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Abstract

As COVID-19 continues to spread rapidly across the country, the crowded and unsanitary conditions in prisons, jails, juvenile detention, and immigration detention centers leave incarcerated individuals especially vulnerable. This chapter will discuss potential avenues for detained persons and their lawyers seeking to use the legal system to obtain relief, including potential release, during this extraordinary, unprecedented crisis.

I. Background: Overview of COVID-19 situation in jails and prisons

In the wake of the global COVID-19 pandemic, the Centers for Disease Control and Prevention have emphasized social distancing and increased sanitization as the best practices to slow the transmission of the virus and keep communities as safe and healthy as possible. Among the most vulnerable are people in jails, prisons, juvenile detention, and immigration detention facilities, who must face the threat of this highly contagious disease while being held in an environment that makes basic measures of personal protection impossible.

In the United States, many correctional facilities operate through the use of communal and shared spaces. Incarcerated individuals are often held in shared cells, sleeping only a few feet away from each other. Bathrooms, cafeterias, and recreational areas are all communal. These conditions make social distancing—which the CDC considers the single most effective measure

in preventing the spread of COVID-19—extremely difficult, if not impossible. Many facilities also lack the conditions necessary to maintain a sanitary environment. For example, incarcerated individuals have reported being held in facilities with no soap, sanitation supplies, or even working sinks. In fact, in most prison systems, hand sanitizer is considered contraband. Without the ability to avoid crowded areas, wash their hands on a regular basis, and maintain sanitary living conditions, incarcerated individuals will remain at high risk of contracting and transmitting COVID-19.

As of April 6, 2020, over 230 detained people at New York City jails have tested positive for COVID-19. The transmission rate within that population is eight times the transmission rate in the general population of New York City, which is the current epicenter. The medical building at Rikers Island, which houses the jail's only contagious disease unit, showcases the egregious inability of jails in New York City to adequately treat individuals infected with the coronavirus. The building contains 88 beds, meaning that treating the more than 800 men quarantined on Rikers Island because someone in their building tested positive would be impossible, likely resulting in suffering and death.

In California, a state caught in the early wave of the pandemic, dozens of incarcerated persons and detention center employees have tested positive. The state ordered early release of thousands of individuals from jails and prisons in order to slow the spread of the disease. Facilities in many other states have also reported positive tests, including Pennsylvania, Illinois, and Ohio. Like California, some of these states have released large numbers of detainees. In early April, the death toll in state and federal facilities around the country has continued to rise, with multiple deaths at the Oakdale facility in Louisiana. This is unsurprising given that individuals incarcerated at the prison, which is located 200 miles west of New Orleans, reported that coughing or feverish men were not always separated from their healthy cellmates, and cells continued to hold six men at a time. Some men tried to fashion masks from their own clothing because they were not provided masks by prison officials. Stories and testimonies of prisons' shortcomings in the face of a deadly pandemic and the desperate attempts of incarcerated people to protect themselves are commonplace.

II. Prisoners' Rights in the Time of COVID-19

Even as the pandemic unfolds and COVID-19 spreads throughout detention facilities, incarcerated people retain their constitutional rights, including the right to be free from cruel and unusual punishment. To vindicate this right, prisoners may bring suits challenging the conditions of their confinement. To prevail in such suits, prisoners must show that prison officials, acting with deliberate indifference, exposed prisoners to a substantial risk of serious harm. If such a showing is made, courts have the responsibility of fashioning appropriate relief to remedy the serious risk of harm.

In order to challenge conditions of confinement under the Eighth Amendment, prisoners and their attorneys must show that "prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health[.]'" *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (*quoting Helling v. McKinney*, 509 U.S. 25, 35 (1993)). To prevail on a conditions of confinement claim, a plaintiff must satisfy both an objective element, that the alleged deprivation is "sufficiently serious," and a subjective element, that prison officials have a "sufficiently culpable state of mind," such as that of deliberate indifference to the detainee's health or safety. *See Farmer*, 511 U.S. at 834.

A. What Harms Are Sufficiently Serious?

To be sufficiently serious, the act or omission by an official "must result in the denial of the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834. Most circuits have held that a serious medical need can be either a condition for which a physician has mandated treatment or a need that is "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *See, e.g.*, *Leite v. Bergeron*, 911 F.3d 47, 52 (1st Cir. 2018); *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014); *Kuhne v. Dep't of Corr.*, 745 F.3d 1091, 1096 (11th Cir. 2014); *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014); *Santiago v. Ringle*, 734 F.3d 585, 590 (6th Cir. 2013); *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012). Outside of the realm of infectious diseases, circuit courts have found sufficient seriousness in conditions such as appendicitis, an infected cyst, and a tooth cavity, some of which could be life-threatening and some of which could result in severe pain. *See Blackmore v. Kalamazoo*

Cty., 390 F.3d 890 (6th Cir. 2004); *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997); *Harrison v. Barkley*, 219 F.3d 132 (2d Cir. 2000).

a. Predicting Future Harms

A prisoner concerned about contracting COVID-19 in prison may satisfy the "sufficiently serious" prong by showing that they face a substantial risk of serious harm in the future, even if they are not currently infected or suffering. A plaintiff can obtain preventative relief even without the threatened injury. *Farmer v. Brennan* 511 U.S., 825, 845 (*quoting Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1922)).

In order to demonstrate sufficient seriousness with respect to exposure to future harm, a prisoner "must show that he himself is being exposed" to an unreasonable risk of serious harm. *Helling v. McKinney*, 509 U.S. at 35. Once this showing is made, the court must inquire into both the seriousness and likelihood of the potential harm, considering whether the risk is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* at 36 (emphasis in original). Similarly, while courts have generally recognized that the finding of a serious risk is tied to an individual's health conditions, the Supreme Court has held that it is not relevant "whether a prisoner faces an excessive risk of [harm] for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843.

Mere exposure to infectious diseases can constitute a sufficiently serious deprivation and officials cannot be deliberately indifferent to such a risk, even if someone does not show serious symptoms. *See Hutto v. Finney*, 427 U.S. 678 (1978); *Helling v. McKinney*, 509 U.S. at 35 (1993). In *Helling*, the Supreme Court rejected the proposition that prison officials "may ignore a condition of confinement that is sure or very likely to cause serious illness" in the future. 509 U.S. 25, 33.

Lower courts have recognized that a wide array of communicable diseases can present a substantial risk of serious harm to inmates. *See, e.g., Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D. Cal. 1996) (recognizing that "tuberculosis presents a substantial risk of serious harm" to inmates, and that tuberculosis "is particularly dangerous in a prison environment, where

overcrowding and poor ventilation can hasten the spread of this airborne disease."); *Kimble v. Tennis*, No. CIV. 4:CV-05-1871, 2006 WL 1548950, at *4 (M.D. Pa. June 5, 2006) (concluding that "an inmate infected with MRSA and with open sores could constitute a serious health risk[.]"). Applying the standard articulated in *Helling*, a district court in the Third Circuit concluded that the infectious skin disease scabies clearly constituted an unreasonable risk to the plaintiff where over 100 prisoners and guards had already contracted the disease. *Hemphill v. Rogers*, No. CIV.A.07-2162JAG, 2008 WL 2668952, at *11 (D.N.J. June 27, 2008). However, prisoners should not need to show that other incidents of harm have occurred at prison. The Fifth Circuit held in *Ball v. LeBlanc* that, especially in cases where the harm can have a sudden onset, a showing of prior death or injury was not necessary. 792 F.3d 584, 593 (5th Cir. 2015). In *Ball*, which concerned the risk of heat-related illnesses, the Fifth Circuit made clear that the lack of any prior heat-related incidents at a prison did not preclude the court from concluding that the prisoners were at substantial risk of serious harm. *Id*.

At least one court has found that plaintiffs who alleged they were exposed to valley fever had a cognizable claim under the Eighth Amendment. *Beagle v. Schwarzenegger*, 107 F. Supp. 3d 1056, 1069 (E.D. Cal. 2014); *see also Allen v. Kramer*, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *11 (E.D. Cal. Aug. 17, 2016) (finding that the plaintiff had stated an Eighth Amendment claim based on the defendants' failure to implement adequate measures to limit exposure to valley fever.) In *Beagle*, the court underscored that plaintiffs "need not demonstrate that they are at a higher risk of contracting Valley Fever or a more severe form of the disease to state an Eighth Amendment claim." *Beagle*, 107 F. Supp. 3d. at 1069. Even plaintiffs who are relatively less susceptible to contracting the disease or developing a serious illness as a result of infection may nonetheless experience a "constitutionally unacceptable level of risk" and need not show that they have an increased risk of infection or severity. *Id*.

Both the level of communicability of the disease and the infection rate in the detention facility may factor into a court's application of the *Helling* test. One court found in a motion for summary judgment that while Methicillin–Resistant Staphylococcus Aureus (MRSA) was a sufficiently serious condition, the plaintiff had not been exposed to a substantial risk of

contracting it from his infected cellmate. *See Lopez v. McGrath*, No. C 04-4782 MHP (N.D. Cal. May 30, 2007). Due to MRSA's relatively low infectiousness and the hygiene precautions taken by the facility, the court determined that no additional measures were needed to reduce plaintiff's risk "to a constitutionally permissible level." *Lopez*, No. C 04-4782 MHP at 24. In regard to *Farmer*'s subjective prong, the Sixth Circuit relied on a jail's comparatively low infection rate (0.19% of the jail population) to find that prison officials had no reason to infer that conditions in the jail posed an unreasonable risk that inmates would contract MRSA. *Bowers v. Livingston Cty.*, 426 F. App'x 371, 373 (6th Cir. 2011); *Cf. Duvall v. Dallas Cty.*, 631 F.3d 203, 206 (5th Cir. 2011) (finding "serious, extensive and extended" violations of a pre-trial detainee's Fifth Amendment rights in a case where the jail's MRSA infection rate was close to 20%). As of April 11th, 2020, the infection rate in the jail on Rikers Island is 7.7% and climbing daily.

b. Risk of Exposure to COVID-19 in Detention Facilities

Courts have already begun to recognize COVID-19 as a substantial health risk in Fifth Amendment claims for civil detainees. The U.S. District Court for the Southern District of New York found that the chance of exposure to COVID-19 in an Immigration and Customs Enforcement (ICE) facility where detainees or staff had tested positive for the virus posed an unreasonable health risk to detainees. *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020) (*quoting Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002). In the case, which Plaintiffs brought as a Fifth Amendment Due Process habeas claim, the court observed, "the risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious… It can no longer be denied that Petitioners, who suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis." *Id*. at *16.

A day later, in *Castillo v. Barr,* another court ruled in favor of an ICE detainee's Fifth Amendment claim due to COVID-19 risk. *See Castillo v. Barr*, 2020 U.S. Dist. LEXIS 54425 (C.D. Cal. Mar. 27, 2020). The court concluded that detainees faced a serious risk of harm, noting, "the science is well established—infected, asymptomatic carriers of the coronavirus are highly contagious. Moreover, the Petitioners presently before the Court are suffering from a condition

of confinement that takes away, inter alia, their ability to socially distance." *Castillo v. Barr*, 2020 U.S. Dist. LEXIS 54425 at 13.

B. What Is "Deliberate Indifference"?

The second prong of a conditions of confinement claim brought under the Eighth Amendment asks whether prison officials acted with a sufficiently culpable state of mind, such as that of deliberate indifference. The Supreme Court has held that a prison official acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To act with deliberate indifference, the official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*.

a. Prison Officials' Knowledge of Excessive Risks to Inmate Health

To act with deliberate indifference, officials must have knowledge of the risks to inmate health or of the circumstances pointing to the existence of such risks. In determining whether prison officials acted with deliberate indifference, courts tend to look at whether those officials had actual knowledge of the asserted serious needs of inmates or of circumstances clearly indicating the existence of such needs. *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 895–96 (6th Cir. 2004).

Prisoners can prove an official's "actual knowledge of a substantial risk to his safety" through inference from circumstantial evidence. *Bistrian v. Levi*, 696 F.3d 352, 367 (3d Cir. 2012). In cases where the prison officials fail to provide treatment, there is often little or no evidence about what inferences the defendant in fact drew. Nonetheless, "in those cases, a genuine issue of material fact as to deliberate indifference can be based on a strong showing on the objective component." *Estate of Carter v. City of Detroit*, 408 F.3d 305, 313 (6th Cir. 2005). This principle is based on the *Farmer* court's statement that a prison official cannot escape liability by choosing not to learn more about the situation. *Farmer*, 511 U.S. at 843, n.6 (1994).

b. Prison Officials' Denial of Medical Treatment or Failure to Comply With Accepted Medical Protocols

Prison officials disregard an excessive risk to inmate health and safety when they deny, delay, or intentionally interfere with medical treatment, or fail to follow accepted medical standards and protocols. *See, e.g. Estelle v. Gamble,* 429 U.S. 97, 105 (1976); *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (finding that known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm); *Holland v. Hanks*, No. 97-3660, 1998 WL 93974, at *4 (7th Cir. 1998) (suggesting that a failure to comply with treatment protocols for tuberculosis would be sufficient to show deliberate indifference).

While an inadvertent failure to take action, standing alone, does not constitute deliberate indifference, a consistent pattern of reckless or negligent conduct is sufficient to establish deliberate indifference. *See DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990). To prove deliberate indifference, a prisoner need not show a complete failure on the part of prison officials to respond or provide even minimal medical care. *Id.* In *DeGidio,* the Eighth Circuit affirmed the district court's finding that the prison officials' response to a tuberculosis outbreak, considered as a whole, constituted deliberate indifference to the safety and medical needs of the inmates, pointing to the prison officials' failure to test all inmates for tuberculosis after an inmate was diagnosed with tuberculosis, to develop written infection-control policies, to keep adequate medical records and charts, and to provide a full-time doctor and medical director. *Id.* at 531.

One court has found that failure to provide inmates with their preferred method of treatment may not constitute deliberate indifference. In *Forbes v. Edgar*, the Seventh Circuit held that prison officials were not deliberately indifferent to an inmate's serious medical needs despite her claims that prison officials allowed tuberculosis to spread throughout the prison and that officials denied her a preferred medical treatment. 112 F.3d 262, 267 (7th Cir. 1997). Importantly, however, the tuberculosis control procedures implemented by the *Forbes* defendants were consistent with the protocols recommended by the Center for Disease Control

(CDC) and the American Thoracic Society, and the treatment provided to the petitioner was approved by the CDC. *Forbes*, 112 F.3d at 267. The Seventh Circuit held that while prisoners are not entitled to demand specific care, they are "entitled to reasonable measures to meet a substantial risk of serious harm to [the prisoner]." *Id.*

With regard to COVID-19, courts have found deliberate indifference in a Fifth Amendment claim when ICE detention facilities failed to adequately protect prisoners by following the CDC's recommended preventative measures. In *Basank v. Decker*, the District Court for the Southern District of New York held that the officials in that case were deliberately indifferent in their response to COVID-19 because, though they did take some measures, including providing soap and hand sanitizer to inmates and increasing the frequency and intensity of cleaning, they could not show that detainees could not remain the CDC-recommended six feet apart from each other in the facilities. *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191 at *5 (S.D.N.Y. Mar. 26, 2020).

III. Conditions of Confinement for Pretrial Detainees

Pretrial detainees are also protected from unconstitutional conditions of confinement. Conditions of confinement claims brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause, rather than the Eighth Amendment's Cruel and Unusual Punishments Clause. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). The Supreme Court has recognized that a detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, (1983). The test for whether a detainee's conditions of confinement are unconstitutional relies on the same two prongs as those articulated in *Farmer*—substantial risk of serious harm and deliberate indifference. *See Darnell*, 849 F.3d at 29. Importantly, however, the deliberate indifference prong can be satisfied if a pretrial detainee shows that prison officials knew *or* should have known that the condition posed an excessive risk to health or safety. Darnell, 849 F.3d at 35; *see also Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (adopting an objective standard for determining whether use of force against a pretrial detainee was excessive under

the Due Process Clause of the Fourteenth Amendment). In other words, *Farmer*'s "subjective" prong is measured objectively for detainees.

IV. Remedies

Prisoners seeking release due to the risk of COVID-19 will have to comply with guidelines set by the Prison Litigation Reform Act, 18 U.S.C. § 3626 (PLRA). Courts normally only order release as a last resort as a remedy for medical risks, and some district courts have declined to recognize an independent right of action under the prevailing Supreme Court case on prisoner release, *Brown v. Plata*, 563 U.S. 493, 502 (2011).

A. When Can A Court Order Prisoner Release?

A court will require special circumstances to order prisoner release as a remedy for an Eighth Amendment violation. The PLRA outlines the requirements that must be satisfied for a court to grant relief in a civil action regarding prison conditions. First, only a three-judge district court may enter a prisoner release order. 18 U.S.C. § 3626(a)(3)(B). A three-judge district court may be convened once (1) a court has previously entered an order for "less intrusive relief" that has failed to remedy the deprivation at issue and (2) the defendant has had a "reasonable amount of time" to comply with previous orders. 18 U.S.C. § 3626(a)(3)(A). Once convened, the three-judge court can impose a population limit if it finds that (1) crowding is the primary cause of the constitutional violation, and (2) no other relief will remedy the violation. 18 U.S.C. § 3626(a)(3)(E).

In *Brown v. Plata*, the Supreme Court held that a remedial order imposing a population limit on the California prison system was consistent with the requirements of the PLRA. *See Brown v. Plata*, 563 U.S. 493, 502 (2011). The Court cited the exceptional degree of overcrowding in California prisons, which had operated at around 200% of capacity for at least 11 years; the unsanitary and unsafe prison conditions resulted in an increased risk for the transmission of serious infectious diseases, approximately one suicide per week, and the failure of prisons to provide adequate medical and mental health care to prisoners. *Id*. at 502–504. After years of ongoing but ultimately unsuccessful efforts to solve the crisis through construction, hiring, and

procedural reforms, the Court found that it was appropriate to convene a three-judge court and for that court to order the release of some prisoners to address the problem of overcrowding. *Id.* at 514–515.

Brown v. Plata limited federal district court management of state prisons, making it clear that prison caps—and prisoner release orders—must be "the remedy of last resort." *Id.* at 526. While a federal court retains the authority to order release when it is truly necessary to remedy a violation of a prisoner's constitutional rights, state prison administrators are entitled to a certain amount of deference in the adoption of practices that, in their judgment, are needed to accomplish the legitimate goals of a prison system. *See, e.g.*, *Griffin v. Gomez*, 741 F.3d 10, 20 (9th Cir. 2014) (holding that a district court's order requiring the state to release an inmate from the security housing unit was an abuse of discretion and that the court had improperly impeded state prison management). *But see Huerta v. Ewing*, No. 216CV00397JMSMJD, 2018 U.S. Dist. LEXIS 174120, at *26-28 (S.D. Ind. Oct. 10, 2018) (recognizing that a district court must exercise restraint in granting relief, but that county jail officials' failure to take the ordered measures may entitle prisoners to petition the court for additional relief, including the convening of a three-judge panel to issue a prisoner release order).

a. 18 U.S.C. § 3626's Three-Judge Court Requirement

A three-judge district court may enter a prisoner-release order to remedy overcrowding under 18 U.S.C. § 3626. Once a court has entered an order for "less intrusive relief" that has failed to remedy the deprivation at issue and the defendant has had an undefined "reasonable amount of time" to comply with the previous orders, a three-judge district court may convene to order release of prisoners as a remedy to cure an Eighth Amendment violation. *Plata*, 563 U.S. at 512. *See also Butler v. Kelso*, No. 11CV02684 CAB RBB, 2013 WL 1883233, at *10 (S.D. Cal. May 2, 2013) (denying plaintiff's motion to amend his complaint alleging that California state prison officials acted with deliberate indifference to his serious medical needs to include a request for prison release order); *Nagast v. Dep't of Corr.*, No. ED CV 09-1044-CJC, 2012 U.S. Dist. LEXIS 59309, at *8 (C.D. Cal. Feb. 27, 2012) (holding that a California prison inmate could not bring a §

3626 claim because he did not satisfy the requirements needed to convene a three-judge court).

Additionally, the defendant must have had a reasonable amount of time to comply with the previous orders for less intrusive relief. In *Gillette v. Prosper,* a plaintiff seeking reforms to his facility, which had been mandated by a court order two and a half years earlier, was not granted relief because the facility was entitled to more time to comply with the order. *Gillette v. Prosper*, Civil Action No. 2014-00110, 2016 U.S. Dist. LEXIS 27776 (D.V.I. Mar. 4, 2016) (distinguishing the timeline from *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 889 (E.D. Cal. 2009) where there were 12 years for compliance, and from *Brown v. Plata*'s five years for compliance).

b. *Plata*'s Limits

District courts in California maintain that *Plata* by itself does not provide any substantive right on which a prisoner can rely for an independent cause of action. In *Shafer v. Avenal State Prison*, the Eastern District Court expressed that *Plata* does not "provide any substantive right" for plaintiffs nor does it "stand for the proposition that federal district courts can order state officials to release specific prisoners." 2014 U.S. Dist. LEXIS 95630 (E.D. Cal. July 11, 2014).

The next year, in *Thomas v. Alameda County*, the Northern District Court in California denied a prisoner's request for injunctive relief in which he cited *Plata*; the court ruled that the plaintiff's claim of general prison overcrowding failed because *Plata* does not provide a substantive right. *Thomas v. Alameda County*, 2015 U.S. Dist. LEXIS 32182, at *8 (N.D. Cal. Mar. 16, 2015). The decision cited a case before the court three years earlier that stated a remedial § 1983 court order could not, standing alone, serve as a basis for liability because "such orders do not create 'rights, privileges or immunities secured by the Constitution and laws' of the United States." *Id.* Finally, the Southern District Court took the same stance in 2018. *Gomez v. Paramo*, No. 17-cv-0834-BAS-MDD, 2018 U.S. Dist. LEXIS 129295, at *20 (S.D. Cal. Aug. 1, 2018).

c. Release in Habeas Proceedings

Release is typically unavailable as a remedy for Eighth Amendment violations in habeas proceedings. Courts have thus far refused to consider Eighth Amendment medical claims as grounds for release of individual prisoners in habeas proceedings. In *Glaus v. Anderson,* a prisoner who claimed that his facility failed to treat his Hepatitis C could not appropriately seek release as a remedy. The court noted, "If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option." *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005).

In *Seifert v. Spaulding*, similarly, a plaintiff claimed that the physicians at his facility denied his diagnosis and refused to treat him could not gain release. The court concluded, "Even where a prisoner claims that his only hope of obtaining adequate medical treatment is through release, a court cannot order release as a remedy for conditions of confinement that violate the Eighth Amendment violation." *Seifert v. Spaulding*, No. 18-11600-MGM, 2018 U.S. Dist. LEXIS 221340, 3 (D. Mass. Sep. 11, 2018).

B. Release of Detainees During COVID-19 Pandemic

Recently, courts have granted remedy in the form of release to civil detainees as a remedy for Eighth or Fifth Amendment violations caused by the COVID-19 pandemic. *See Coronel v. Decker*, No. 20-cv-2472 (AJN), 2020 U.S. Dist. LEXIS 53954 (S.D.N.Y. Mar. 27, 2020); *Hernandez v. Decker*, No. 20-CV-1589 (JPO), 2020 U.S. Dist. LEXIS 57122 (S.D.N.Y. Apr. 1, 2020). Notably, however, the Prison Litigation Reform Act does not apply to civil detainees.

On April 4th, the original three-judge panel in *Plata v. Brown* dismissed an emergency motion for release filed by plaintiffs in the California prison system. *Coleman v. Newsom*, Case No. 2:90-cv-0520 KJM DB P, (E.D. Cal. Apr. 4, 2020); *Plata v. Newsom*, Case No. 01-cv-01351-JST (N.D. Cal. Apr. 4, 2020). The plaintiffs claimed that the threat of COVID-19 in prisons called for a modification of the population reduction order in *Plata v. Brown*. *Id*. at 2. The three-judge panel

ruled that "because Plaintiffs' motion seeks a release order to redress a different constitutional injury than those previously found in the Coleman and Plata proceedings, that relief cannot be granted through a modification to our prior remedial order." *Id*. at 9. Plaintiffs were instructed to bring a claim before a single judge. *Id*. at 12. If this single-judge court found a constitutional violation, the panel continued, it would only be authorized to order defendants "to take steps short of release necessary to remedy that violation." *Id.* at 13. Only if such steps proved inadequate could a three-judge panel be convened. *Id*. at 12–13.

C. Compassionate Release Under 18 U.S.C. § 3582

Another potential remedy is compassionate release. 18 U.S.C. § 3852 allows a court to reduce a federal inmate's sentence if the court finds that "extraordinary and compelling reasons" warrant a reduction, and that a reduction would be "consistent with any applicable policy statements issued by the Sentencing Commission[.]" 18 U.S.C. § 3852(c)(1)(A)(i). A court must also consider the applicable factors set forth in § 3553(a). This provision provides courts with the statutory authority to grant the compassionate release of certain prisoners. A growing number of courts have used § 3852 to order the release of federal prisoners who, due to their age and/or health status, are at high risk of developing serious illness or death if they contract COVID-19. *See, e.g. United State v. Rodriguez*, No. 2:03-CR-00271-AB-1, 2020 U.S. Dist. LEXIS 58718 (E.D. Pa. Apr. 1, 2020); *United States v. Resnick*, No. 14 CR 810 (CM), 2020 U.S. Dist. LEXIS 59091 (S.D.N.Y. Apr. 2, 2020); *United States v. Colvin*, 2020 U.S. Dist. LEXIS 57962 (D. Conn., Apr. 2, 2020); *United States v. McCarthy*, 2020 U.S. Dist. LEXIS 61759 (D. Conn., Apr. 8, 2020); *United States v. Daly*, 2020 U.S. Dist. LEXIS 61804 (S.D.N.Y. Apr. 7, 2020).

The recently enacted First Step Act amended § 3852 to remove the Bureau of Prisons' exclusive gatekeeping function over motions seeking compassionate relief. As amended, § 3852 allows prisoners to request that the BOP file a motion seeking compassionate release. If the BOP does not file such a motion, the prisoner may then (1) file a motion after fully exhausting administrative appeals of the BOP's decision not to file a motion, or (2) file a motion after "the lapse of 30 days from the receipt ... of such a request" by the warden of the defendant's facility,

"whichever is earlier." 18 U.S.C. § 3852(c)(1)(A); *see also Rodriguez*, 2020 U.S. Dist. LEXIS 58718 at *3.

Congress tasked the U.S. Sentencing Commission with determining what constitutes "extraordinary and compelling reasons." In an application note to the sentencing guidelines, the U.S. Sentencing Commission listed three specific categories of extraordinary and compelling reasons and created a catch-all provision that allows the Director of the Bureau of Prisons to determine when extraordinary and compelling reasons other than those explicitly included in the application note exist. U.S.S.G. § 1B1.13 cmt. n.1(D). A majority of district courts that have considered the meaning of "extraordinary and compelling reasons" since the enactment of the First Step Act have concluded that "the most natural reading of the amended § 3582(c) ... is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it." *United States v. Brown*, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019); *see also United States v. Young*, No. 2:00-CR-00002-1, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020) (concluding that "district courts themselves have the power to determine what constitute[s] extraordinary and compelling reasons for compassionate release."); *United States v. Redd*, No. 1:97-CR-00006-AJT, 2020 WL 1248493, at *8 (E.D. Va. Mar. 16, 2020) (concluding that a court may find that "compelling reasons exist based on facts and circumstances other than those set forth in U.S.S.G. § 1B1.13 cmt. n.1(A)-(C)[.]").

Courts have used the authority conferred by § 3852 to grant compassionate release sought by prisoners who are particularly vulnerable to COVID-19. The U.S. District Court for the Eastern District of Pennsylvania granted a sentence reduction and ordered the immediate release of a prisoner who has diabetes, high blood pressure, and liver abnormalities, and was in the seventeenth year of a twenty-year sentence. *United State v. Rodriguez*, No. 2:03-CR-00271-AB-1, 2020 WL 1627331 (E.D. Pa. Apr. 1, 2020) The U.S. District Court for the Southern District of New York granted a sentence reduction and ordered the immediate release of a prisoner who suffers from diabetes and related end-stage liver disease, and has served three years and nine months of his six-year sentence. *United States v. Resnick*, No. 14 CR 810 (CM), 2020 U.S. Dist. LEXIS 59091 (S.D.N.Y. Apr. 2, 2020). Both courts recognized that the petitioners' medical

conditions, in combination with the ongoing coronavirus pandemic, constituted extraordinary and compelling reasons. In both instances, the petitioners filed motions in federal court pursuant to § 3852's 30-day lapse provision. *See* 18 U.S.C. § 3852(c)(1)(A).

The U.S. District Court for the Eastern District of Michigan granted compassionate release to a prisoner who had requested relief and exhausted his administrative remedies prior to the outbreak of COVID-19. Miller v. United States., No. CR 16-20222-1, 2020 WL 1814084 (E.D. Mich. Apr. 9, 2020). In that instance, the prisoner suffered from a number of underlying medical conditions and the court found that it would be futile to require "him to submit yet another petition to merely indicate his heightened vulnerability due to COVID-19[.]" *Id.*

Conclusion

The Eighth Amendment's prohibition on cruel and unusual punishment preserves prisoners' right to basic safety. Prison officials violate this right when they fail to adequately protect prisoners from an unreasonable risk of serious harm, either by denying needed medical care or failing to comply with accepted protocols. Meanwhile, pre-trial and civil detainees, and prisoners awaiting sentencing or appeal, have a greater ability to seek release. Despite the fact that prisoners may face significant barriers in attempting to secure release through the courts, some federal prisoners—those who are elderly and/or have pre-existing conditions that place them at a higher risk of developing serious illness due to COVID-19—may be more likely to secure relief by asking a court for compassionate release.