant's release because the defendant did not allege any additional health problems beyond prior drug use.[120]

In *Chamberlain v. Virginia Department of Corrections*, a pro se plaintiff suffering from OUD petitioned the court for access to MAT.[121] The Virginia Department of Corrections (VDOC) has a blanket policy prohibiting MAT to all inmates except for pregnant women and for those out on parole beyond the Department of Corrections Facilities, including halfway houses, and those out on parole, probation, or supervision.[122] The VDOC has a policy that the facility will only provide "comfort" medicines that treat the symptoms of withdrawal but will not provide MAT for the treatment of just OUD without an additional factor.[123]

The question remains: Why did the defendant bring up this claim now, several months into his sentence? According to the defendant, additional security measures the prison enacted to curb the spread of COVID-19 had the unintended consequence of "significantly impact[ing] the inflow of opioids. . . ."[124] The defendant claimed that this lull of illicit opioids pushed him into a "forced withdrawal" because of his lower physical tolerance.[125] His next concern was once the prison returned to normal operation, "the sudden flood of opioids will return," and he will re-use at his previous dose rate, putting him at risk of overdose.[126] The court was unpersuaded.[127]

It is possible that the defendant may have been more successful had he been represented by an attorney. While the pro se defendant did allege that denial of medication discriminates against prisoners suffering from OUD, the court found no ADA or constitutional protection.[128] Some district courts have granted compassionate release because the inmate is likely to be

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[120] *Id.* at *3.
[121] Chamberlain v. Dep't of Corr., No. 7:20-CV-00045, 2020 WL 5778793, at *1 (W.D. Va. Sept. 28, 2020).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Chamberlain*, 2020 WL 5778793 at *2.
[128] *Id.*

successful in a house arrest setting.[129] Further, his concerns about subsequent overdose is corroborated by evidence that shows that as much as thirteen percent of former prisoner deaths result from OUD inmates going through severe withdrawal in prison and then using opioids again at the pre-prison dosage.[130] The cruel reality is that the pro se defendant—like so many inmates across the United States—is left to internalize the fear of the COVID-19 unknown. The pro se defendant will serve the remainder of his sentence with a denied compassionate release petition and no MAT to address the psychological and physical pains of withdrawal.

CONCLUSION

The prison system is ill-equipped to protect vulnerable inmates during this novel pandemic. The opioid epidemic has cast new light on what addiction means in America. There is no reason why such stigma is cast on preexisting conditions caused by drug use in 2020, during a pandemic that targets the pulmonary system. The prison system should use the pandemic as a moment to realize that drug use and substance abuse disorders are serious psychological disorders that create long-term health problems. MAT programs should be implemented where possible to ease the physical and psychological symptoms of withdrawal. Where adequate care of the psychological and physical symptoms associated with OUD cannot be provided by prison services, compassionate release should be considered. Given the risks of COVID-19, district courts should grant compassionate release petitions for prisoners that face severe health risks with low remaining sentence time. In the post-pandemic world, prison systems should recognize the severity of OUD, and consider allowing OUD and other

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[129] Lisa Tenorio-Kutzkey et al., *DOJ Expands Home Confinement as Coronavirus Spreads in Prisons*, DLA PIPER (Apr. 16, 2020), https://www.dlapiper.com/en/us/insights/publications/2020/04/doj-expands-home-confinement-options-as-coronavirus-spreads-in-prisons/; *Updated Compilation of Compassionate Release Grants*, THE FEDERAL DOCKET, https://thefederaldocket.com/updated-compilation-of-compassionate-release-grants/ (last visited Feb. 15, 2021).

[130] *Criminal Justice Drug Facts*, NAT'L INST. FOR DRUG ABUSE (June 1, 2020), https://www.drugabuse.gov/publications/drugfacts/criminal-justice.

substance-use disorder sufferers to serve their sentences in facilities with access to adequate treatment and care.