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OVERSIGHT HEARING ON THE FEDERAL BUREAU OF PRISONS AND IMPLEMENTATION OF THE FIRST STEP ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

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OVERSIGHT HEARING ON THE FEDERAL BUREAU OF PRISONS AND IMPLEMENTATION OF THE FIRST STEP ACT

Thursday, October 17, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 3:15 p.m., in Room 2141, Rayburn Office Building, Hon. Karen Bass [Chair of the Subcommittee] presiding.

Present: Representatives Bass, Nadler, Jackson Lee, Jeffries, Cicilline, Dean, Mucarsel-Powell, Cohen, Reschenthaler, Collins, Chabot, McClintock, Lesko, Cline, and Steube.

Staff present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Julian Gerson, Staff Assistant; Ben Hernandez-Stern, Counsel; Joe Graupensperger, Chief Counsel; Milagros Cisneros, Detailee; Monalisa Dugue, Deputy Chief Counsel; Veronica Eligan, Professional Staff Member; Jason Cervenak, Minority Counsel; Andrea Woodard, Minority Professional Staff.

Ms. BASS. The Subcommittee will come to order. Without objection, the chair is authorized to declare recesses of the Subcommittee at any time.

We welcome everyone in this afternoon's oversight hearing on the Federal Bureau of Prisons and the implementation of the First Step Act.

I now recognize myself for an opening statement.

I first want to acknowledge the loss of a great giant and champion for criminal justice reform, our colleague, Mr. Elijah Cummings. We were all by his passing this morning, and our hearing was a little bit delayed as we took the opportunity to acknowledge him on the floor of the House a few minutes ago.

As he recently stated, the American people demanded that their representatives in Washington fight for them and for what affects their lives on a day-to-day basis. That is precisely what is being done when we hold oversight hearings such as these, and today, of course, we will hold it in his memory.

The First Step Act is a bipartisan measure signed into law on December 2018. Since its enactment, we have been monitoring its

implementation. The process has generated a series of questions and raised valid concerns. Today's hearing is an opportunity to have an open discussion about the status of the First Step Act. We will evaluate how the law has progressed in the past 10 months, with the goal of ensuring that it meets its intended purpose to be a legitimate first step toward reforming our criminal justice system.

The First Step Act is the result of years of discussion, vigorous debates, and a reflection of both the dedication and determination of all those involved. The bill doesn't attempt to address all the ills within our current system. As the title reflects, we are just at the beginning of a very long process. It has established Federal prisons reforms and generated important but modest improvements to our sentencing laws.

Specifically, it allowed the 2010 Fair Sentencing Act to apply retroactively. It scaled back certain harsh and unjust sentencing practices and is helping to ensure that we address mass incarceration at the front end rather than simply at the back end. The law expands the eligibility of defendants for safety valve relief, which allows for judicial discretion to depart from a mandatory minimum sentence, in certain instances. A provision in this law eliminated the ability to stack firearm enhancements within the same indictment, which has historically resulted in excessive sentences. These are just some of the sentencing reform provisions in this law, and we should continue to build upon them.

As for the prison reform efforts, this law addresses a number of issues related to conditions and places of confinement in our Federal Bureau of Prisons, including, for instance, a ban on the shacking of pregnant prisoners during labor and delivery. The law also provides for a significant expansion of recidivism reduction programming as part of the earned time credit system, and I am pleased that we were able to get some of the major issues addressed.

However, like every new program, there are trials and error. Where we applaud the many positive things about this law, we must honestly address any shortcomings early in the process to ensure this law lives up to its intended purpose. This is why Congress routinely conducts oversight hearings to provide transparency to ensure well-intentioned laws are functioning as we intended them to, and to provide solutions for any unintended consequences.

I know one unintended consequence that has received a great deal of media attention is the fact that one of the individuals who was released because of First Step then was involved in a horrific crime that resulted in the death of someone. I know that there will be other weaknesses that we determine in the law, but I hope that this does not detract from the need in our country to really examine our criminal justice system.

In addition to discussing the progress made thus far with the First Step Act implementation, I would also like to hear about the overall conditions of BOP. For example, the problem that happened with some of the conditions in the Metropolitan Detention Center in Brooklyn, the problem that they had with extremely cold temperatures during a seven-day partial power outage in New York.

We have a lot to discuss, and therefore I want to thank both panels of witnesses for coming, and I look forward to your testimony.

It is now my pleasure to recognize the Ranking Member for his comments.

Mr. RESCHENTHALER. Thank you, Madam Chair, and I want to thank you for holding this important hearing today on oversight of the Bureau of Prisons.

Last year, Congress passed, and the President signed into law, one of the most sweeping criminal justice reform measures in recent history. The First Step Act was the product of lengthy bipartisan and bicameral negotiations. Today, we are again working in a bipartisan fashion to ensure that the First Step Act is properly and effectively implemented. If the First Step Act is not implemented correctly there will be no subsequent steps, and as the Republican sponsor of bipartisan legislation that would seal criminal records for certain nonviolent offenders, I want to make sure that we see more done on criminal justice reform.

My first elected office was that of a district judge, which is really the front lines of the criminal justice system. In that position, I handled everything from traffic issues to truancy to even preliminary hearings on murder cases, and sometimes all in the same day. It was truly an eye-opening experience, and it helped me understand that ultimately, we can reduce crime by ending the revolving door between prison and the streets. You can be strong on crime while also being smart on crime.

I would like to examine the issues affecting our correctional officers' safety, including new methods for bringing contraband into prisons, understaffing, and prosecution for assaulting officers. Just a few weeks ago I heard first-hand from CEOs at USP Hazelton about threats that they face every day. We must do more to keep these men and women safe, both on the job and at home with their families.

I look forward to hearing from our witnesses and about the issues and so much more as we move forward with criminal justice reform.

Thank you, and I yield back the remainder of my time.

Ms. BASS. We will now hear from the Ranking Member of the full committee.

Mr. COLLINS. Thank you, Madam Chair. I appreciate that.

Welcome, Director Hawk Sawyer and Associate Deputy Attorney Bacon. I want to thank both of you for your service and we are happy you are here with us today, and I also want to thank Ms. Bass. This hearing is one that I have waited for since basically we started this session. I am glad to have it and thank you for finally coming, and the full Committee chairman as well.

The Bureau of Prisons is tasked with protecting society by confining offenders in the controlled environments of prisons, community-based facilities that are safe, humane, cost-efficient, appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. It is the duty of the BOP not to merely provide housing, food, and security for Federal inmates but to assist those inmates in becoming law-abiding citizens upon their release. All Americans have an interest in that, because we all know the vast majority of Federal

inmates, well above 90 percent, will someday be released, regardless of what efforts have been done to reduce recidivism.

I don't think think anything happens in random chance. I believe, frankly, and from my faith perspective, God has his hand upon everything. Today is an amazing day in which we celebrate the home-going of Elijah Cummings, one who influenced this body in amazing ways. As I spoke earlier today, and I will not reflect on those words from earlier today, but he had an amazing way to connect with people that other people didn't connect with, from an amazing position of power, and he did so with a heart and compassion.

Today is also a day, with this hearing, after being, hopefully, rescheduled for so many times in the previous months, we get to it today, our celebration of the First Step Act. With my friend, Hakeem Jeffries, who is not here right now, I think Elijah would be very pleased with what has come, with a bill that he and I introduced this year, the FAIR Act, which we actually take this a step further in gaining employment for those who have been incarcerated and removing barriers to that.

In this room today, from several of the rows back that I see the faces, there are those who have benefitted from the First Step Act. You are here today because of what happened when a body came together and saw beyond our differences and saw what we could do together. I see the advocates who have been here, and which we have laughed, we have cried, we have struggled, and we see something actually come.

Today's hearing is one that is long overdue, but it is also one that is welcomed in the environment in which we have today. We understand that when we see the Bureau of Prisons, we see the Department of Justice coming together and taking seriously what this Congress said that we want to see happen here and giving us good input. I am so glad to see, Director, you are back, and we have talked about this before. This is what we are supposed to be about.

So, for those who are here today who have benefitted from something from Congress, consider yourself lucky. Most of what we do seems to not benefit a lot of people, but for you it benefitted. This Committee can do this. As Elijah Cummings was so fond of saying, "We are better than where we are. We are better than this." This is a good day for this hearing. It is a good day to show what we can do when we understand that people and policy are what we are about, not what we talk about.

Thank you for being here, and Madam Chair, thank you for holding this hearing. I yield back.

Ms. BASS. Thank you very much, Representative Collins. I appreciate you mentioning our colleague, Hakeem Jeffries. I am sure he will be with us shortly, and between the two of you played the leading role in making sure that First Step got to the finish line.

You also mentioned and acknowledged the audience, and I just would like to take a moment and ask for those people that benefited by First Step if you would please stand.

[Applause.]

Ms. BASS. In another setting, perhaps in a more informal briefing, I think that it would be very helpful and important to hear

some of your stories. There is nothing like putting a face and a story to policy that we attempt to develop and implement here.

Now, I want to introduce our witnesses. We will now hear from our first panel, Dr. Kathleen Hawk Sawyer is the Director of the Bureau of Prisons and Antoinette Bacon, who is an Associate Deputy Attorney General with the Department of Justice and is steering the implementation of the FSA and the risk assessment tool developed to implement it, the prisoner assessment tool targeting estimated risk and needs, our PATTERN. Thank you both for joining us today. We welcome our witnesses and thank them for participating in today's hearing.

Now, if you would please rise I will begin by swearing you in.

Raise your right hand. Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Ms. SAWYER. I do.

Ms. BACON. I do.

Ms. BASS. Thank you. Let the record show the witnesses answered in the affirmative. Thank you, and please be seated.

Please note that your written statements will be entered into the record in their entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that time there is a timing light on your table. When the light switches from green to yellow you will have one minute to conclude your testimony. When the light turns red it signals that your five minutes have expired.

Thank you, Dr. Sawyer and Dr. Bacon. We will now proceed with your testimony.

TESTIMONY OF KATHLEEN HAWK SAWYER

Ms. SAWYER. Good afternoon, Chair Bass and Congressman Reschenthaler. I appreciate the opportunity to discuss with you today the mission and the operations of the Bureau of Prisons and our progress in implementing the First Step Act. I thank the Judiciary Committee for their work over the many years in support of the Bureau of Prisons. This subcommittee, in particular, has been integral to our operations for many decades, including years of tremendous population growth, rapid expansion, and the opening of many new institutions.

I thank you and your colleagues for your groundbreaking criminal justice reform work through the bipartisan support of the First Step Act. Programming to assist inmates in returning to their communities as law-abiding citizens has always been a cornerstone of our mission. In fact, we have long held that an inmate's reentry journey begins the very day they enter our custody, and with the First Step Act we look forward to further enriching those offerings to help improve the lives of our inmates, and thereby help keep our communities safer.

I was honored, two months ago, to be selected by the attorney general to return to lead the Bureau of Prisons and to work alongside the finest corrections professionals in the world. I began my career as a psychology intern at one of our prisons and held positions of increasing responsibility, from associate warden to warden,

and before my original appointment as the bureau's sixth director, in 1992, a position I held until my retirement in 2003.

While much has changed since my last term as director, the foundation of the Bureau is sound. We have been challenged by the dramatic growth that we experienced commensurate with the budget cuts that followed the tragedy of 9/11, and the shift of focus from crime to terrorism. These factors have seriously strained the Bureau.

Our over 35,000 staff play a critical role in the criminal justice system, yet the great work our staff does every day goes largely unseen by the American public. This inherently dangerous work, particularly at our high-security facilities where we house our most dangerous inmates, is a responsibility we take very seriously. Unfortunately, we have experienced significant staff shortages that make our job even more difficult. In my first eight weeks as director I have placed great emphasis on filling the almost 3,700 vacancies nationwide.

Also in my first eight weeks, I have mobilized a thorough systems overview to identify areas of strengths and weaknesses and have identified three initial areas of emphasis. One is staffing, one is training, and one is an emphasis on the basics of sound correctional practice. Our system is the largest in the nation, housing over 176,000 inmates across the United States, and this return to the bedrock of sound corrections is critical to ensure that staff nationwide are following the policies and procedures that keep staff, inmates, and the public safe.

The Bureau, like corrections nationwide, also continues to face dangerous security threats from the introduction of contraband. Synthetic drugs, illicit narcotics, and contraband cell phones are some of the chief threats. The use of drones to drop contraband onto prison grounds is an ongoing problem that continues to evolve. We have deployed contraband-detecting technologies and we continue to leverage new technology and cutting-edge solutions to effectively detect and interdict prison contraband.

Our aging infrastructure is another area of concern. Almost half of our prisons are over 30 years old, and some, like Leavenworth, Atlanta, and Lewisburg date back over 80 years to the very beginnings of the Bureau of Prisons. Prison facilities are subjected to much heavier than normal wear, since they are continuously used, 24 hours a day, 365 days a year. This aging infrastructure affects institutional security, as critical systems sustain extensive wear and tear, as well as premature deterioration. We are focusing on repairing and/or replacing key systems but require significant funding to ensure that all facilities can be maintained as continued infrastructure decline occurs.

The implementation of the First Step Act is a priority for the Bureau, and I am pleased to report that we have made great progress. We have updated policies, are implementing the many requirements of the act. We are working closely with the Department of Justice and the Independent Review Committee on new risk and needs assessment that the Act requires. We have listened to the important comments of the many interested stakeholders, from crime victims to a broad array of advocacy groups.

The statutory timelines in the Act were formidable, but I am proud to say that the Bureau and the Department have met key deadlines, particularly the release of the new risk and needs assessment system, and we continue to remain focused on a full and balanced implementation of the First Step Act.

That concludes my formal statement, and I would be happy to answer any questions that you might have.

[The statement of Ms. Sawyer follows:]

Department of Justice

STATEMENT OF

KATHLEEN HAWK SAWYER
DIRECTOR
FEDERAL BUREAU OF PRISONS

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ON
OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS
AND
IMPLEMENTATION OF THE FIRST STEP ACT OF 2018

PRESENTED
OCTOBER 17, 2019

Statement of Kathleen Hawk Sawyer
Director, Federal Bureau of Prisons
Before the Subcommittee on Crime, Terrorism, and Homeland Security
of the
Committee on the Judiciary
U.S. House of Representatives
October 17, 2019

Good afternoon, Chairwoman Bass, Ranking Member Ratcliffe, and Members of the Subcommittee. I appreciate the opportunity to discuss with you today the mission and operations of the Bureau of Prisons (Bureau) and our progress in implementing the First Step Act of 2018 (FSA).

I am honored to be selected by Attorney General Barr to return to lead the Bureau and to work alongside the finest corrections professionals in the world. I was originally appointed to serve as the Bureau's sixth Director in 1992, a position I held until my retirement in 2003. While much has changed since my last term as Director, the fundamental principles that guide our mission of protecting society by confining offenders in safe, humane, cost-efficient, and appropriately secure facilities remains the same. As an agency, we must re-commit to those fundamental principles at our 122 federal prisons nationwide.

It is also a privilege to lead this agency as we work together to implement the First Step Act. The Bureau has long espoused the philosophy that reentry begins on day one for each of the over 170,000 inmates in our custody, and we take great pride in the programs we have in place nationwide to assist inmates in returning to their communities as law-abiding citizens. Evidence has shown a number of our programs can work to reduce recidivism, and many more will be subject to evaluation in the future. With the First Step Act, we look forward to further enriching those offerings to help improve the lives of our inmates and, thereby, help keep our communities safer.

The Bureau – long referred to as the standard for correctional excellence – has also faced stresses and strains. The agency experienced over 30 years of rapid inmate population growth and prison construction, significant crowding, under-staffing, and strained budgets. The aftermath of September 11th also brought individuals who presented unique security concerns as the nation's law enforcement efforts were targeted toward international terrorism. In the past four years, the Bureau has largely been without permanent leadership. While those who have taken the helm in the capacity of Acting Director have taken on an incredible challenge and done excellent work, the long-term lack of permanent leadership – along with these temporary tenures – have caused instability for the agency.

These factors have contributed to the Bureau's less than stellar performance in some recent instances, and I am committed to addressing these issues. Together, Bureau staff have risen to every challenge in the past and I am confident this time will be no different.

OUR STAFF – DEDICATED PROFESSIONALS

I am keenly aware of the significant dedication the Bureau's over 35,000 law enforcement professionals have to their agency, and the personal sacrifices they make in fulfilling the agency's important public safety mission. These staff play a critical role in the federal criminal justice system; our partners such as arresting authorities, prosecutors, judges, and community members count on us as law enforcement professionals to ensure the individuals in our custody are accounted for at all times, are treated humanely and with dignity, and are returned to their communities with the training and skills they need to be productive, law-abiding citizens. The great work our staff do every day goes largely unseen by the general public, in contrast to our missteps. Yet this inherently dangerous work, particularly at our higher security level institutions where we house our most dangerous offenders, helps keep communities safe every day. It is critical that we demonstrate our core values – correctional excellence, respect and integrity – each and every day. When we do so, even during adversity, we can ensure that everyone – both inmates and staff – remains safe.

OUR CHALLENGES

Staffing

Staffing our institutions fully is among my highest priorities. The vast majority of Bureau employees are federal law enforcement officers working directly with the inmate population in various roles across our 122 institutions nationwide. These are public trust positions, and it is critical that we select individuals who possess the skills and the integrity to achieve correctional excellence in what can be a demanding, intense, and at times dangerous job.

Law enforcement nationally, and particularly corrections, are struggling to recruit and retain skilled workers. While historically staffing had not been a problem for the Bureau, we are now facing similar challenges. This is particularly true at many of our remotely located prisons, and in our facilities that are located in very high cost-of-living areas. We are currently working aggressively to fill the over 3,700 vacancies nationwide, but doing so will take time. Bureau leadership nationwide understands we must find the right individuals to fill these vacancies – individuals who share our commitment to respect, human dignity, and the very highest level of performance.

We have made great progress. Agency-wide there have been over 9,000 selections made since March 2018, with our hires exceeding our agency separations each month. We have established 10% recruitment, relocation, and retention incentives at our hard-to-fill locations, and a 5% nationwide retention incentive for retirement-eligible employees.[1] We have just put in place a higher entry level for newly-hired Correctional Officers for individuals who have relevant experience, which I anticipate will make these positions more attractive for applicants who have solid correctional experience. We are also using 3,000 temporary positions to allow us to succession plan seamlessly as staff promote or retire, avoiding the lag caused by waiting until the position is vacant to begin the hiring process. I am grateful to the Department of Justice (Department) and to Congress for supporting this temporary position authority. Going forward,

[1] Bureau of Prisons Federal Law Enforcement Officers are subject to mandatory retirement at age 57. See Title 5 § 8355(b) for CSRS and Title 5 § 8425(b) for FERS.

we are working closely with both the Department and the Office of Personnel Management on potential hiring authorities and novel recruitment strategies.

Increasing our staffing will assist us in our basic correctional functions of safety and security, and also allow us to increase programming and productive activities for the inmate population. Increased staff will also allow us to decrease our use of augmentation – a process whereby we fill temporary gaps in security posts, as when if an officer is on sick leave or is in training, with trained correctional workers and without sacrificing safety and security. It is important to emphasize that all institution employees are law enforcement officers trained to respond to emergencies and perform security duties as needed, not just our correctional officers. Everyone is hired as and is taught that they are correctional workers first. All staff receive the same basic law enforcement training, they all receive the same annual refresher training, and they all receive law enforcement pay and retirement. As such, having these corrections professionals occasionally cover security posts can be a good use of resources. But there are times when low staffing has forced us to do so far more than we would like. Congress has asked that we decrease our use of augmentation, and Congress is correct. These staffing increases will help us achieve that important goal.

Contraband

The Bureau, like corrections nationwide, continues to face dangerous contraband security threats. Contraband cell phones and SIM cards, illicit narcotics – particularly buprenorphine, – and synthetic drugs remain chief among those. The use of drones to drop contraband into prison recreation yards is also an ongoing problem that continues to evolve. We have deployed new contraband-detecting technologies, including thermal fences, state of the art metal detectors, and whole-body imaging devices, and we continue to leverage technology and cutting-edge solutions to effectively detect and interdict prison contraband.

Cell Phones: Contraband cellphones have been an ongoing correctional security and public safety concern for the Bureau, as well as state correctional systems. In addition to traditional detection technology used to keep contraband cellphones out of prisons, Managed Access Systems (MAS) and Micro-Jamming Systems (MJS) are two viable wireless interdiction technologies that offer promising opportunities for deployment in Bureau facilities. But they are both extremely costly. MAS captures all cellular signals within the geo-spatial confines of a prison and disables unauthorized cellular signals from contraband devices, and can be configured to provide intelligence for internal prison security. In contrast, MJS jams all cellular signals within the geo-spatial confines of a prison, rendering cellular communication within the geospatial area useless. The Bureau is currently collaborating with the Department and the National Telecommunications and Information Administration on micro-jamming tests at both BOP and state facilities. We are encouraged by the promising test results and the potential for future deployment of micro-jamming technology. We are also using mobile MAS technology to perform MAS assessments that detect contraband cellphones in a correctional facility. This technology is portable and can be relocated as needed; it is a valuable and flexible measure that can be deployed quickly to react to an identified or trending threat without a requirement to install infrastructure. Pending funding, the Bureau plans to conduct pilots to gauge the efficacy and cost-effectiveness of both MJS and MAS technology. This testing is mission critical, as

contraband cellular devices are used by inmates and co-conspirators to conduct illicit criminal activity; plan escapes; facilitate the introduction of dangerous contraband; and thereby threaten staff, other inmates and members of the public.

Illicit Narcotics and Synthetic Drugs: Synthetic drugs, such as fentanyl and fentanyl analogues, MDMA (ecstasy), K2 (Spice) and bath salts are an ever-evolving contraband threat to corrections nationwide. These compounds can be sprayed onto paper, personal mail, and incoming publications, creating a multi-pronged threat in our prisons. Exposure to the chemicals is hazardous to our staff and inmates, and can be lethal. Inmates who obtain and use the compounds can engage in significant misconduct, unpredictable behavior, and overdose; additionally, illicit contraband economies disrupt the orderly running of our institutions. Because manufacturers of these compounds frequently alter the chemical composition of the substances, reliable detection in a correctional environment where time is of the essence in responding is very difficult. We are working on new approaches that will provide our staff additional tools to reduce or eliminate the chance of exposure to these hazardous compounds, including exploring mail scanning, hand-held scanners, and new technologies to detect synthetic drugs. For example, we are conducting an off-site mail scanning pilot that would eliminate physical mail for general inmate correspondence. Inmate mail would be scanned, converted to an electronic file, and made available to inmates for reading on an inmate kiosk, thus eliminating the threat of synthetic drugs introduction in the physical mail.

Drones: With the support of the Department and the Federal Aviation Administration (FAA), the Bureau has obtained flight restrictions prohibiting drone flights over 108 Bureau institutions. BOP also played a key role in securing the passage in late 2018 of the Preventing Emerging Threats Act of 2018, which authorizes the Attorney General to mitigate credible threats presented by drones to the safety or security of certain BOP facilities and assets considered high risk and a potential target for unlawful drone activity. BOP is working closely with the Department to begin implementing that authority. In the near term, BOP will devote resources to support the testing and evaluation of cutting-edge technology capable of detecting and mitigating drones that threaten BOP facilities. BOP also participates in a Department-wide committee, the Counter-UAS Operational Test and Evaluation Committee (COTEC), focused on exploring the most promising forms of technology to counter the drone threat. BOP will continue to explore the most effective and efficient means of tackling this emerging threat in a manner that protects our prisons while promoting the safety and efficiency of the national airspace system.

Aging Infrastructure

About 30 percent of the BOP's 122 institutions are over 50 years old and 45 percent are over 30 years old. The older an institution becomes, the greater the need for repairs/replacements of systems. Due to years of inmate crowding and aging infrastructures, Bureau facilities and systems continue to sustain extensive wear and tear as well as premature deterioration. As with all deferred maintenance, the longer necessary repairs and maintenance are postponed, the greater the risk of problems becoming worse over time and the repairs becoming more costly. We carefully monitor and maintain the facilities and systems to

minimize the risk of catastrophic failure. However, delaying work on critical infrastructure and preventive maintenance puts even greater pressure on future fiscal years and on our employees to keep deteriorating systems running for much longer than best practices dictate.

This aging infrastructure also affects institution security, as deteriorated facilities add to increased risk of escape, inability to lock down cells, and potential violence due to frustration over inadequate living conditions, such as aging HVAC, plumbing, and roofs. Prison facilities are subjected to much heavier than normal wear since they are continuously used 24 hours a day, 365 days a year. As a result, the rate of deterioration tends to be higher than other federal facilities of similar age. We address this challenge by reprioritizing projects on a regular basis to ensure that the most critical needs are met, but that can result in an inability to then address lower priority projects.

OUR ACCOMPLISHMENTS – FIRST STEP ACT

The Bureau has made great progress in implementing the FSA. We appreciate the considerable work of the Department of Justice (Department) in the implementation process, as well. In particular, the Department's National Institute of Justice has been instrumental in collaborating with us as we move forward aggressively to ensure this important criminal justice reform is appropriately and effectively implemented. We similarly appreciate the ongoing work of the Independent Review Committee as they advise the Attorney General on the new risk and needs assessment systems required under the FSA.

We have listened to the important comments of the many interested stakeholders – from crime victims to a broad array of advocacy groups. The statutory timelines in the FSA were formidable, and placed before us many challenges, but I am proud to say that the Bureau and the Department rose to that challenge. And we continue to remain focused on the full, fair, and balanced implementation of the FSA.

The FSA memorialized in statute many things the Bureau has long had in place, as well as some newer Bureau initiatives. The prohibitions on room confinement for juveniles and restraining pregnant females have been in place in the Bureau for several years. While both populations are quite small within our agency, we recognize these individuals have unique needs. As such, we provide them with programming that specifically addresses these unique needs. Our small population of juveniles are housed in contract juvenile facilities that are required to provide very rich programming and treatment for the population. Our pregnant females have housing options that allow them to spend quality, post-partum time bonding with their child, often up until the inmate releases from prison.

We have for many years made feminine hygiene products available free of charge to our women prisoners. In 2017 we standardized nationwide what products were offered, and made explicit at our female prisons those products should be readily available in common areas in quantities sufficient to meet the needs of the women.

Designating inmates within 500 miles of their release residence when possible – consistent with safety, security, capacity, and inmate programming and health care needs – has long been our policy. Designation to facilities close to an inmate's release residence is important

in supporting family and community ties, as well as facilitating reentry needs, and we remain committed to those placements whenever possible.

The Bureau began a Medication Assisted Treatment (MAT) opioid therapy pilot in 2018, prior to the enactment of FSA. Initial screenings for MAT are completed on all inmates within fifteen months of release, and the Bureau is now screening inmates who are further from release. In conjunction with the pharmaceutical treatment, this program includes substantial psychological support for participants. Now, we are working to expand our pharmaceutical offerings for MAT through enhanced prescriber licensing, which is a federal requirement for some MAT pharmaceuticals.

Similarly, the Bureau has housed dog training programs in our facilities for many years. These programs, which are supported by community organizations and volunteers, provide marketable skills to our inmates, a number of whom have gone on to work in the industry upon release. The programs provide important soft skills, as well, such as responsibility, persistence, and empathy. With the passage of FSA, we have 20 dog pilots operational and the Bureau welcomes additional programs to the pilot.

The policy providing for staff personal weapons storage on Bureau property was issued in September 2018. This provision has special significance for the agency, as in the FSA it is named for Bureau Lieutenant Osvaldo Albarati. Lt. Albarati was murdered on his way home from his job at the Metropolitan Detention Center in Guaynabo, Puerto Rico on February 26, 2013.

With the President signing the FSA into law on December 21, 2018, several provisions became immediately effective. Despite the government shutdown, the Bureau rapidly developed guidance and policies to ensure appropriate implementation. The retroactive application of sentence reductions under the Fair Sentencing Act resulted in over 2,000 orders for release, with the release thus far of over 1,500 of those inmates. Staff also immediately began the challenge of re-programming our Good Conduct Time (GCT) sentence computations to reflect the change. As a result, on July 19, 2019, when the GCT change took effect commensurate with the Attorney General's release of the Risk and Needs Assessment System, the Bureau executed timely releases of over 3,000 inmates.

Guidance regarding the expanded Reduction in Sentence (RIS or compassionate release) provisions were issued in January 2019. Since the Act was signed into law, 95 inmates have received Compassionate Release. The re-initiation of the Elderly Offender Pilot from the Second Chance Act of 2008 was issued in April 2019. We currently have 328 inmates approved for the pilot, with 242 already on Home Confinement. The balance are pending their Home Confinement placement.

De-escalation training has been completed for Bureau field and administrative staff during agency-wide Annual Training. Our institution volunteers – a critical component of our community partnerships at our local institutions – have increased by almost 1,700 volunteers since the enactment of the FSA. In June, we distributed to all our institutions inmate reentry booklets that outline crucial inmate reentry resources, and have already had institutions request additional copies for further distribution to the inmate population. Finally, the youth mentoring pilot programming has been distributed to our institutions nationwide.

RISK AND NEEDS ASSESSMENT

In accordance with the FSA, the Attorney General on July 19, 2019, released the Department's report on the Risk and Needs Assessment System. The new Risk Assessment system – the Prisoner Assessment Tool Targeting Estimated Risk and Needs or PATTERN – has been developed by the Department and is currently undergoing fine-tuning as we consider feedback from stakeholders. The Bureau already has in place a robust Needs Assessment system, and we are working with experts in the field and research consultants to further enhance it.

PROGRAMMING

For many decades, the philosophy of the Bureau has been that release preparation begins on the first day of incarceration. By offering a variety of programs and activities, the Bureau has helped inmates enhance their skills to support a successful reentry back to the community. Reentry programing can be a critical component of public safety. Our goal is to provide inmates with as much opportunity as possible to improve themselves through job training, education, and programs which promote understanding of what it means to be a productive law-abiding citizen. The BOP also provides treatment programs which affect inmate risk and address their needs in critical areas such as mental illness and/or substance abuse.

Inmate programs in federal prisons include work, education (including literacy), vocational training, substance use disorder treatment, psychological services and counseling, observance of faith and religion, and other programs that impart essential life skills. These programs are a critical part of the Bureau's mission to keep our communities safe. The Bureau also provides inmates with career technical education and apprenticeships in a variety of fields including: building trades, mechanics, horticulture, food preparation, and cosmetology, as well as job readiness certifications in areas such as CDL-licensed drivers and biomedical technicians. These programs seek to improve reentry outcomes by promoting prosocial behaviors while targeting behaviors that would otherwise increase the risk of recidivism. The First Step Act provides us with the opportunity to add new programs, and enhance and expand existing programs, to help reduce risk, reduce recidivism, and better prepare inmates to return to our communities.

CONCLUSION

I am honored to speak on behalf of the Bureau, and also on behalf of the many Bureau staff in our 122 institutions, as well as our administrative offices nationwide. Our mission is challenging, but critical to the safety and security of the public, our staff, and the inmates we house.

I also thank the staff who worked long hours to make tremendous progress on the implementation of FSA. The Bureau can be proud of this hard work, but we understand we still have more to do. I look forward to the strong, continued collaboration between our staff, staff

from across the Department, and the many stakeholders with an interest in helping to reduce recidivism.

Chairwoman Bass, Ranking Member Ratcliffe, and Members of the Committee, this concludes my formal statement.

Ms. BASS. Thank you. Ms. Bacon?

TESTIMONY OF ANTOINETTE T. BACON

Ms. BACON. Good afternoon, Chair Bass, Mr. Reschenthaler, and Members of the committee. I am Antoinette Bacon, Associate Deputy Attorney General, and I appreciate the opportunity to be here today to discuss the Department of Justice's ongoing efforts to fully implement the first Step Act.

Both the attorney general and the deputy attorney general have consistently and emphatically stated that the Department will work diligently to implement the First Step Act, and they both have been actively engaged in these efforts. For example, both have met with the Independent Review Committee to learn from this group of highly esteemed experts, and each visited a BOP facility to see firsthand the quality, education, and vocational programs, and to speak with inmates and staff who participate in these programs and deliver these programs.

Following their lead, our team has worked tirelessly to ensure that the act's many reforms are implemented in a way that reduces recidivism, that provides opportunities to offenders, and that protects our communities. The written testimony contains greater detail on this, but in my remarks, I would like to highlight several ways in which the Department has been demonstrating its commitment to the act.

First, we met the very ambitious July 19th deadline to publish a new risk and needs assessment system called PATTERN. PATTERN obtains the highest level of predictability of any current system. It contains 17 different factors, 11 of which are dynamic, which means that they can change during a period of incarceration. PATTERN was validated for males and female inmates separately.

Importantly, DOJ did not create PATTERN in a vacuum. Instead, we consulted with the Independent Review Committee, the Administrative Office for U.S. Courts, the National Institute of Corrections, and over two dozen diverse stakeholder groups. Then, once announced, we opened PATTERN to a 45-day study period, to solicit additional input, including input from BOP's union. We are currently reviewing all this feedback and are working in collaboration with the Independent Review Committee to identify appropriate changes to the tool.

Going forward, the Department is committed to studying PATTERN's effectiveness. We want to know if it is working. To that end, the National Institute of Justice has just announced an intention to release a solicitation to evaluate and to validate the tool. Based on that research, along with other data, we fully intend to refine and make appropriate changes to the tool going forward.

Developing PATTERN was only one part of the First Step Act. The Department has had equally robust implementation with the act's other requirements, which include, for example, reduced sentences. On July 19th, the deputy attorney general announced that approximately 3,100 Federal prison inmates were released from BOP custody as a result of the increase in good conduct time that the Act allowed. As of last week, approximately 2,139 inmates have received sentencing reductions, pursuant to the retroactive applica-

tion of the Fair Sentencing Act of 2010, which closed that gap or narrowed that gap between crack and powder cocaine sentencing.

The second key area is effective reentry programming. Helping offenders successfully reintegrate into the community is a key factor in preventing and reducing recidivism and really finding gainful employment. Getting a good job is part of that process. To further that goal, BOP has launched a ready-to-work initiative which connects private employers looking to hire returning citizens with inmates nearing release.

To further assist with reentry, the deputy attorney general announced that the Department of Justice has prioritized $75 million in order to fully fund the First Step Act to its authorized fiscal year 2019 level, and that funding is being used in a variety of ways, including helping with job readiness by increasing vocational opportunities, by expanding education programs, including providing English as a second language workbooks and textbooks, and helping the female inmate population by expanding access to programs that are targeted specifically to females' needs.

These are just some of the ways we are working to faithfully implement the First Step Act, and I look forward to working with you as we seek to provide opportunities, reduce recidivism, and protect our communities.

Thank you.

[The statement of Ms. Bacon follows:]

Statement of Antoinette T. Bacon
Associate Deputy Attorney General
Before the Subcommittee on Crime, Terrorism, and Homeland Security
of the
Committee on the Judiciary
U.S. House of Representatives
OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS AND IMPLEMENTATION OF THE FIRST STEP ACT OF 2018
October 17, 2019

Thank you for the opportunity to testify regarding the Department of Justice's ongoing efforts to fully implement the First Step Act.

The Attorney General has consistently and emphatically stated that the Department will implement the First Step Act's requirements. As part of his January 2019 confirmation hearing, the Attorney General committed to faithfully implementing the Act. He has consistently communicated that message to the public and to those within the Department.

The Department, in turn, has worked tirelessly to ensure that the Act's many reforms are implemented in a way that reduces recidivism, provides opportunities to offenders, and protects our communities. As an example of that commitment, the Deputy Attorney General announced on July 19, 2019 that $75 million in existing resources would be reprioritized in order to provide the FSA's authorized funding level for implementation in 2019.

Today, I would like to focus on the Department's efforts to develop, refine, and implement the Risk and Needs Assessment System (RNAS) required by the Act. I also will summarize some of the other steps that the Department has taken to implement the Act.

I. Developing, Refining, and Implementing the Risk and Needs Assessment System

A. Developing the Risk and Needs Assessment System

Beginning with the Act's enactment, the Department focused on the development of the RNAS. The RNAS classifies inmates according to their risk of recidivism and determines the type and amount of evidence-based recidivism reduction programming that is appropriate for each inmate. An inmate's risk classification may also affect the inmate's ability to receive certain incentives. For example, some inmates may be able to receive time credits for successfully completing evidence-based recidivism reduction programs and productive activities. The Act also created an Independent Review Committee (IRC) to consult with the Department as it develops the RNAS.

Congress set an ambitious schedule to implement the Act's requirements. The Act required the Attorney General to develop and publish the RNAS within 210 days of the Act's enactment. That deadline was made even more ambitious for two reasons. First, the IRC did not exist when the Act was enacted. As a result, the Department had to start the process of establishing the IRC, consult with the IRC, and publish the RNAS – all within 210 days. Second, most Department employees were prevented from working during the funding lapse from December 2018 to January 2019.

Despite these challenges, on July 19, 2019, the Department satisfied Congress's deadline to publish the RNAS. On that day, the Department announced that it would use a new risk assessment instrument, the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) to classify inmates according to their risk of recidivism. The Deputy Attorney General emphasized the importance of PATTERN by holding a press conference announcing its release.

In developing PATTERN, the Department contracted with two national experts in risk assessment systems – Dr. Grant Duwe, the Director of Research for the Minnesota Department of Corrections, and Dr. Zachary Hamilton, an Associate Professor of Criminal Justice and Criminology and the Director of the Washington State Institute for Criminal Justice. The Department benefitted substantially from Drs. Duwe and Hamilton's knowledge and expertise. Consistent with the Act, PATTERN incorporates dynamic risk factors – things that an inmate can change over time. Such dynamic factors include, among others, an inmate's infractions, beneficial programs, and vocational courses.

The Department also satisfied the Act's requirements with respect to the IRC. Shortly after funds were made available for the IRC's work, the National Institute of Justice (NIJ) selected the Hudson Institute as the host organization for the IRC. As the host organization, the Hudson Institute acted as a project manager and supported the IRC in its work. The IRC includes members with academic expertise, such as Drs. Faye Taxman and James Byrne; those with correctional expertise, such as John Wetzel and Patti Butterfield; and those who have served in senior roles in the United States Government, such as George Terwilliger and John Walters.

The Department consulted extensively with the IRC as it developed PATTERN. The IRC gave advice during formal meetings with the Attorney General, Deputy Attorney General, and Department subject matter experts. It also participated in informal consultation sessions among IRC members and NIJ's outside experts.

The Department also held three listening sessions in April and May of 2019 to allow stakeholders to provide input regarding the RNAS. The Department received written and in-person statements from 27 individuals representing a variety of communities, including legal experts, law enforcement, criminal justice advocates, academics, victims' rights advocates, and others. The Department received constructive advice on a variety of topics, including what a useful risk assessment system should include, the need to avoid racial bias, and the need to take account of the harms suffered by crime victims.

B. Refining the Risk and Needs Assessment System

In announcing PATTERN, the Department made clear that it was only the first step in implementing the Act. Indeed, as part of PATTERN's announcement, the Department immediately began the process of considering how to improve it. That process included a 45-day public study period that recently concluded. During that study period, the Department solicited public comment and conducted two listening sessions with interested stakeholders. The Department received 17 statements (combining written and in-person) as a result of the listening sessions. Additionally, the Department has continued to consult with the IRC and NIJ's outside

experts to consider ways to improve PATTERN. This is an ongoing process, and we look forward to refining the RNAS over time.

C. Implementing the Risk and Needs Assessment System

In addition to developing and improving PATTERN, the Department is committed to ensuring that the System is appropriately implemented within BOP. Indeed, NIJ contracted with a third outside expert, Dr. Angela Hawken, to work on implementation of the RNAS.

As PATTERN is refined and finalized, BOP will train staff in how to use it appropriately. BOP anticipates assessing new inmates as they are processed at intake and reassessing all inmates every six months. After an inmate is assessed, BOP will provide a needs plan with tailored programs and services. BOP is actively reviewing its available programming to ensure that inmates are being offered appropriate programs and services. We expect that BOP will post a list of approved programs by January 2020.

The Department also is working to design an enhanced needs assessment tool with input from expert practitioners, academic researchers, and federal partners. As part of that effort, on August 28 and 29, 2019, the RAND Corporation, on behalf of NIJ, hosted a workshop on the Use of Risk and Needs Assessments in Prisons. I attended a portion of that workshop, along with IRC member, Dr. Faye Taxman. The prototype needs assessment system is expected to be available for testing by the second quarter of 2020.

Additionally, BOP is developing a system to track and award earned time credits for inmates who successfully complete evidence-based recidivism reduction programs and productive activities. BOP will continue to update its systems and policies to integrate PATTERN into its operations.

The Department also will monitor the effectiveness of PATTERN over time. NIJ will research and evaluate the predictive validity of PATTERN. It also will examine the effectiveness of our programming in reducing recidivism. Based on this research and other data, the Department will refine and make changes to PATTERN and the associated programming and procedures.

II. Other Efforts to Implement the First Step Act

Of course, the Risk and Needs Assessment System is only one part of the Act. Other steps that the Department has taken to implement the Act include:

- **Good Time Credit Recalculation**. Over 3,000 federal prison inmates were released from BOP custody as a result of the Act's recalculation of how much good time credit an inmate may accumulate each year.
- **Compassionate Release**. BOP updated its policies to reflect the new procedures for inmates to obtain "compassionate release" sentence reductions under 18 U.S.C. §§ 3582 and 4205(g). Since the Act was signed into law, 95 inmates have received Compassionate Release.

- **Expanded Use of Home Confinement**. The Act authorizes BOP to maximize the use of home confinement for low risk offenders. Currently, there are approximately 2,000 inmates on Home Confinement. The legislation also expands a pilot program for eligible elderly and terminally ill offenders to be transitioned to Home Confinement. There are currently 328 inmates approved for the pilot, with 242 already on home confinement under the pilot.

- **Drug Treatment**. Offenders are interviewed and screened by drug treatment specialists and a clinical psychologist to determine if they have a substance abuse treatment need. Inmates with an identified need are provided an individualized treatment plan to address their need. About 20,000 BOP inmates are currently enrolled in drug treatment programs, including the Residential Drug Abuse Program (RDAP).

- **Medication Assisted Treatment (MAT)**. The Act requires BOP to assess the availability of and the capacity to treat opioid use disorders through evidence-based programs, including medication-assisted treatment. In the midst of the opioid crisis, this initiative is important to improve reentry outcomes. Every inmate within 15 months of release who might qualify for MAT has been screened. Inmates are screened physically and psychologically for history of an opioid-related disorder.

- **Effective Re-Entry Programming**. Implementing the Act includes helping offenders successfully reintegrate into the community – a critical factor in preventing recidivism and, in turn, reducing the number of crime victims. Finding gainful employment is an important part of that process. In furtherance of this goal, BOP launched a "Ready to Work" initiative to connect private employers with inmates nearing release under the Act.

In addition to these implementation efforts, BOP has taken the following important actions:

- Updated existing guidance and training concerning the use of restraints on pregnant inmates;

- Verified that existing policies and contracts comply with the Act's requirement to provide sanitary products to female offenders free of charge;

- Updated its policy for employees to carry and store personal weapons on institution property;

- Offered de-escalation training to its employees and officers in accordance with the Act;

- Identified a dyslexia screening tool; and

- Updated its mental health awareness training regarding inmates with psychiatric disorders.

Thank you again for the opportunity to testify regarding the Department's efforts to implement the Act. I look forward to working with you as we seek to provide opportunities, to reduce recidivism, and to protect our communities.

Ms. BASS. Thank you very much. We will now begin our five minutes of questioning, and I will begin.

I would like to ask the Honorable Hawk Sawyer, in terms of the implementation, and specifically the provisions in the First Step Act that addressed pregnant women. So, my question is what has changed in the BOP in regard to pregnant women?

Ms. SAWYER. A couple of things have changed, some we really did not need to change. We did not historically really use shacking of female pregnant inmates to any extent. If we had an inmate that was acting out in some way to where it threatened the life of the inmate themselves, and especially their unborn child, we would, at times, have to restrain them. So, we put clearly into—

Ms. BASS. What does acting out mean?

Ms. SAWYER. Some of our pregnant women have mental health issues also, the typical issues that some of our inmates have.

Ms. BASS. Right.

Ms. SAWYER. So, when they are flailing about, fighting our staff, resisting any kind of—

Ms. BASS. Right.

Ms. SAWYER. —calmer interaction, then we feel that we do have to subdue them, and we do it as gently as we possibly can, and when necessary, restrain them. To tell you, since—

Ms. BASS. How would be they be restrained?

Ms. SAWYER. They could have handcuffs placed on them. They could have their arms attached to a chair, until we calm them down. To the chair's concern, this has occurred once in the last year. It is not something that we do, except when it is absolutely necessary.

The way in which the change that has occurred, though, is we have defined this even more explicitly in our policy. We have instituted a reporting system where if it ever occurs it needs to be notified up through the ranks, so we find out about it. The part we did change, though, is we were never as clear on postpartum inmates.

Ms. BASS. So, also, during pregnancy—I am not talking about labor and delivery but I am talking about pregnancy—

Ms. SAWYER. Right.

Ms. BASS. —women then do not routinely have chains around their waists? They don't routinely have chains on their feet?

Ms. SAWYER. We don't handcuff them, use chains—

Ms. BASS. You don't have handcuffs when they are being transported around the facility?

Ms. SAWYER. Exactly. When a woman first comes to our institution, we automatically do a pregnancy check, because sometimes they come in and don't even realize they are pregnant.

Ms. BASS. Right.

Ms. SAWYER. So, we make them very aware of their condition, if they are pregnant. We put it very clearly in their file so that any staff interacting with them knows that they are pregnant, and we are very cautious to make sure we do not restrain pregnant women in any way. As I indicated, the real change for us has been in the postpartum women. We were not as clear and explicit. We now have it clearly in policy that for 12 weeks after delivery we are utilizing the same—treating them in the same way we do during the course of their pregnancy.

Ms. BASS. Wonderful. Thank you very much. I would like to ask Ms. Bacon about the assessment tool. I think there was a request made from the Committee to see the assessment tool, and I was wondering if you have it available for us to look at.

Ms. BACON. Yes. So, currently the Department is taking under consideration the approximately 170 comments we received during the 45-day study period, and working in close collaboration with the Independent Review Committee.

Ms. BASS. Let me ask you something about those comments. So, people were commenting—they saw the tool and they were commenting on the tool?

Ms. BACON. They saw the tool as described in the report that the Department of Justice issued on July 19th.

Ms. BASS. They didn't actually see the tool itself?

Ms. BACON. That is correct.

Ms. BASS. So, do you have the tool available so that we can see it? I understand you are reviewing it and all of that, but I would like to see what the instrument is.

Ms. BACON. The tool is not yet complete, because we are still taking into account not only the approximately 170 comments but also the Independent Review Committee had a series of—

Ms. BASS. So, it is not actually being used right now because it is not finished?

Ms. BACON. It is not being used right now.

Ms. BASS. Okay. So, when part of the criticism of First Step, the release of a couple of individuals who have committed crimes, I think there was the assumption that they were assessed, and something happened. So, how are people released if there is not a risk assessment tool available?

Ms. BACON. Currently they are being assessed under the existing BOP system, which is called BRAVO, and that tool was designed many years ago to assess risk of prison misconduct, and to try to determine what is the risk level while incarcerated.

Ms. BASS. Do you have that instrument I could see?

Ms. BACON. Yes. That instrument is available.

Ms. BASS. The older instrument?

I would like to see that. Then also, when are you going to finish the feedback and when will the RFP be available?

Ms. BACON. We are working very diligently to update the tool and to make any necessary updates from the listening session and from the Independent Review Committee's suggestions, train all of the BOP employees, work with the BOP union, if necessary and appropriate, on any changes, and have everybody screened.

Ms. BASS. So, we'd like to see that, as well, in terms of formal comments. Then when you do have an RFP it will be, who are you looking for to evaluate it?

Ms. BACON. The RFP will be issued through the National Institute of Justice, open to anyone who qualifies under the terms of the RFP. What we are really trying to—

Ms. BASS. When do you think it will be available?

Ms. BACON. My understanding is in the very near future.

Ms. BASS. Okay.

Ms. BACON. Because the goal is to have not only the BOP and not only the Independent Review Committee and not only the ex-

perts that NIJ hired but another group who all will have access to the data and can each independently verify and test and work with each other to make sure—

Ms. BASS. That's good. I am about ready to run out of time. That is very helpful, and I would like to be notified when that RFP, before it is going to be released, because when you look at evaluation, who evaluates it is very critical, and what their experience is with different populations, their cultural awareness, *et cetera*, is critical to an evaluation. So, making sure that the RFP is widely available to different groups is very important. Thank you.

Mr. RESCHENTHALER. Thank you, Madam Chair. This question is for both witnesses.

I know that the President is deeply committed to the First Step Act and AG Barr has stated that he is in lockstep with the President in ensuring swift implementation. Can you just broadly address what you are doing to ensure that this bipartisan measure is successful, and if you could provide a timetable on when those in prison will be able to take advantage of the recidivism reduction programming in the First Step Act?

Ms. BACON. Yes. The attorney general is deeply committed to ensuring that the First Step Act is fully and fairly implemented and has been personally involved since the beginning in ensuring that we were on pace to meet the deadlines, as evidenced by our ability to meet the July 19th deadline, which was quite ambitious.

We did not stop at July 19th. In fact, we saw that as the work just beginning. From July 19th to today, we have been laser-focused on working on building up the needs part of the needs assessment system, and also in really taking the feedback we have received and challenging ourselves to see how we can improve the system, PATTERN, as drafted. We are currently on pace to meet all of the deadlines that are in the statute.

Mr. RESCHENTHALER. Do you have anything to add?

Ms. SAWYER. Well, I would just say that we have already begun training our staff. Even though we do not have the final needs assessment, yet we are already starting up the training for our staff, to have them prepared to move forward once the risk assessment is completed, and to actually move forward on the needs assessment portion of it also, to identify the needs.

We are also looking at the program offerings that we have available in the Bureau of Prisons, and we have received some funding during this past fiscal year to increase the program offerings in a number of our education vocational training areas and our specific program areas. We are kind of planning out the year ahead with monies we requested into next year of additional programs we will be able to add, to have available to the inmates also.

Mr. RESCHENTHALER. Thank you. My next question is about COs. A correctional officer can be responsible for, as you know, supervising as many as 150 inmates at once, and the COs are unarmed inside the facilities. It is my understanding that insufficient staffing levels in a more aggressive inmate population have led to a spike in violence. What is the BOP doing to prevent violence against staff, and if you have these statistics, how many assaults took place last year? How many of these assaults led to criminal prosecutions?

Ms. SAWYER. Okay. I do not have the information here today on the numbers of assaults and prosecutions, but we will be very happy to get those for you.

Staff safety is our most critical concern, absolutely, and the vacancies we have in staffing right now are just unacceptable. They have come about because of several years of uncertainty about our budgets, uncertainty about the number of positions we were allowed to fill. There has just been a lot of concern with how much money we were going to have and how many positions we were going to have each year. It has caused us to fall back in terms of filling positions.

Now, we are ramping up absolutely dramatically and trying to fill these positions. Since I have become the director, we have initiated a number of new things. We are getting some new authorities from OPM. We are trying to get direct-hire authority at the institutions. We have hired up like two dozen more staff in our staffing area, just to help process the new employees coming on board. We have ramped up our recruiting. We are doing everything we can to get the right bodies coming on board, get them through the very slow hiring process in the Federal Government, and getting them into our institutions as quickly as possible.

Some of the things we have done in terms of protecting our staff, we have gone, the last few years, to providing stab-proof vests for our employees, because that was an issue of concern for some years where some of our employees were actually being stabbed by the inmates. We have stab-proof vests for everyone. They are required in all our higher-security institutions. They do not carry weapons but they carry like a pepper spray canister with them, which enables them to break down any disruptive inmates very quickly and stop any aggressive action. We do everything we can to try to keep our staff safe but filling up these positions is critical.

As you know, from Hazelton, the new warden there has done a wonderful job of getting his staffing level up almost to full complement. So, it is just a matter of us getting all of our institutions up to that level of staffing.

Mr. RESCHENTHALER. Just one follow-up question on staffing. I am being told that nurses and administrative personnel are being used to supervise inmates. One, is this true, and two, is there anything being done to curb this augmentation of staff?

Ms. SAWYER. Augmentation is an integral part of how we do business. I started as a psychology intern at the Bureau of Prisons. I had to cover posts for correctional officers. We all are trained as correctional workers first. We all have the same basic correctional training. So, when a teacher is teaching, they don't have a correctional officer in that classroom to guard the inmates while the teacher is responsible for overseeing those inmates. When I did therapy groups as a psychologist, I was responsible for providing security. Our work detail supervisors, they are responsible. We are all trained as correctional officers first.

So, what has happened, though, more recently, with the lower staffing, we have had to use augmentation more than we would like to. So, we need to get us back to a level where augmenting is good, because, I went from a psychology intern to a warden. Had I not had all those experiences along the way of working other

posts and details, I would have been ill-prepared to move into those jobs. So, it is a way we develop and train our staff.

Our problem today is we are using augmentation too much because our staffing levels are too low. So, we need to get it up to a level of appropriate augmentation, but not overly so.

Mr. RESCHENTHALER. Thank you.

Ms. BASS. Thank you, and we have been joined by the chair of the full committee, Mr. Nadler.

Chair NADLER. Thank you, Madam Chair. I ask unanimous consent that my opening statement be placed in the record.

Ms. BASS. Without objection.

[The statement of Chair Nadler follows:]

CHAIR NADLER FOR THE RECORD

Statement of the Honorable Jerrold Nadler, Chairman, Committee on the Judiciary, for the "Oversight Hearing on the Bureau of Prisons and Implementation of the First Step Act" before the Subcommittee on Crime, Terrorism, and Homeland Security

Thursday, October 17, 2019, at 2:00 p.m.
2141 Rayburn House Office Building

I thank our Crime Subcommittee Chair, the Gentlelady from California, Ms. Bass, for holding this hearing today to carry out our oversight responsibilities over the Bureau of Prisons and implementation of the First Step Act.

Passage of the First Step Act, thanks to the leadership of Ranking Member Collins, along with the Gentleman from New York, Mr. Jeffries, and many others, was an important bipartisan achievement. It has been almost one year since the First Step Act was enacted and, while there have been some positive developments, many questions remain about its implementation.

We must ensure that any changes we put in place in the Bureau of Prisons, as a result of the First Step Act, are carried through in a transparent fashion and in a way that alleviates—not exacerbates—the disparities that already exist in the criminal justice system. I am concerned that the risk assessment tool established by the Department of Justice pursuant to the First Step Act fails this test. I, therefore, look forward to today's hearing and a full discussion of these issues.

I am especially glad that Dr. Kathleen Hawk Sawyer, Director of the Bureau of Prisons, is here because I remain concerned about an incident that took place earlier this year at the Metropolitan Detention Center (MDC) in Brooklyn—in my district. In late January and early February 2019, a severe cold wave caused by a weakened jet stream around the Arctic polar vortex hit Canada and the northeastern United States. The temperature in New York, on January 31st, reached 2 degrees Fahrenheit, with a windchill of negative 17 degrees.

On the coldest week of the year, there was a fire at MDC and something went very wrong. Inmates—many of whom only had short-sleeved shirts to wear—had no heat, they had no electricity, and they had no way to contact their loved ones. Inmates who needed medication, had none. Inmates who needed CPAP machines to sleep safely could not use them because there was no power. Everyone was freezing—and many were terrified.

Along with Congresswoman Nydia Velazquez, I went to MDC in the middle of all this. I could not believe what I saw. Not only was there no plan in place to assure inmate safety in case of a power outage, there appeared to be no sense of urgency to address this life threatening problem.

Congresswoman Velazquez and I insisted that the Office of the Inspector General of the Department of Justice investigate. Last month, OIG issued a report, which contains alarming findings that are consistent with what we had heard and seen.

According to the report, there have been long-standing temperature regulation issues at MDC, which have gone unaddressed. This is unacceptable. Moreover, BOP leadership and staff failed to manage effectively critical aspects of the jail operation during the emergency. This, too, is unacceptable. BOP *must* do better.

I am also concerned that BOP has been plagued by staffing shortages for years. To make up for these shortages, staff are often called upon to work overtime, and often many times in the same week. BOP also relies on a practice called "augmentation" through which staff who are not correctional officers—including secretaries, teachers, nurses, and cooks—perform the duties of corrections officers, including supervising inmates in housing units and elsewhere.

These staff are ill-equipped to replace experienced correctional officers who know the inmates and the responsibilities of their assigned posts. Augmentation also reduces access to programming, recreation, and education initiatives, which are key to maintaining safe facilities and reducing recidivism—one of the major goals of the First Step Act.

From press accounts and from what we have been told by corrections union representatives, it appears that these staffing issues may have contributed to the failure of BOP to adequately supervise Jeffrey Epstein, who should have been under greater and more skilled supervision before he killed himself this summer.

These are just some of the important issues that we must examine today. I look forward to hearing from our two panels of distinguished witnesses, and I yield back the balance of my time.

Chair NADLER. Thank you.

Ms. Sawyer, Nydia Velazquez and I were witnesses at the Brooklyn Metropolitan Detention Center in Brooklyn to the catastrophic conditions back in January or February. The inspector general's report recommends that the MDC upgrade its heating, ventilation, and cooling equipment and put in place a system to automatically monitor the temperatures throughout the facility.

It has now been 10 months since the crisis. Have those upgrades been made?

Ms. SAWYER. We have made most of them, Congressman. We have been working diligently to make all the improvements on both the electrical side and the heating and air conditioning side. On the heating side we have gone through all our heating equipment, done all the preventive maintenance, checked all the coils and the wires and everything you could possibly check.

The thing we have not yet done, because we have to get the funding for it and then put it into place are the sensors that we would like to have located around the institution to tell us exactly what the temperature is in each area of the institution. Because as you know, during your visit, it was very warm in some parts of the institution and not warm enough in other parts of the institution, and controlling a large building is very difficult.

So right now, we are doing it with handheld sensors. We are going around the institution with handheld sensors and checking the temperature all the time, very regularly, and having to convey that back to the powerhouse. The new sensors, which will be coming in the near future, will be permanently placed around the housing units and around the institution. They will immediately feed back, electronically, the information on the temperatures to the powerhouse so that it can be regulated very quickly and regularly. That we are still in the process of installing, but we have made significant improvements.

Chair NADLER. When do you think they will be finished?

Ms. SAWYER. I don't have a specific date. I would be very happy to get that to you.

Chair NADLER. Well, I mean, two months? Two years?

Ms. SAWYER. We are talking about months.

Chair NADLER. Okay. One of the things that really shocked me was that they had no census or information as to which inmates required, let's say, CPAP machines or oxygen machines. When the power went out those people were helpless. They could have had strokes or whatever. What has been done about that?

Ms. SAWYER. Well, at the time when this thing was occurring, Congressman, we offered those inmates who needed the CPAPs to move to the other housing—the one building had power and heat; it was okay. It was the west wing, the west building that had the power and the heating problems. We offered them to move, and they elected not to move over. Still, that is our responsibility. That was our fault for not having a backup plan for them right away.

We now have, in our regulations there at the institution, what the plan is. The plan is we will not ask them if they want to move. We will move them over to where the power is available to them, and make sure that they can plug in their CPAP equipment, and make sure we know exactly who those inmates are. The officers

there will know who they are, and we get they right back onto the CPAP immediately.

Chair NADLER. Okay. Now, the IG report also says that until the upgrades we talked about a minute ago—the temperature monitors—are made, including the monitoring system, the inmates should be given long-sleeved clothing, thermal underwear, or other cold-weather clothing as part of their standard issue attire, rather than the short-sleeved attire they get now. With winter approaching, has that been done?

Ms. SAWYER. Absolutely. In fact, we are giving them all coats as well, just in case. Just in case. We are giving them extra clothing. We make our own blankets a Federal Prison Industries so we should never be without enough blankets. So, we are giving them plenty of blankets, plenty of warm clothing, and we are actually giving every inmate a coat, just in case.

Chair NADLER. Okay. Are you reviewing the status of all Federal correctional facilities to determine whether similar problems exist there, and take appropriate steps to ensure that what happened at MDC Brooklyn doesn't take place elsewhere?

Ms. SAWYER. Yes, sir, we are. We have initiated—all these institutions should be reviewed within every one to three years, in terms of a complete relook at the heating and air conditioning and electrical systems. Again, because many of our institutions are so old, preventive maintenance and a lot of the money that we should be putting into this equipment has just not been forthcoming to do all the work we would like to do. But we are trying to target the ones that we think could be more vulnerable than others, and eventually get to all the institutions to make sure—

Chair NADLER. I have two more questions in 45 seconds.

Ms. SAWYER. Okay. I am sorry.

Chair NADLER. One of the issues that took place at MDC was that visitation was cut off to families and attorneys. As a result, for a period that was too long no one on the outside knew what was going inside. Families, in particular, were very anxious and, frankly, terrified not to know what was going on with their loved ones. Has MDC taken any measures to ensure that families and attorneys are kept informed if anything like this ever, God forbid, happens again, and what specific measures have been taken?

Ms. SAWYER. Right. One of our biggest failings at that institution, on that situation, was communication. They were so busy trying to fix the heating and air conditioning, the heating, and electrical problems, we forgot to be quite as aggressive at letting all of our stakeholders know—the family Members, the—

Chair NADLER. You are doing that now?

Ms. SAWYER. We have policy in place—

Chair NADLER. You are doing that now?

Ms. SAWYER. —we have made contacts to repair some of the damage.

Chair NADLER. Thank you.

Ms. SAWYER. Sorry.

Chair NADLER. In the one second I have left, my last question is, one of the things that was shocking to me was that there didn't seem to be any emergency plan in place at that point. Has that been rectified?

Ms. SAWYER. Yes. We had an emergency plan. We didn't an emergency plan authority. We didn't have the person in place that was supposed to be making sure that that emergency plan was activated right away. That person is now in place. The emergency plan is there. God forbid this occurs again, but if it does, we should be much better prepared to deal with it, sir.

Chair NADLER. Thank you. My time has well expired.

Ms. BASS. Representative Chabot.

Mr. CHABOT. Thank you very much, and Madam Chair, I would like to commend you on holding this hearing. I think this is a very important hearing. I would like to focus much of my attention to the Prison Industries program, UNICOR now. I have been a longtime big supporter of that group and trying to keep them going in the right direction. I would just note that most of the people that inhabit our Federal prisons will one day get out. There are exceptions. We have people that have obviously murdered multiple people, and the likelihood of them getting out may be somewhat slim. Most of these folks are going to get out.

So, to the extent—and that is the case at the local level as well. So, to the extent that we are able to get these folks marketable skills that they can put to use when they get out makes it much less likely that they are going to revert back to crime. It is my understanding, for example, that you all have something called the post-release employment project, and if I have got my numbers straight, I believe that if they were in Federal Prison Industries and got a skill there is something like a 24 percent less of a chance that they will end up back in crime when they get out. Would you like to talk about that?

Ms. SAWYER. That is absolutely true, Congressman, and I testified before you on Prison Industries issues 20 years ago, so I know you were a strong supporter of that program back then. It is one of our most powerful programs and it is evidence-based that it does have a significant impact upon recidivism. The 24 percent that you recall is exactly right, that it is a 24 percent less likely that an inmate is going to return to crime when they hit the streets, and it is also a 15 percent increase in likelihood that they are going to be productively employed, a taxpaying citizen back in the community. It is a powerful program.

At one time, when I was director before, 20 years ago, we had 28,000 inmates in Federal Prison Industries. We are now at only 11,000 inmates in Prison Industries. Our authorities and our ability to be a mandatory source purchase agent from all the Federal Government has been eroded a lot over the years, and it is harder and harder for us to get the kinds of work and orders that we need to employ the kind of inmates we did before.

We still make 80-some different product lines. It was 122 different product lines when I was here before. We are down to 80-some product lines. We try to diversify as much as possible so that we don't impact any particular industry in this country.

We have gotten some new authorities through the First Step Act which we are hopeful are going to help us raise those numbers a little bit, but we need all the help we can get to advance authorities. If we really want to impact inmates through the First Step

Act, Federal Prison Industries is a critical, critical area that we can do that.

Mr. CHABOT. Great. Thank you. I certainly understand and I was, for the last two Congresses, Chair of the House Small Business Committee. I am now the Ranking Member of the House Small Business Committee. So, there are some folks, business folks, that are concerned about the competition, and I certainly understand. I think we can work through this, though, and I would like to see an expansion of the number of inmates that are qualified to be in the program so that we can get job skills for a lot more of these people, who again, will someday be out on the street. We don't want them preying on the public. We want them to have marketable skills and be able to obtain a job and be self-supporting.

So, the First Step Act, it is my understanding that before last year only Federal Government agencies could buy products manufactured by Federal inmates, but with the enactment of the First Step Act, section 605, expanded potential purchasers to, for example, the District of Columbia, so the government of the District of Columbia here in Washington, some nonprofit entities, and in disaster relief and emergency response efforts. Is that correct?

Ms. SAWYER. Yes, that is.

Mr. CHABOT. Okay. So, I would hope that is something else that we could work on.

It is also my understanding, as far as the Federal Government, about 50 percent of the products go to the Defense Department. Is that right, approximately?

Ms. SAWYER. I don't know if it is exactly 50 percent, but they are our biggest purchaser, yes.

Mr. CHABOT. Okay. Then some of the other agencies is Homeland Security, the Justice Department, Department of Transportation, Treasury, Veterans Administration, the Bureau of Prisons itself, the GSA, Social Security Administration, and the Postal Service.

Ms. SAWYER. Yes. Yes.

Mr. CHABOT. Does that sound right?

Ms. SAWYER. Yes.

Mr. CHABOT. The products we are talking about are textiles, office furniture, recycling, and a number of other things.

So, let me just conclude with this because my time has almost expired. Anything that we can do to get marketable skills to those that are inhabiting our prisons, both at the local and especially at the Federal level, since we are here at the Federal level, I think we are doing incredible good for society overall. Because these people will come out some day and they ought to be working and supporting themselves, not preying on the public.

Ms. SAWYER. Thank you, Congressman, for your support.

Mr. CHABOT. Thank you very much, and I yield back.

Ms. BASS. Mr. Jeffries?

Mr. JEFFRIES. Thank you, Madam Chair, for your leadership, and I also want to thank, of course, my good friend, Doug Collins, for his tremendous leadership of the First Step Act, and Chair Nadler, all distinguished Members of the committee.

Before I begin my questioning, I just had a statement for the record that reads, in part—it is from Jay Chattelle, who is the nephew of Troy Pine, of course, who was the young man who was

tragically killed on Wednesday, October 2nd, in Providence, Rhode Island, by someone who was released pursuant to the retroactive application of the Fair Sentencing Act of 2010.

The statement, in part, reads, "My uncle was a truly great man and his loss has devastated my family. No family should have to go through this. But to blame President Trump or the First Step Act is 100 percent wrong. This bill was passed with good intentions. Way too many people are in jail for way too long. Nobody should use my family's name or pain for a political agenda. At the funeral, my brother spoke of the need for love and forgiveness, and I wish the world had heard it.

"Anyone who speaks my uncle's name, please speak it in a way that will draw people together and bring help to people in these communities, including human beings who have been locked up for too long. Speak it in a way that brings healing to people who need it. My family is about God's love and grace. I hope you will join us in this effort. God bless you all."

I just ask unanimous consent that this statement be entered into the record.

Ms. BASS. Without objection.

[The information follows:]

MR. JEFFRIES FOR THE RECORD

STATEMENT FROM JAY CHATTELLE, nephew of Mr. Pine:

"My uncle was truly a great man, and his loss has devastated my family. No family should have to go through this. And there should be accountability, especially at the lower levels where big mistakes were clearly made. But to blame President Trump or the First Step Act is 100 percent wrong. This bill was passed with good intentions. Way too many people are in jail for way too long. I know another man who got out a few years early because of the First Step Act. He moved to Florida to be with his family, and he has left his old ways behind. There are many similar examples. Nobody should use my family's name or pain for a political agenda. At the funeral, my brother spoke of the need for love and forgiveness — and I wish the world had heard it. My brother and I were my uncle's closest relatives, so we know what he would have wanted. Anyone who speaks my uncle's name, please speak it in a way that will draw people together — and bring help to people in these communities, including human beings who have been locked up for too long. Speak it in a way that brings healing to people who need it. My family is about God's love and grace. We are working to make healing be my uncle's legacy. I hope you will join us in this effort. God bless you all."

Mr. JEFFRIES. Certainly, our thoughts and prayers are with the family of Troy Pine.

Director Sawyer, the First Step Act is designed to help currently incarcerated individuals successfully reenter society. Is that true?

Ms. SAWYER. Yes, sir.

Mr. JEFFRIES. According to the U.S. Sentencing Commission, almost one-third of Federal offenders are reconvicted in eight years after reentering the community. Is that correct?

Ms. SAWYER. It is about 40 percent in the Federal system.

Mr. JEFFRIES. The First Step Act was crafted to sort of reduce this recidivism by helping to bring to life programs that provide education, job training, substance abuse treatment, and mental health counseling. Is that correct?

Ms. SAWYER. Yes, it is.

Mr. JEFFRIES. The research shows that inmates who participate in correctional education programs, for instance, are significantly less likely to recidivate. Is that right?

Ms. SAWYER. Yes.

Mr. JEFFRIES. For example, I think there was a May 2018 report that the White House Council of Economic Advisors issued that concluded that mental health programs reduce recidivism by approximately 21 percent and substance abuse programs by 17 percent. Is that correct?

Ms. SAWYER. I am not familiar with those numbers. They sound correct.

Mr. JEFFRIES. That is consistent with the literature as it relates to the impact of similar programs on recidivism. Is that true?

Ms. SAWYER. Yes.

Mr. JEFFRIES. Would you agree that implementing the

First Step Act is the right thing to do for individuals, families, and communities that have been devastated by what I would characterize as the failed war on drugs?

Ms. SAWYER. I absolutely support the First Step Act. Absolutely, sir.

Mr. JEFFRIES. Would you agree that reducing recidivism improves public safety in communities throughout the country?

Ms. SAWYER. Yes, sir.

Mr. JEFFRIES. Is it fair to say, also, that reducing recidivism saves taxpayer dollars as well by reducing the need for incarceration and the cost of prosecution and things of that nature? Is that correct?

Ms. SAWYER. Yes, sir. We have often said that we would like to work ourselves out of business. We would like to reduce recidivism to the point that we didn't even need the prisons that we have today.

Mr. JEFFRIES. So, we have a framework in place, of First Step, and as we worked on this legislation, we were very clear that to deal with mass incarceration as an epidemic we need sustained energy, sustained intensity, sustained effort, but we need it to start someplace, with a first step. We have to make sure that this first step, of course, is successful.

So my question for you is, because I believe the commitment is there, as was articulated by the Department of Justice, is what are the resources that are necessary to make sure that we can bring

this programming to life, to really help the people who can use this programming for them to bring their natural talents and abilities and their hopes and dreams and aspirations into reality?

Ms. SAWYER. We have had outstanding programs in the Bureau of Prisons for years. Our residential drug treatment program, our education programs, our prison industry programs we discussed, many good programs. Our limitation, though, was we never had enough resources to make those adequately available to all the inmates, to have the positive impact on all the folks leaving our institutions.

So, that is where we come to today. Resources is going to be our biggest challenge. We requested funding in the 2019 budget. We got $75 million. We have ramped up, as I said earlier, our education programs, our vocational training programs, and some other programs, bringing in our necessary staff to add to our drug treatment programs and other model programs that can impact the needs of the inmates. We have requested funding again for 2020, to increase those even to a greater extent.

We don't really know for sure what exactly our funding needs are going to be, because until we complete the needs assessment, apply that to all our inmates, we don't know for sure what all the needs are going to be and what other programs we may need to add to our operations.

Resources are going to be our single only impediment to fully actualizing the First Step Act.

Mr. JEFFRIES. Well, thank you, and I just want to thank—I know Chair Bass acknowledged some of the individuals who are present with us today who have been released pursuant to the First Step Act. We fight for you. We appreciate your continued engagement and involvement and your willingness to be amongst us today. I yield back.

Ms. BASS. Thank you for your leadership.

Representative Lesko?

Ms. LESKO. Thank you, Madam Chair, and thank you, both of you, for coming here to testify. I have five questions and they are all for you, Director Sawyer, and so if you could answer them fairly fast that would be helpful, so I don't run out of time.

On August 12th, our committee, Chair Nadler and Ranking Member Collins, wrote your office and department a letter asking about the Jeffrey Epstein death in the prison, and I was wondering what the status is of the AG's investigation into that.

Ms. SAWYER. I am afraid that the situation is still under investigation, and so I am really not at liberty to say much about that just yet.

Ms. LESKO. Okay. In the Department's response to the committee's letter there seemed to be a lot of blame on the suicide prevention program coordinator, a doctoral-level psychologist, for taking Epstein off the suicide watch. Do you think that is an accurate assessment, and if so, was there any disciplinary action?

Ms. SAWYER. Again, I am not at liberty to discuss the Epstein case, in particular, but I would like to give a little more information on the suicide watch program, because I think it is very misunderstood.

Ms. LESKO. Okay.

Ms. SAWYER. I am a psychologist. I worked as a psychologist in the Bureau of Prisons with our inmates for many years. The suicide watch program is a very stark situation. If we deem you to be suicidal, imminently suicidal, we place you in a room with nothing in there except a mattress, a very thick, heavy kind of a gown that you would wear, so that you could not use it to strangle yourself with or hang yourself with. Even with your eating utensils you get kind of scoop so that you can't hurt yourself with that. It is a very stark and you are watched constantly—it is very stark environment. It can become depressive if you are in there too long.

Our average length of time in that status is about 24 hours. We then, though, have the option of moving an inmate to what we call psychological observation. They are still watched all the time, but they get clothes back, they get other reading materials and things in their room, they get more traditional bedding. It is a much different status. So, we do have the option of moving from one to the other. Suicide watch is not our only recourse.

Ms. LESKO. Thank you. There were reports that there was no video footage of his room when he did. Is that like normal procedure?

Ms. SAWYER. Again, I can't speak to the Epstein case, but I can say that a number of our camera systems are faulty and need to be repaired. In some of our institutions, especially our high-rises, we are working very diligently to upgrade, not only to replace the cameras but get digitized cameras, which give you a much clearer picture as to exactly what is going on. We are working to improve those in all our institutions.

Ms. LESKO. Thank you. I am switching people now, to my last question, and this is about John Walker Lindh, who, 17 years ago, was convicted of a couple of things. He was first indicted of conspiracy to murder U.S. citizens, two counts of providing material support and resources to terrorist organizations, one count of supplying services to the Taliban, and I can go on and on. Basically, assumed to be a terrorist. Then he was released this year, after 17 years, so early, apparently on good time.

Can you explain to me—there was reports that he is still professing in the belief of global jihad and a supporter of the Islamic State? How does somebody get released early if they are reportedly still professing those types of things?

Ms. SAWYER. The good conduct time that currently existed in the regulations prior to the First Step Act required an inmate to serve 85 percent of their sentence, and if they had no misconduct issues within the institution, they followed the rules and regulations, then we had to release them. The Bureau of Prisons has really no control over when an inmate's sentence is up.

Now, what we do with individuals who are terrorists in our system is we monitor them very carefully. Their mailings are monitored. Their interactions are monitored. We feed that intelligence out to our law enforcement communities so that when that individual is released the community to which he is going, all the law enforcement personnel know exactly what they are getting, what their thinking is, and what, if any, possibility there could be of them reoffending. So, that we see as our responsibility, is once we have to release them, we make sure whoever is receiving them has

a much intelligence as they can possibly have as to the status of that offender.

Ms. LESKO. Thank you. We did go on timing, so thank you for that. Also, I want to applaud—I think it is good that we do have programs that people that are doing a good job and can contribute to the society. So, I applaud this Committee for passing that type of legislation, and for you, I wish you all the success, the people in the audience. Thank you.

Ms. BASS. Representative Jackson Lee?

Ms. JACKSON LEE. Thank you, Madam Chair, and to the Ranking Member for convening this important hearing, and welcome Madam Director. I think we have worked together in the past.

Ms. SAWYER. Yes, we have.

Ms. JACKSON LEE. I am delighted, I believe, that you are making history, and that is something to take note of.

In the hearings that I have had today, each one of them I mentioned our friend and colleague, the honorable Elijah Cummings, and I will do it here, and say that we will always be reminded of his seeking justice, and that is what we are doing here today.

I would also like to associate myself with the words of Congressman Jeffries and the letter that he read, to not use and misuse a vitally important program of restoration to be against these kinds of programs.

Let me start, as well, with a question about Mr. Epstein at the Metropolitan Correctional Center. I heard what you said so I am not asking for the details. What I am asking for is that the Congress—and I am saying this because the DOJ is represented here—have this committee, in particular, and I know our chairman certainly will have that done, but I want to be on the record that we want the full, unredacted report as to each action and response. So, I am making that request to you and I hope that you will adhere to it, Madam Director.

Ms. SAWYER. Yes, ma'am.

Ms. JACKSON LEE. So, let me go to a more generic question. I visited the Metropolitan Correctional and in my responsibilities on this committee, I met with a lot of the corrections officers, dedicated that they were. There is certainly an alluding to the circumstances of overly exhausted, sleeping.

What are you doing about the excessive overtime, shortage—I heard something that I wanted to be very pointed—because of overtime and the lack of time between days off and working? I understand, when I spoke to these leaders at Metropolitan, they were barely getting any time off to go home and come back. They were doing three shifts. I am just giving the kind of description. What are you doing about that, because that certainly impacts justice, it impacts those who are detained, and it impacts the workers?

Ms. SAWYER. Right. One of our biggest challenges right now is filling the 3,000 positions that we have vacant, and since I came on board eight weeks ago, that has been a full court press of mine. We have hired 20-some new employees in our staffing offices to try to move the applicants much faster through this rather slow process of hiring. We have ramped up our recruiting process. We are getting new authorities from OPM to be able to give our institutions direct-hire authority so they can hire straight from the street.

Ms. JACKSON LEE. Are you responding, as well, to your present staff and then some relief as well?

Ms. SAWYER. Right. Absolutely.

Ms. JACKSON LEE. I have a short period of time so we—

Ms. SAWYER. Yeah, to our present staff we are trying to use only voluntary overtime, trying not to mandate overtime. That is what causes us to use staff from other locations.

Ms. JACKSON LEE. Thank you. Thank you very much.

I am committed to a program that deals with addressing pregnant inmates, obviously women. It is SIMARRA legislation that I have included in some legislation that has made its way through the House and it is on to the Senate, and that is to be creative in dealing with women who are pregnant, that may give birth while they are in prison. There are many different—how should I say?—proposals. Mine deals with making sure that there is a bonding and that they are allowed to be with the child for a period of time. How open are you to that?

Ms. SAWYER. Absolutely. We have six MIT programs right now. We call them Mother and Infants Together. Six months from the time the birth occurs to six months after, the mother can be placed in a halfway house with her child to create that bonding connection. Then we also contract with the State of Washington for an ongoing program. If a woman is within 30 month of release they can keep the baby with them for 30 months, but they have to be in Washington State, which is undesirable to some women.

Ms. JACKSON LEE. So excellent, and what I will say is, so you won't mind that being codified so they won't have to be move to Washington State. I need to get to my other questions.

Though it is not your responsibility, my legislation, that was added to the First Step Act, had to do with the Independent Committee. I know that it has been housed somewhere. I would like you to comment on the value of having that oversight. Then, lastly, would you please describe, for the DOJ, the policies in place that will allow inmates to contact counsel or file complaints when facilities experience emergencies, such as at MDC?

So, would you—the Committee—

Ms. SAWYER. The Independent Review Committee on the First Step Act?

Ms. JACKSON LEE. Yes.

Ms. SAWYER. I would defer to Toni.

Ms. BACON. The Independent Review Committee has been a valuable asset. We have appreciated an open working relationship with them, and they have provided very hopeful suggestions and guidance, not only on the tool, on developing PATTERN, but also on evidence-based recidivism reduction programs, needs assessment systems, and an overall implementation plan.

Ms. JACKSON LEE. Well, the counsel, can these inmates get to their counsel when these conditions are not working?

Ms. SAWYER. I am not sure I understand your question, Congresswoman.

Ms. JACKSON LEE. Can you describe the policies in place that would allow inmates to contact counsel or file complaints when facilities experience emergencies like at MDC?

Ms. SAWYER. Sure. They should have easy access to be able to contact an attorney. That is not a big concern for us. What happened—if you are talking about MDC at Brooklyn, when we had to shut down our attorney visits for a while because of the heating and air conditioning, and electrical problems, that was a temporary situation based upon our utilities problems, and we have put in place now ways to rectify that should, hopefully, never happen again, but should it happen again, ways that we can get them access to the attorneys that they wish to contact.

Ms. JACKSON LEE. I am yielding back. I just want to say we have a detention center in my district 20 years. I do want to give applause and praise to those staff persons there. I heard that the Independent Committee—just for the record; I am not asking for a response—it is not working, and so I want to follow that up at a later time.

I yield back. Thank you, Madam Chair, for your courtesy.

Ms. BASS. Representative Cline?

Mr. CLINE. Thank you, Madam Chair, for holding this hearing. Thank you to the witnesses for being here today.

Federal Bureau of Prisons plans an important role in protecting society and confining offenders while they serve out their sentences. The First Step Act of 2018 includes three major components, as was discussed—correctional reform, sentencing reform, and reauthorization of the Second Chance Act.

It is important to note that nationally and in my home State of Virginia, crime is at or near all-time lows, and this is a direct result of laws passed by Congress and by the States, that ensure violent and dangerous offenders receive appropriate punishments for their offenses. It is also important to remember, and keep as a goal, that victims of crime and their families, should never be robbed of justice, and violent offenders must be held accountable by our criminal justice system.

The First Step Act appropriately prevents violent offenders from earning additional time credits to reduce their sentences. In my home State of Virginia, the practice of discretionary parole release was abolished in 1995, and our truth in sentencing laws require convicted felons to serve at least 85 percent of the pronounced sentence, and they may earn, at most, 15 percent off in sentence credits, regardless of whether their sentence is served in a State facility or a local jail.

At 23.4 percent, Virginia has the lowest recidivism rate in the country, among the 43 states that report three-year reincarceration rates for felons. Of the 12,000 offenders released from incarceration in Virginia in fiscal year 2014, who had an opportunity to recidivate, 2,800 were reincarcerated within three years. Virginia's leading rate can be attributed to the effective reentry programs and treatments offered by Virginia Department of Corrections during an offender's incarceration and its effective supervision in the community after release.

I did note with interest the Federal Law Enforcement Officers Association letter to Chair Bass and Ranking Member Ratcliffe asking for additional resources for probation officers and additional legislation to give them additional authorities to ensure their safety

during their job of monitoring this increased number of prisoners who are being released.

So, I would ask, Ms. Bacon, the First Step Act requires DOJ to develop a risk and needs assessment system to be used by BOP to assess the recidivism risk of all Federal prisoners and to place prisoners in programs and produce productive activities to reduce this risk. Prisoners who successfully complete recidivism reduction programming and productive activities can earn additional time credits toward pre-release custody.

Can you describe how this is being implemented, and are there any early indicators of success regarding the release under provisions in the First Step Act?

Ms. BACON. Yes. So, step one is to develop the risk assessment tool called PATTERN, that we are in the final stages of updating, and we intend to publish in the very near future. Step two is then to screen every single inmate in the Bureau of Prisons by January 14, 2020, the statutory deadline, through the risk and needs assessment system, so we can identify what is the individualized need? What is the particular need of each person, to help reduce their recidivism risk?

From there, the next step is to identify, from a menu of evidence-based recidivism reduction programs, what is the program that is best suited to meet that individual's need? Then from there, we intend to monitor, study, and validate the programs to see, one, which programs are working? Which should be expanded? Where should we go with those, and to identify and be honest about which ones aren't working, and that we might look to improve or that might need to be substituted with others.

So that way, as we evolve and grow, we can maximize the number of beneficial programs that reduce recidivism and allow our communities to be safer.

Mr. CLINE. Are you going to be looking to States for examples of programs that may have worked in reducing recidivism as models for you to use?

Ms. BACON. Yes, absolutely. That has been part of our research, is to examine States. Also DOJ, in conjunction with the Independent Review Committee, recently took a trip to Canada to learn from our colleagues up north what programs they use, how effective they are, how they implement, how they measure. So, we are looking to multiple sources to determine what are the possibilities out there, where is the strongest evidence, and what programs give our inmate population, the Federal population, the best chance of success, yes.

Mr. CLINE. I was both a prosecutor and a defense attorney in Virginia, and on the Courts of Justice Committee there, so I would encourage you to look to Virginia for some of the examples of programs that we have used to success.

With that, Madam Chair, I yield back.

Ms. BASS. Thank you.

Mr. Cicilline?

Mr. CICILLINE. Thank you, Madam Chair. I, too, want to acknowledge the loss of our extraordinary colleague, Elijah Cummings. We have lost a great champion for justice and a passionate civil rights leader, and someone who was a fighter for truth in the

Congress of the United States. We all remember him and honor his service.

I also want to acknowledge the tremendous loss of the family of Troy Pine, and I know a number of my colleagues have already acknowledged that. While we all support criminal justice reform, the particular facts of this case I know the court is reviewing, and we want to be sure that we understand how that happened. Most importantly, extend our condolences to his family.

Director Sawyer, I wanted to start with you. I met with the individuals in my State who run the residential reentry centers. One of the things that they raised with me is that very often they get inmates from the Federal Bureau of Prisons that have done a lot of things like prepared resumes, gotten their IDs, but that often doesn't get transmitted to the residential reentry center. There doesn't seem to be a lot of coordination between the Bureau of Prisons and the residential reentry centers, which is really undermining the ability of these individuals to reenter successfully.

So, I am wondering what the Bureau of Prisons can do in partnership with the residential reentry centers to provide for a more seamless reentry for inmates, and what steps might be taken to ensure that some of the work that has been done on things like getting an ID and preparing a resume, travels with that inmate to the residential reentry center so they have a leg up on this reentry work, as they are getting back into the picture and they are going to reenter the community?

Ms. SAWYER. To be honest, Congressman, I am little surprised to hear that being raised as a concern, because we have our staff from the central office in the local community corrections or reentry staff working directly with the halfway houses. So, if there is a breakdown in some type of communication at that level we will look specifically at those in your region and see what is happening, because—

Mr. CICILLINE. That would be great.

Ms. SAWYER. —we felt we had a pretty good line of communication there, but we will check it.

Mr. CICILLINE. They have been involved in this work for quite a while in the whole New England region and have had the experience in various places. So, if you would look into it.

Ms. SAWYER. Definitely. Absolutely, sir.

Mr. CICILLINE. Similarly, they also raised, during that meeting, that while the Bureau of Prisons has done a very good job in terms of moving people back into the community or entitled to some reduction in their sentence as a result of this historic legislation, that the kind of backfilling of those spots for people who now become eligible under the First Step Act for residential placement, those spots aren't getting refilled.

So, I am wondering what is the status of the second part of this? The first part is obviously getting people's sentences reduced that get back into the community, but as a result of other sentence reductions they now become eligible for residential placement. That doesn't seem to be happening, and they know that because a lot of their folks are getting released but they are not having anybody refill them, and there are obviously people in the system who are eligible.

So, what is the status of that second part?

Ms. SAWYER. Well, we target all our eligible inmates to go out through a residential reentry program because we feel that is a good halfway step back for them. At least 75 percent of our inmates released go through the halfway houses.

We can't, though, guarantee that the right number are going to release into a particular district at the right time. So, even if we contract for, say, 20 beds at this particular house, I can't guarantee we are going to release 20 inmates to that specific locality.

Mr. CICILLINE. No, no, I understand. Maybe I am not making myself clear.

Ms. SAWYER. I am sorry.

Mr. CICILLINE. There are people, because of the First Step Act, now are within close enough time to be—they are at the end of their sentence, that they are now eligible to be at a residential reentry center.

Ms. SAWYER. Right.

Mr. CICILLINE. They are still at the Bureau of Prisons.

Ms. SAWYER. Right.

Mr. CICILLINE. So, is that process of calculating where those people are so that they get placed in residential reentry centers and not wait at the Bureau of Prisons?

Ms. SAWYER. Yeah. That is an ongoing, like a revolving door, that we identify the inmates, we try to get them out within at least six months of their time. The average stay is about five months. We try to get them out there as quickly as we can.

Mr. CICILLINE. If you could look at the stats because my sense is the second half of that may be not happening.

Ms. SAWYER. We will definitely look at that.

We will look at that, for sure.

Mr. CICILLINE. My final question, Director, is, the First Step Act requires the Bureau of Prisons to assess an evidence-based recidivism reduction programming or productive activity to each person incarcerated. It is not clear that the Bureau of Prisons has enough programs to meet this requirement at every facility. For example, one of the most popular evidence-based recidivism reduction programs within Bureau of Prisons is the residential drug abuse program, and it frequently has a waiting list of 5,000 people. That was one in 2016. It sometimes requires individuals to transfer to a different facility, perhaps one with a higher security level than their previous facility.

So, access to evidence-based recidivism reduction is crucial to the successful implementation of the First Step Act. Does the Bureau of Prisons and does every BOP facility have an evidence-based recidivism reduction program, as defined by the First Step Act? How many programs are in the BOP catalog? How many have wait lists? Is there more we need to do? Because that is a requirement, and if it just doesn't exist throughout the system, we have a problem.

Ms. SAWYER. The wait list on the drug program is a misnomer. We identify the drug program for the latter part of a person's sentence because research shows that if you do it on the front end of their sentence then they sit without drugs available in the institution, and then they get out and we missed the point. So, we schedule it later in their time.

So, the waiting list—we are going to need to change the name for that, because it is a misnomer. It really is—we have kind of targeted when we want them to enter the program. We are going to have to back that up a little bit because now they can earn the credits and get out a little bit earlier. They are really not waiting because we don't have beds. 80-six of our institutions have residential drug treatment programs. We should be able to accommodate all our inmates.

If not, we mentioned earlier that funding is going to be an issue. With the new needs assessment coming, we are going to be able to identify, very clearly, what the needs of the inmates are, where we are short on programs in particular areas, and look to growing those programs as time goes on. Some money came to us in 2019, $75 million, and we are looking for at least another $75 million in the next one. We are targeting which programs we think we are going to need, but we won't know exactly what they are until this moves down the road a little bit and we can identify the needs and develop the programs to match those.

Mr. CICILLINE. Please let us know, because we want to advocate for that.

Ms. SAWYER. Absolutely. Thank you, sir.

Mr. CICILLINE. Thank you, Madam Director, and I yield back.

I am yielding to myself.

Mr. CICILLINE. [Presiding.] I now recognize the gentlelady from Pennsylvania, Ms. Dean, for five minutes.

Ms. DEAN. Thank you, Mr. Chair, and I thank Chair Bass for holding this hearing. I come from Pennsylvania. I was a State representative before being elected in 2018, and wanted to serve on this committee. I served on Judiciary there. Criminal justice reform is something I care deeply about. So, I wanted to ask you, in a couple of different areas.

We know that criminal justice reform is an issue that we need to robustly address. According to a 2018 report by the Department of Justice, 83 percent of State prisoners released in 2005, across 30 States, were arrested at least once in the nine years following their release. That is five out of every six persons released. That numbers reveals to, I think, anybody, that the rehabilitation of inmates, at least at that data point, was not working for inmates, was not working for our communities.

We have made some progress in the right direction with the passage of the First Step Act, which seeks to decrease recidivism rates through a number of the tools that you have been discussing today.

One of those tools is earned time credits, that I would like to learn more about, earned by participating in recidivism reduction programming that could be used to decrease time spent in prison. Director Sawyer, could you briefly describe that programming, and who designs that programming?

Ms. SAWYER. If I may, I would like to defer to the Department of Justice, because they are handling that part of it more robustly.

Ms. DEAN. Absolutely. Thank you.

Ms. BACON. Yes. We are in the process of identifying evidence-based recidivism reduction programs, whether those be programs that are currently offered at the Bureau of Prisons or maybe programs that are offered in States or in other locations. The next step

is to then match the programs with the individualized need, and that is a very important step, because if someone's need is mental health and they are in a drug program, that is not necessarily going to reduce their likelihood of recidivism. So that matching is key, and that is where training of BOP staff and using the experience and the education of the high-quality staff we have is very important, because part of this will be the staff matching the program to the individualized need.

Ms. DEAN. Is that going on at this time?

Ms. BACON. Not yet. Where we are in the process now is identifying the menu of programs that have appropriate evidence, and this is an area where, in some cases, the research has been lacking. Part of the First Step Act, what we are excited about, is it is definitely an inspiration to research and study these programs so we can have a better understanding of which programs are working.

Ms. DEAN. I think that helps me bridge to the next conversation that I wanted to have. I want to focus on educational aspects of programming, because education for people in prisons has a clear public safety benefit, reducing recidivism.

I, too, am heartbroken at the death of Chair, Elijah Cummings. I, as a little old freshman, had the honor of introducing legislation with him, so I feel quite sad in his absence. He and I—he, mostly, but I along with him, introduced the Promoting Reentry Through Education in Prisons Act, the PREP Act. The bill would standardize Bureau of Prisons educational programs, creating an office of correctional education within the agency. I was inspired by Elijah Cummings' leadership in this area.

Are you familiar with that legislation, the PREP legislation, either of you?

Ms. SAWYER. Somewhat, yes.

Ms. DEAN. Okay. I am eager to meet with you, meet with whomever, to try to get as much support as we possibly can for it. What we do know is if we could create a bureau and centralize the educational programming, best practices, meeting the assessment tools that are needed to identify the holes in the system in education and rehabilitation, and put it across the system instead of just here and there, we believe it would make a huge difference.

Ms. SAWYER. Yeah. I was just going to say, we have education programs at every one of our institutions. We agree with every single thing that you are saying.

One of the things First Step Act is going to help us with is it will incentivize inmates to take the programs. We require them to take education programs, literacy programs, and GED programs for 240 hours, when they first come into the institution. Some of them stay with it, and we have a lot of folks get their GEDs and become literate in our institutions. Some of them get tired of it and so they don't stay there, because there was, in their eyes, no benefit, no matter how much we tried to encourage them.

Once we lost parole, we lost a lot of that incentive. Now, with the First Step Act, with the earned credits, we have got a new incentive there for them, that hopefully are going to keep those inmates in those programs much longer. So, we applaud that.

Ms. DEAN. I appreciate that and I see my time has run out. There is lots more to talk about, whether it is mandatory mini-

mums or the programming around substance abuse disorder. I would love to talk with you more.

Ms. SAWYER. Perfect.

Ms. DEAN. Thank you, Mr. Chair.

Mr. CICILLINE. I thank the gentlelady. I now recognize the gentlelady from Florida, Ms. Mucarsel-Powell, for five minutes.

Ms. MUCARSEL-POWELL. Thank you, Mr. Chair, and thank you to the witnesses for coming here this afternoon. I think it is very important that we have the opportunity to discuss the First Step Act, which makes critical sentencing and prison reforms to the criminal justice system. It is so important that these reforms are implemented quickly and fairly, and those that are in the criminal justice system have that opportunity to have equal treatment.

I think it is important to talk about the State of the Bureau of Prisons, because, as you have mentioned, it has a lot of issues. I think that you were hired just recently. How long have you been there now?

Ms. SAWYER. Eight weeks.

Ms. MUCARSEL-POWELL. Eight weeks. It didn't have a director for over a year. Is that correct?

Ms. SAWYER. We had an acting director for 15 months.

Ms. MUCARSEL-POWELL. Okay. You have lost about 12 percent of your total staff. Is that correct?

Ms. SAWYER. Right now, we are down over 3,000 employees.

Ms. MUCARSEL-POWELL. Is there a reason? You have only been there eight weeks, but is there anything that you have seen that can explain why there is such a shortage of staff right now in the Federal Bureau of Prisons?

Ms. SAWYER. Well, we had very inconsistent budgets for several years and threats of losing positions. So, we were concerned about not hiring up too much and then risking having to riff them, because in some of the budgets we were threatened with losing positions. One year we kept our positions but lost the funding for like 1,500 positions. It has been very inconsistent in terms of both our position allotment and our budgets. So, a lot of that caused us to kind of get behind the curve with filling our positions, and now we find ourselves with a 3,000 backlog in empty positions.

Ms. MUCARSEL-POWELL. Well, one of the reasons why I am asking that is because I know that there have been complaints in one of the Federal Bureau of Prisons in Miami because of the working conditions. They have actually had to file several OSHA complaints, and the union has stated that the working conditions are just very dire for them at this point. So, have you had a chance to look over those complaints?

Ms. SAWYER. Yes. The issue at Miami, at least, was mold, and the climate down there is very conducive to mold. Once anyone identifies any mold—and we ask all of our staff to be vigilant all the time in terms of any life safety issues, whether it is with the inmates and staff or whether it is the facility, as soon as we identify the possibility of a mold concern we right away come in, we do the mold assessment, we bring in OSHA, we bring in the contractors to repair them.

Ms. MUCARSEL-POWELL. They had to file it more than once. Now, that you are there—

Ms. SAWYER. It recurred. It recurred, is what happened. We got the mold—the eradication was completed, we thought it was all taken care of, and then we found it occurring in another part of the institution. So, those things concern us very much, and we try—

Ms. MUCARSEL-POWELL. Can you just give me an update, yes?

Ms. SAWYER. We will do that. Thank you.

Ms. MUCARSEL-POWELL. I know that you can't really get into details with the Jeffrey Epstein case, but as you can imagine—and I think it was the attorney general that stated that Mr. Epstein's death raised serious concerns that must be addressed.

So, if you can just walk me through, what are the specific mental health and suicide prevention training that you provide the personnel that deal with these issues?

Ms. SAWYER. All of our staff, when they come into the Bureau of Prisons, suicide prevention training is part of their training at the institution level, at our training academy in Glencoe, Georgia. We impress upon them suicide prevention. We also, every year in our annual training, repeat again suicide prevention training. One of our vulnerable areas are our special housing units, where inmates are kind of secluded from everyone else. We do quarterly training with the staff there to stay on top of suicide prevention issues.

We do a lot of training with our staff, and the issue oftentimes is that the inmates, they understand the program too, and if the inmates truly want to die, they know how to, well, let me say it a little differently. We try to give every inmate a roommate so that they are never completely alone. Just the other day we had an inmate that died by suicide, and he waited until his roommate was taken out of the cell for recreation and took his life during that time frame.

So, my only point—and again, I am a doctoral-level psychologist and I have worked suicide prevention in our institutions for years, it is very, very difficult for those who do not identify any likelihood—

Ms. MUCARSEL-POWELL. I only have a few seconds.

Ms. SAWYER. Sure. I am sorry.

Ms. MUCARSEL-POWELL. Sorry, Ms. Sawyer. Really quickly, but it seems to be reported that there was a staffing issue in that particular prison, and because of the augmentation policy it was someone else that was actually on watch of Mr. Epstein. Is that correct?

Ms. SAWYER. I cannot speak to anything specifically about Mr. Epstein. It is still under investigation.

Ms. MUCARSEL-POWELL. Okay. Okay. Thank you.

Ms. SAWYER. Okay.

Ms. MUCARSEL-POWELL. I yield back.

Mr. CICILLINE. I thank the gentlelady, and I thank the Ranking Member for her accommodation.

I just wanted to ask, one thing we really haven't touched on in this hearing, and it is one of the real purposes of it, is the Independent Review Commission's obligation to assist in reviewing and validating the risk and needs assessment system.

So, my first question is what was the feedback and advice from the Independent Review Committee regarding the development of

PATTERN, and what steps were taken to incorporate that advice, because that is a really central part of this act?

Ms. BACON. The Independent Review Committee engaged with us almost immediately on formation and was involved with the development of PATTERN really from the inception. The Independent Review Committee met not only with us at DOJ, working on the implementation, but also had a direct pipeline to the contractors, Doctors Hamilton and Duwe, who are actually developing the tool.

So, along the way the Independent Review Committee provided advice to the contractors, gave suggestions on different ways the tool could be improved and developed, and that relationship has continued through July 19th, and as recently, I believe it was approximately two-weeks ago, we had another meeting with the Independent Review Committee where they again gave suggestions to us on how we could improve the tool.

So, I would describe it as a collaborative working relationship, and we have certainly benefitted at the Department from their advice and their experience in the development of the tool.

Mr. CICILLINE. Will that information that you are developing and collecting in this process be shared with Members of this committee? Can we have that assurance?

Ms. BACON. In terms of what advice and—

Mr. CICILLINE. Well, whether or not the recommendations for changing it have been incorporated, what the error rate is, whether this system or this evaluation tool is working.

Ms. BACON. Yes, that is—

Mr. CICILLINE. That is the purpose of the Independent Review Committee, and we would like to know how the Bureau of Prisons is responding to that set of recommendations.

Ms. BACON. Yes. It is very important to us that the tool is working accurately. We share your concern there. We want a tool that is accurate and fair. That is the goal going in.

Mr. CICILLINE. No, and I understand that. My question is, will you share with the Committee the results of that analysis and assessment, both what the recommendation of the Independent Review Committee is and what the Bureau of Prisons, what actions you are taking or not taking with respect to their recommendations?

Ms. BACON. Yes. To the extent that is possible we intend to provide as much information as the Committee needs, yes.

Mr. CICILLINE. Great. Thank you very much. We will follow up with you on that. Thank you very much.

With that, I will thank both of our witnesses for your testimony, and I know that our rules provide for an opportunity to provide some written questions, which we will do. I would, also, ask unanimous consent that a statement for the record from the Brennan Center for Justice be include as part of the record, without objection, and a statement from the National Association of Criminal Defense Lawyers.

[The statement of the Brennan Center for Justice follows:]

MR. CICILLINE FOR THE RECORD

BRENNAN
CENTER
FOR JUSTICE

House Committee on the Judiciary
United States House of Representatives

Statement for the Record
Brennan Center for Justice at NYU School of Law

"Oversight Hearing on the Federal Bureau of Prisons and Implementation of the First Step Act"

October 17, 2019

The Brennan Center for Justice at NYU School of Law thanks the House Committee on the Judiciary for conducting this oversight hearing. The First Step Act of 2018 (the "Act") has already cut unnecessarily long federal drug sentences, however cautiously. It could also revolutionize the federal prison system by building a new rehabilitative infrastructure, helping to further reduce mass incarceration in the process. The Brennan Center — a nonpartisan law and policy institute that focuses on democracy and justice — supports both goals. We know that the members of this Committee, Republicans and Democrats alike, do as well.

However, less than a year after its enactment, the Act's potential has already been limited by funding uncertainty and a misguided system for evaluating the risk level of people currently in federal prison. Both issues deserve the Committee's scrutiny.

I. The First Step Act Lacks Regular, Adequate Funding, and Will Fail Without It.

Critical to its ultimate passage, the First Step Act's "prison reform" provisions require the Attorney General to create "evidence-based recidivism reduction programs and productive activities" for all people in federal prison within two years of enactment, and permits the immediate "preliminary" expansion of these programs.[1] The Act authorizes $75 million to fund these programs annually, beginning in the fiscal year that just ended and continuing through FY 2023.[2] To date, however, none of that money has been appropriated. Instead, in late July, the Department of Justice ("DOJ") reallocated $75 million from elsewhere in its budget to fund implementation through the end of the fiscal year — a period of a little over two months.[3] It is unclear how that money was spent, or how September's continuing resolution affects those funds.[4] And, Congress has not formally appropriated any of the $75 million authorized for the *current* fiscal year.

This funding uncertainty prevents the Act from functioning as intended and undermines congressional objectives. Recidivism rates for people released from federal prison are, by all estimates, relatively high,[5] something the Act's prison reform components were drafted to change.[6] Unless those provisions are fully funded, and recidivism reduction programs made available broadly to incarcerated people, that goal will not be realized. Instead, the federal justice system will continue to fail people who become ensnared in it, perpetuating mass incarceration rather than reducing it.

Oversight and additional information are needed to determine (1) how DOJ and the Bureau of Prisons ("BOP") spent the implementation money available to them during FY 2019; (2) how much of that money remains available for use during FY 2020, if any, and how BOP plans to use it, and; (3) whether BOP has a plan to bridge future funding shortfalls. Congress should also act immediately to prevent

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[1] First Step Act of 2018 § 102(a), 18 U.S.C. § 3621(h)(2), (4) (2019).
[2] First Step Act § 104(a).
[3] Press Release, U.S. Dep't of Justice, Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs System (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and; *see also* U.S. Dep't of Justice, *Announcement of Major Developments on the Implementation of the First Step Act*, YOUTUBE (July 22, 2019), https://youtu.be/t2kIMg9BLmg?t=1765 (implying the money would be spent down rapidly during the waning months of the fiscal year).
[4] *See* Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, § 106(3), 113 Stat. 1093, 1095 (2019) (extending current appropriations through November 21, 2019).
[5] *See, e.g.*, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (2016), https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview.
[6] *See, e.g.*, 164 Cong. Rec. S7743 (statement of Sen. Booker); *id* at S7743-44 (statement of Sen. Durbin) (discussing bipartisan interest in recidivism-reduction programming).

such funding shortfalls in the future — a bipartisan goal that has already begun to gather support.[7]

II. The First Step Act's Risk and Needs System Hinders the Bill's Rehabilitative Goals and Risks Aggravating Racial Disparities in the Justice System.

This past July, the First Step Act passed a significant implementation hurdle when DOJ released the risk and needs system ("RNAS") required by the Act — a tool that BOP will use to determine the recidivism risk of incarcerated people, their needs during their incarceration, and reward them with credits toward transfer to prerelease custody.

As drafted, however, the system falls far short of what Congress intended. As explained in a comment letter submitted to DOJ by the Brennan Center in September 2019, the RNAS uses a short-sighted definition of recidivism, overstating risk in the incarcerated population; aggravates racial disparities despite Congress's clear hope that the system would minimize them; and fails to account for dynamic factors associated with rehabilitation, meaning that the system will undervalue progress made by incarcerated people toward preparing for a successful release. This final shortcoming will prove especially glaring as DOJ begins rolling out more recidivism reduction programming.

Rather than restating these arguments at length, please find the Brennan Center's comment letter attached for the Committee's reference. Furthermore, we share the concerns raised by the Committee in its own comment letter.[8] Oversight is needed to ensure that DOJ implements the statute as Congress intended, by promoting and rewarding progress toward rehabilitation and minimizing racial disparities in the criminal justice system.

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[7] *See* Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, S. 2584, 116th Cong. (2019) (proposing to appropriate the full $75 million for FY 2020).

[8] Letter from Rep. Jerry Nadler, Chairman, Comm. on the Judiciary, U.S. House of Representatives et al. to Hon. William Barr, Attorney General, U.S. Dep't of Justice et al. (Sep. 6, 2019) (raising similar concerns about "the use of dynamic factors" and racial disparities, among others).

Conclusion

This Committee's hearing comes at a critical juncture: with the First Step Act's sentencing reform provisions already in effect, the Act's prison reform provisions must now be faithfully implemented for the Act to achieve its full potential. Funding shortfalls and questionable implementation decisions risk impairing that process. But these dangers are avoidable if Congress chooses to act. We urge the Committee to exercise its oversight powers accordingly, and appreciate the leadership the Committee has shown in convening this hearing.

Attachment: Brennan Center Public Comment on "PATTERN," the First Step Act Risk and Needs Assessment Tool

BRENNAN
CENTER
FOR JUSTICE

September 3, 2019

David B. Muhlhausen, Ph.D.
Director, National Institute of Justice
Office of Justice Programs
Department of Justice
810 Seventh Street N.W.
Washington, D.C. 20531

Public Comment on "PATTERN," the First Step Act's Risk and Needs Assessment Tool

Dear Director Muhlhausen:

Thank you for the opportunity to comment on the risk and needs assessment system ("RNAS") developed by the Department of Justice ("DOJ") to implement the First Step Act (the "Act").

Like many other civil rights organizations, the Brennan Center supported the Act for its potential to both reverse outdated drug sentencing laws and significantly expand the federal prison system's commitment to rehabilitation.[1] These complementary goals will both help reduce mass incarceration: the first provides immediate relief, and the second helps people rebuild their lives, reducing recidivism and by extension the federal prison population in the long term. Thanks to the Act's retroactivity provisions, the first goal is already being realized.[2] But the success of the second, long-term effort depends on careful implementation, faithful to the statute and to Congress's goals in passing it.

That faithful implementation depends in turn on the success of the RNAS, which will be used to assign a recidivism risk level to every person in BOP custody, and determine, among other things, what type of recidivism reduction programming they receive and how they are

[1] *See* Tim Lau, *Historic Criminal Justice Reform Legislation Signed into Law*, BRENNAN CTR. FOR JUSTICE (Dec. 21, 2018), https://www.brennancenter.org/blog/historic-criminal-justice-reform-legislation-signed-law.
[2] *See* U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS: RETROACTIVITY REPORT (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/201900607-First-Step-Act-Retro.pdf (detailing sentence reductions pursuant to First Step Act provisions).

rewarded for participation.[3] We acknowledge that many questioned whether the First Step Act should include a risk assessment component at all,[4] citing widespread concerns that these tools can entrench biases against communities of color.[5] Because the decision to use such a system has already been made, our concern is that the RNAS operate in an unbiased and accurate manner and promote rehabilitation.

Unfortunately, PATTERN — the RNAS developed by DOJ to implement the First Step Act's prerelease custody credit program — appears to fall short of these goals in several critical ways. Accordingly, we urge DOJ to revise PATTERN to (1) base its risk determinations on a different metric of recidivism, one that is more consistent with the Act's public safety goals; (2) reduce racial disparities in ultimate risk classifications; and, consistent with the intent of the Act's drafters; and (3) truly incentivize rehabilitation.

We base our comments on a review of the report released on July 19, 2019, detailing PATTERN and the process behind its creation (the "Report").[6]

I. By Defining Recidivism Based Predominantly on Short-Term Re-Arrest Rates, PATTERN Under-Values Public Safety and Artificially Inflates Recidivism Risk.

PATTERN seeks to predict the likelihood that a given person in BOP custody will recidivate within a certain time after release.[7] But recidivism can be defined in several ways — based on re-arrest, re-conviction, or re-incarceration — and measured over many different time periods.[8]

Unfortunately, the Report's vague drafting leaves some uncertainty around PATTERN's recidivism metric. DOJ should first and foremost clarify what definition of "recidivism" the system will use, both for PATTERN's general tool and its tool focused on violent recidivism.

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[3] First Step Act of 2018 § 101(a), 18 U.S.C. § 3632(a) (2019).

[4] *See* H.R. Rep. 115-699, at 103 (2018) (presenting, in Dissenting Views, the concerns of House Democrats and civil rights organizations about risk assessment tools).

[5] *See, e.g.*, Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES, Nov. 8, 2018, https://nyti.ms/2QwqWqj.

[6] OFFICE OF THE ATT'Y GENERAL, U.S. DEP'T OF JUSTICE, THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM (2019) [hereinafter *RNAS Report*], https://www.nij.gov/documents/the-first-step-act-of-2018-risk-and-needs-assessment-system.pdf.

[7] *Id.* at 5-6; *see also* First Step Act § 101(a); 18 U.S.C. § 3632(a)(1) (providing statutory mandate).

[8] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2015-2014) 3 (2018), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266 (noting different definitions); U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 7 (2016) https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview (same); *see also* LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 27 n.101 (2016), https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated.

Based on our reading of the Report, however, PATTERN's general tool was designed around a very broad definition: the risk that an incarcerated person would face a "new arrest **or** return to BOP custody within three years of release" (emphasis added).[9] Because return to BOP custody is significantly less common than arrest, that definition would collapse to one based on re-arrest risk.

But that definition of recidivism would create significant room for error, as arrest does not always indicate actual involvement in criminal activity. The problem is especially pronounced if PATTERN classifies arrests for *state* crimes as recidivating events. Prosecution patterns vary widely from state to state, but in all cases we are aware of, a significant drop-off occurs between arrest and conviction.[10] In New York City, for example, just 55 percent of felony arrests in 2018 converted to a judgment of conviction. For misdemeanors, the rate is even lower — just 36 percent, with more than half of all arrests ending in dismissal in 2018.[11] Further, while arrests are very common, with approximately 10.5 million effected in 2017, just one third of those arrests related to the most serious offenses tracked by the FBI (so-called Part I index crimes).[12]

Because arrest represents a poor proxy for serious criminality, designing PATTERN around re-arrest risk would fail to account for public safety while artificially inflating recidivism in the measured population.[13] DOJ should re-design the system to assign risk levels based on something more closely associated with harm, such as re-conviction or re-incarceration.

If this re-design proves necessary, it would certainly entail additional analysis and data.[14] But narrowing the definition of recidivism from "any arrest" would improve the tool significantly by tailoring it more narrowly toward actual public safety risks.[15] Notably, this is hardly a novel proposal. While many risk assessment tools focus on re-arrest, re-conviction and re-

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[9] *RNAS Report*, *supra* note 6, at 49-50. The version of PATTERN used to predict general recidivism appears especially broad. *See id.* at 50 (defining a recidivating event as "any arrest or return to BOP custody following release").

[10] National data on conviction rates are notoriously hard to find. For one recent source, *see, e.g.*, BRIAN A REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 — STATISTICAL TABLES 24 tbl. 21 (2013), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4845 (noting conviction rates near or below 75 percent for most offenses).

[11] NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, NEW YORK CITY: ADULT ARRESTS DISPOSED (2014-18) (2019), https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf.

[12] FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2017, tbl. 29 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29.

[13] *See* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94-97 (2017), https://bit.ly/2MNHDPS.

[14] *See id.* at 77-78 (noting that the definition of recidivism affects the volume and type of data needed to construct a tool).

[15] *See* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1007-08 (2019) (criticizing the "fusion of arrest and guilt" in risk assessments); *cf.* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 562 & n.316 (suggesting that conviction may be "too under-inclusive to be useful" for risk assessment tools in the *pretrial* context, based on "conversations with statisticians in the field," but agreeing that "'[a]ny arrest' is an overbroad proxy for harm").

incarceration are other common metrics.[16] Indeed, one tool cited by the Report for its effort to reduce racial disparities defines recidivism based on a new *adjudication* rather than a new arrest.[17] PATTERN should do the same.

II. PATTERN Creates Significant Racial Disparities.

During the development of the RNAS, several stakeholders expressed concern that any risk assessment tool would exacerbate racial disparities within the criminal justice system, especially if not designed to mitigate that outcome.[18] Those concerns appear to have been well-founded. According to the Report, during development, PATTERN identified more than half of all Black men (53 percent) in the diagnostic sample as having a high risk of recidivism, compared to 29 percent of white men. Indeed, the plurality of white men (30 percent) were classified as "minimum risk"; just 7 percent of Black men received the same classification.[19]

These disparities likely result from PATTERN's heavy reliance on criminal history,[20] a factor known, even in research cited by the Report's authors, to negatively and inequitably affect how Black people are classified by risk assessment tools.[21] Due to historical discrimination and enforcement patterns, Black men and women may have longer criminal records than their white counterparts despite similar offending patterns. Blacks are disproportionately arrested for drug offenses, for example, despite using drugs at rates similar to whites.[22]

Beyond that, Black communities are routinely the targets of discriminatory police practices, artificially inflating the number of arrests in that population. Despite making up just under a quarter of the city's population, at the peak of New York City's "stop and frisk" initiative,

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[16] *See* SUSAN TURNER ET AL., UNIV. OF CAL. IRVINE, CENTER FOR EVIDENCE-BASED CORRECTIONS, DEVELOPMENT OF THE CALIFORNIA STATIC RISK ASSESSMENT (CSRA): RECIDIVISM RISK PREDICTION IN THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION 7 tbl. 4 (2013), https://bit.ly/2LglG8R; *see also, e.g.*, PAMELA M. CASEY ET AL., CTR. FOR SENTENCING INITIATIVES, NAT'L CTR. FOR STATE COURTS, OFFENDER RISK & NEEDS ASSESSMENT INSTRUMENTS: A PRIMER FOR COURTS 9, A-59 (2014), https://bit.ly/2KJhi1Q (citing STRONG, a Washington State tool, which defines recidivism risk as "a subsequent conviction . . . for a felony offense committed within three years").

[17] *RNAS Report*, *supra* note 6, at 60 nn.29-30 (citing Zachary Hamilton et al, *Optimizing Youth Risk Assessment Performance. Development of the Modified Positive Achievement Change Tool in Washington State*, 46 CRIM. JUST. & BEHAV. 1106, 1112-13 (2019) (defining, in turn, recidivism as "a new adjudication for any charge" within a given date range)).

[18] See, e.g., Letter from Monique L. Dixon, Dep. Director of Policy, NAACP LDF, to David B. Muhlhausen, Director, Nat'l Inst. of Justice (April 12, 2019); Letter from ACLU et al. to David B. Muhlhausen, Director, Nat'l Inst. of Justice (April 12, 2019); Letter from JustLeadershipUSA to David B. Muhlhausen, Director, Nat'l Inst. of Justice (April 11, 2019), https://www.ncjrs.gov/pdffiles1/nij/253115.pdf.

[19] *RNAS Report*, *supra* note 6, at 62.

[20] *Id.* at 55 (assigning as many as 30 points based on criminal history).

[21] *Id.* at 60 nn.29-30 (citing Hamilton, *supra* note 17, at 1123 (stating that "improvements in the M-PACT" — that is, more equitable outcomes — "are likely the result of weighting procedures, reducing the importance of criminal history in the prediction equation.'"); *see also* Eaglin, *supra* note 13, at 95-99; Letter from ACLU et al. to David B. Muhlhausen, Director, Nat'l Inst. of Justice (Apr. 12, 2019), at 5 & nn.25-26, https://www.ncjrs.gov/pdffiles1/nij/253115.pdf.

[22] JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 10 (2015), https://www.brennancenter.org/publication/reducing-racial-and-ethnic-disparities-jails-recommendations-local-practice; *see also, e.g.*, *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/.

Blacks were targeted in more than half of all stops.[23] Similarly, successive DOJ investigations revealed racially discriminatory policing in Ferguson, Mo. (arrest practices), Baltimore, Md. (disproportionate stops, arrests, false arrests, and uses of force), and Chicago, Ill. (use of force patterns).[24]

Over the course of decades, these discriminatory enforcement patterns helped create the reality of mass incarceration. Any risk assessment tool should be designed to limit the risk of bias from static factors that, like criminal history, are determined in part by that legacy.

But the Report details no effort to reduce racial disparities during the design process, apart from the mere inclusion of *some* dynamic factors[25] — a statutory requirement.[26] Some options exist. Theoretically, for example, PATTERN could be designed to incorporate criminal history in a novel way, by discounting the impact of drug convictions. Better yet, it could exclude arrest records entirely when "scoring" someone's criminal history, for the reasons stated in the previous section, and focus solely on a person's history of conviction and incarceration. Instead, PATTERN simply relies on the "criminal history score" assigned to each incarcerated person under BRAVO, BOP's existing risk assessment tool.[27] To the best of our knowledge, BRAVO makes no such creative provision.[28]

We leave it to other experts to determine how best to modify PATTERN to minimize its negative impact on racial disparities. Our concern is that no such effort appears to have been made so far.

III. Contrary to Congress's Stated Purpose in Passing the First Step Act, PATTERN Appears to Undervalue Rehabilitation.

Lastly, PATTERN appears to under-value dynamic factors related to rehabilitation. In the "general" version of PATTERN, men in BOP custody can receive a total of 72 points based

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[23] *Floyd v. City of New York*, 959 F. Supp.2d 540, 572-74 (S.D.N.Y. 2013) (describing the racial breakdown of stops).

[24] *See* Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ's Scathing Ferguson Report*, WASH. POST, Mar. 4, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-dojs-scathing-ferguson-report/; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 47-73 (2016), https://www.justice.gov/opa/file/883366/download; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE, N.D. ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 145-48 (2017), https://www.justice.gov/opa/file/925846/download.

[25] *RNAS Report*, *supra* note 6, at 60 ("when developing PATTERN, there was an attempt to include many predictive dynamic indicators," partially "to reduce potential sources of racial disparity").

[26] First Step Act § 101(a), 18 U.S.C. § 3631(b)(4)(C) (obligating the Attorney General to review the RNAS annually to, among other things, ensure inclusion "dynamic" factors), § 3632(a)(4) (stating that the RNAS "shall be used to" periodically re-assess each incarcerated person's recidivism risk "based on factors including indicators of progress, and of regression, that are dynamic and that can reasonably be expected to change while in prison").

[27] *RNAS Report*, *supra* note 6, at 45, 55.

[28] We reached out to BOP, asking to review documentation on BRAVO cited in the Report (*see RNAS Report*, *supra* note 6, at 44 n.8), but were informed that those documents may be proprietary. Email from Scott D. Camp, Senior Research Analyst, Federal Bureau of Prisons, to author (Aug. 6, 2019, 01:22 PM EST) (on file with author). If this or other documentation on BRAVO exists in the public domain, we were unable to locate it but welcome the chance to review it.

solely on unchangeable factors related to age or criminal history.[29] By comparison, they can earn a maximum reduction of just 12 points by completing recidivism reduction programs.[30] Participation in prison education programs, which is proven to reduce recidivism,[31] is barely scored, and not scored at all for men.[32] And completing vocational courses appears to *increase* risk level.[33]

Tellingly, for men, whether the person surrendered to federal custody, a static factor, counts for 12 points — as much as completing more than 10 recidivism reduction programs.[34] Post-sentencing voluntary surrenders, the only type that PATTERN appears to score, are rare, occurring in only 25 percent of the diagnostic sample.[35] Worse, our understanding is that such surrenders occur most frequently in cases presenting special circumstances or involving affluent defendants. PATTERN should value rehabilitation above access and privilege.

Taken together, the balance of factors seems to reflect an over-reliance on static factors and an under-valuing of rehabilitative factors. That structure is the opposite of what Congress intended. For example, one architect of an early draft of the Act, then-Rep. Robert Goodlatte (R-Va.), praised the final product for "plac[ing] a new focus on rehabilitation."[36] And Sen. John Cornyn (R-Texas), whose support was likely critical to the Act receiving a floor vote,[37] insisted that it would "allow[] prisons to help criminals transform their lives."[38] Consistent with the letter of the law, PATTERN affords some weight to dynamic factors. But it does not appear to go beyond this minimal requirement, or account for the fact that incarcerated people may, in Sen. Cornyn's words, transform their lives.

We appreciate that this combination of factors has resulted in a model that appears to predict recidivism risk within the training dataset.[39] But in its current iteration, the under-valuing of dynamic factors means PATTERN is ill-equipped to deal with changing recidivism patterns

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[29] *RNAS Report*, *supra* note 6, at 53-55. While "Age at time of assessment" is technically changeable, the method of changing it — ageing while incarcerated — is hardly the type of "dynamic" factor "indicat[ive] of progress and of regression" that Congress had in mind. *See* First Step Act § 101(a); 18 U.S.C. § 3632(a)(4). Therefore we consider it a static factor.

[30] *RNAS Report*, *supra* note 6, at 54.

[31] *See, e.g.*, LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS (2013), https://www.rand.org/pubs/research_reports/RR266.html.

[32] *RNAS Report*, *supra* note 6, at 56.

[33] *Id.* at 54. We believe that this may be a typographical error.

[34] *Id.* at 54, 56.

[35] *RNAS Report*, *supra* note 6, at 44 n.7 (clarifying how BRAVO defines "voluntary surrender"), 45 (adopting that definition for PATTERN), and 48 (stating that only 25 percent of people in the diagnostic sample had voluntarily surrendered).

[36] 164 Cong. Rec. H10346-04 (2018) (statement of Rep. Goodlatte).

[37] *See* Ames C. Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, BRENNAN CTR. FOR JUSTICE (Jan. 4, 2019), https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next.

[38] 164 Cong. Rec. S7639-03 (2018) (statement of Sen. Cornyn).

[39] *RNAS Report*, *supra* note 6, at 56-57.

that should, ideally, result from the introduction of high-quality and well-funded prison programming. The weighting of dynamic factors should, at a minimum, be seriously reassessed during the next validation cycle.[40] Ideally, it should be re-evaluated immediately to ensure fidelity to the statute's goals.

* * * * *

The First Step Act represents an opportunity for the federal prison system to enhance its commitment to rehabilitation, something that Republicans, Democrats, and the White House all support.[41] But that effort can only succeed if all aspects of the federal justice system work hand-in-hand toward turning lives around and reducing recidivism. A risk and needs assessment tool designed with the express goal of incentivizing rehabilitation, while accurately measuring risk, can reduce crime, rebuild communities affected by mass incarceration, and accelerate the long-term decline of the federal prison population. But as written, we do not believe PATTERN advances those goals.

We raise these concerns based on our own expertise and review of the documents. We fully expect that other experts in the field will raise additional concerns, and we encourage DOJ to engage fully with all such comments. By incorporating feedback from a broad community of stakeholders, each speaking from their own, complementary areas of expertise, DOJ can ensure that the First Step Act lives up to its great potential.

Very truly yours,

Ames C. Grawert

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[40] *See* First Step Act § 101(a), 18 U.S.C. § 3631(b)(4)-(5) (requiring the Attorney General to conduct annual re-evaluation of the RNAS).

[41] *See, e.g.*, President Donald J. Trump, Remarks by President Trump on Second Chance Hiring (June 13, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-second-chance-hiring/.

Written Statement of
Norman Reimer, Executive Director

On behalf of the
National Association of Criminal Defense Lawyers

Before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: Oversight Hearing on the Federal Bureau of Prisons and Implementation of the First Step Act

October 17, 2019

The National Association of Criminal Defense Lawyers (NACDL) appreciates this opportunity to present its views on implementation of the First Step Act.[1] Two key pillars of NACDL's mission are advocating for proportionality and fairness in sentencing and reducing the high barriers to successful reintegration faced by formerly incarcerated persons. NACDL supported passage of the First Step Act because it would reduce sentences for thousands of defendants and prisoners. In addition, NACDL supports systematic, evidence-based practices to reduce the nation's prison population and prepare incarcerated persons to reenter society.

Retroactive Application of the Fair Sentencing Act

The First Step Act authorizes retroactive application of the Fair Sentencing Act of 2010, which reduced the 100-to-1 disparity in sentencing between crack and powder cocaine. Prisoners convicted before August 3, 2010 (when the Fair Sentencing Act became law) can petition a court for a sentence reduction, which lies within the discretion of the judge. As of July 19, the Justice Department reported that 1691 sentencing reductions had been granted under this provision.

Nonetheless, the process for considering motions for sentence reductions raises concerns. In districts with federal defender offices, prisoners enjoy representation for their reduction requests, but in the two districts without defenders (the Eastern District of Kentucky and the Southern District of Georgia) prisoners have been forced to proceed pro se. In several instances, judges in those districts have rejected motions for appointment of counsel and sua sponte found the prisoner ineligible for relief. In some cases, these sua sponte ruling have been found erroneous and reversed by the courts of appeals. NACDL has sought to recruit pro bono counsel for eligible

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[1] The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

prisoners in these two districts, but this ad hoc process is far from ideal; many prisoners, unaware that pro bono counsel might be available, proceed pro se, leading to erroneous decisions and disparate application of the law within the federal system.

Risk and Needs Assessment

Transparency

Given the noncompetitive process used by DOJ to select the host organization for the Independent Review Committee (IRC), and controversy surrounding that choice, the importance of greater transparency cannot be overstated. In developing the risk and needs assessment tool (PATTERN), the IRC met several times, but none of these meetings were open to the public. This lack of transparency prompted NACDL to submit a letter to DOJ requesting information on their compliance with the Federal Advisory Committee Act (FACA), which requires open public meetings and other measures. Disappointingly, DOJ ultimately responded that, in their view, the IRC was not subject to the transparency requirements of FACA. Whatever the legal merits of this claim, this view ultimately undermines public confidence in the process and the tool itself.[2]

The opacity of the PATTERN development process strengthens the public right to access to the data and other materials underlying the tool and informing key decisions. It is impossible to assess, based on the limited information in the DOJ report, whether PATTERN "has a high level of predictive performance," as the DOJ report attests, or whether it is based on flawed assumptions or flawed data. It is imperative that the full dataset underlying PATTERN be released so it can be independently analyzed to determine its false positive and negative rates and its predictive value. To vindicate this public interest, on October 8, NACDL submitted a FOIA request to DOJ for this information, a copy of which is attached. DOJ has

[2] DOJ did conduct several "listening sessions" both before and after its release of PATTERN. During these invitation-only sessions, DOJ heard briefly from various stakeholder representatives but did not provide meaningful information about the development of PATTERN or answer questions. There is no indication as to whether and to what extent the input provided was utilized by DOJ to refine the needs and risk assessment tool.

acknowledged receipt of this FOIA but, to date, has not indicated whether and to what extent the agency will comply with the request.

General Concerns

Algorithmic decision-making is fallible. Moreover, it is only as good as the data it crunches. And, in the criminal justice context, it reproduces and thus exacerbates racial and socioeconomic disparities that often reflect disparate policing and prosecutorial practices and systematic implicit bias. These observations drive our concerns about the fairness and predictive accuracy of PATTERN's risk score system. Additionally, NACDL is concerned that the core construct of the tool disproportionately emphasizes youth as an aggravator and fails to give enough weight to demonstrable evidence of rehabilitation.

Criminal History

PATTERN's heavy emphasis on criminal history disproportionately increases the risk scores of the poorest and the people of color in the federal prison population, making it *more difficult* for them to obtain early release. Indeed, most of PATTERN's "static" factors relate to criminal history, and the points assessed for these factors can overwhelm the ameliorating potential of the "dynamic" factors. Because criminal history is often a function of policing practices that historically disadvantage minorities, the weight given to that history perpetuates disparate impact.

For example, consider a typical drug offender, one of 47% of the BOP's prisoners, and more likely than not, a person of color and/or from a low socioeconomic background.

- If he was convicted of a crime - even a misdemeanor - before he was 18 years old, PATTERN assigns him **12 points**.
- Assuming, conservatively, just one felony conviction for a street-level drug sale a few years later, he is likely in Criminal History Category III under the Sentencing Guidelines, yielding an additional **12 points** under PATTERN.

- If he is then convicted in his late 20s of a federal drug offense (even as a minor, non-violent participant), he gets an additional **24 points** during his initial assessment upon entry into the BOP system.
- As a drug offender, he was likely remanded upon conviction (if he had ever been granted bail in the first place), and accordingly, he does not get to reduce his score by 12 points for self-surrender.
- His PATTERN score on static factors upon prison entry totals **48 points**, classifying him as high risk. Had this hypothetical offender sustained another felony drug conviction in his twenties or perpetrated any violence in his past, no matter how remote in time, the PATTERN score can skyrocket further.

As other groups have pointed out, PATTERN's factors replicate structural and racial biases. Extensive research has established that systematic biases operate at all points in the criminal justice process, from bail to jail. Racial and socioeconomic factors, including the cognitive biases of law enforcement professionals, play pivotal roles in whether an individual is arrested, charged, charged with a misdemeanor or a felony, granted bail, offered diversion, sentenced to probation or prison, revoked on probation, etc. So even if PATTERN's predictive validity is confirmed, its potential to replicate and exacerbate inequities conflicts with the admonition in the First Step Act to avoid unwarranted disparities.

Disproportionate Emphasis on Youth at Time of First Conviction
The heavy scoring for age, with the assessment of 12 points for **any** conviction prior to the age of 18, regardless of the nature of the offense or the passage of time before a subsequent conviction, disproportionately penalizes youthful mistakes, without any showing of a nexus to current risk. At a minimum this factor should be significantly discounted or eliminated if there has been a significant interval without further convictions.

Additionally, the current construct fails to adequately take into account the emerging recognition in the developmental sciences that brain development and the accompanying maturity continues until an individual is in their mid-

20s. Under the current iteration, a first offender who is under 18 would start off with 42 points (12 for age at time of conviction + 30 for age at time of assessment), even though the individual has never been imprisoned before and their unlawful conduct may have been an aberration.

Finally, the triggering offenses are usually state convictions. Yet there is a well-recognized crisis in public defense. In many venues, counsel is not provided to accused persons, particularly if a jail sentence is not imposed. Further, in jurisdictions that rely upon money bail, the accused often face the choice of pleading guilty, even if they are innocent, or remaining incarcerated. And, even in those venues in which counsel is provided, public defense is often woefully underfunded resulting at overburdened and under-resourced counsel who operate under enormous pressure to dispose of cases.

For all these reasons, the severe scoring for youth at time of first conviction is a serious flaw that inevitably will disadvantage the poor and minorities.

Inadequate Recognition of Evidence of Rehabilitation

Given the First Step Act's emphasis on factors "that can reasonably be expected to change in prison" and mandate that "all prisoners at each risk level have a meaningful opportunity to reduce their classification," NACDL does not think PATTERN strikes the right balance between static and dynamic factors. As compared to the static factors, PATTERN's dynamic factors adjust the risk score downwards far less generously. A prisoner can receive a 12-points reduction for programming, but this assumes program availability, an assumption belied by the shortage of BOP's program offerings. (Notably, PATTERN provides no allowance for prisoners with disabilities, who may not be capable of participating in available programming). Remarkably, a prisoner only receives a six-point reduction for completing the BOP's flagship nine-month residential drug treatment program, and a mere one-point reduction for completing a technical or vocational course. Male prisoners get no points off for working in UNICOR and no prisoner gets a reduction for doing any other kind of work, such as unit orderly or food service. For all inmates, irrespective of gender, a solid work history is a factor that should be given substantial weight.

More generally, consideration should be given to the range of in-prison indicators of progress that might be utilized to assess risk. As noted above, two criteria that could be made much more robust are technical/vocational courses and employment. Davis, Lois M., Robert Bozick, et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND Corporation (2013). DOJ should increase the weight given to these factors and should consider incorporating related criteria (e.g., length of steady employment, performance, etc.).

Undue Weight to Infractions

NACDL has serious concerns about the relative weight of infractions and the failure to distinguish older infractions. While PATTERN does separate run-of-the-mill infractions from serious of violent infractions, NACDL notes that the former category includes actions that are trivial, stem from misunderstandings, or manifest other mitigating circumstances. Assuming these incidents have any predictive value for risk-assessment purposes, NACDL believes the level of increase is excessive. In the First Step Act, Congress specifically limited the consequences of rule violations and required that prisoners be allowed to restore credits lost due to such conduct. PATTERN's treatment of infractions runs counter to this more measured approach.

Under PATTERN scoring, the first minor infraction negates one completed program, and successive infractions increasingly outweigh additional program participation. It is the rare prisoner who does not sustain at least two infractions during his experience of incarceration, especially in the early years of a lengthy sentence. DOJ should not only reconsider these levels but also provide some additional benefit for prisoners who go extended periods without any infractions, thereby adding a much-needed dynamic factor to the instrument. Indeed, after the passage of some time period, only the most serious infractions should result in any point assessment, and minor, temporally remote infractions should be wholly disregarded.

Programming

The First Step Act's prison-related measures have the potential to transform the BOP's mission, but much work remains. The concerns outlined above place even greater weight on the DOJ's expeditious development of "evidence-based recidivism reduction programs or productive activities." Access to programming is key to unlocking the benefits of the First Step Act and, as the Federal Defender's statement makes clear, the BOP's past performance in this area has been abysmal.

The First Step Act is a meaningful step away from our retributive model of punishment to one based on rehabilitation, one that has generated hope for thousands of prisoners and their families. NACDL commends the Committee for conducting oversight to ensure faithful and diligent implementation of the law. NACDL further encourages the Committee to seek full transparency surrounding the development of PATTERN and other implementation details, and to press DOJ for needed modifications in keeping with the spirit of the law and input from stakeholders and impacted communities.

NORMAN L. REIMER
Executive Director

October 8, 2019

Monica Potter-Johnson
Office of Justice Programs
Office of the General Counsel
Attention: FOIA Staff
810 7th Street, N.W., Room 5400
Washington, D.C. 20531

FOIA/PA Mail Referral Unit
Department of Justice
LOC Building, Room 115
Washington, DC 20530-0001

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

Dear Ms. Potter-Johnson and FOIA Officer, Department of Justice:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*., and the Department of Justice ("DOJ") Implementing Regulations, 28 C.F.R. § 16.1 *et seq*. The Request is submitted by the National Association of Criminal Defense Lawyers ("NACDL").[1] As set forth in Section I, *infra*, our Request seeks information related to the risk and needs assessment tool that the Attorney General is directed to create by the First Step Act of 2018, 18 U.S.C. §§ 3631-3635 (the "Risk and Needs Assessment Tool").

I. Requested Records

We request materials related to the data used to statistically validate the Risk and Needs Assessment Tool that the Attorney General is directed to create by the First Step Act of 2018. Specifically, we seek the following materials:

1. The raw data about the risk factors considered in developing and validating the Risk and Needs Assessment Tool.
2. The risk factors used in developing and validating the Risk and Needs Assessment Tool.
3. Information showing how weights were assigned to the risk factors used in developing and validating the Risk and Needs Assessment Tool.
4. The model used to train the data regarding risk factors including:

[1] The NACDL is a 501(c)(6) non-profit organization that is "primarily engaged in disseminating information" within the meaning of 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. 16.5(d)(l)(ii).

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Executive Director

a. the data used for training (both the risk factors considered as well as the specific re-offense outcome used);
b. the specific data used for training (*e.g.*, the nature of the sample, in terms of demographics, location, prison-type, etc.);
c. the algorithm (*e.g.*, random forests, logistic regression, etc.) used to train the model; and
d. the resulting (already trained) model.

5. The dataset of 278,940 BOP inmates released from BOP facilities between 2009 and 2015 as provided to the PATTERN tool developers (Dr. Zachary Hamilton and Dr. Grant Duwe), as referenced on page 42 of the Department of Justice report The First Step Act of 2018: Risk and Needs Assessment System ("DOJ Report"). The request is for this dataset to be made electronically available in a form that can be readily imported into standard statistical software (e.g., SPSS or SAS).
6. The developmental dataset of 222,970 inmates released from a BOP facility to a location in the United States who had received a BRAVO assessment provided to the PATTERN developers as described on page 46 of the DOJ Report (the "Developmental Dataset"). The Developmental Dataset should include the factors and data described on page 43 of the DOJ Report with the unit of analysis being the individual offender (e.g., three-year rearrest data, demographic characteristics, criminal history, prison misconduct, participation in programming, and measures from BRAVO and BRAVO-R). The dataset requested should at the least permit an independent evaluator to compute and replicate the statistics contained in Chapter 3 of the DOJ Report (e.g., Tables 1, 3-10). The request is for the Developmental Dataset to be made electronically available in a form that can be readily imported into standard statistical software (e.g., SPSS or SAS).
7. Any informal or formal codebooks used to assess and assign points per Table 2 on pages 53-56 of the DOJ Report.
8. Information on how any of the factors in the Developmental Dataset were coded or recoded in statistical software that may not be evident in the codebook(s) requested above.
9. Information on how missing data for any PATTERN factor was handled in the training and test datasets underlying the full Developmental Dataset.
10. Information on factors that were tested as potentially being included in any of the PATTERN tools (male, female, general recidivism, and violent recidivism) yet were omitted, and the specific reason(s) for such omission.

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11. A list of offenses that qualified as a positive response to the PATTERN factor of "instant offense violent" and qualified for the outcome variable of violent recidivism in the male and female violent recidivism tools.
12. A response to whether the PATTERN factor is age at first arrest or age at first conviction.
13. Information on how each of the variables were coded as the foundation for the percentages in Table 1 on Page 47 of the DOJ Report: programs completed, technical or vocational courses, drug treatment while incarcerated, and drug education while incarcerated. The information requested here includes the names of the programs, their durations, rules for successful completion (as coded by the relevant variables), the location(s) and dates each program was made available, and the professional backgrounds of the relevant program staff.
14. For each of the programs that qualified in the relevant factors (i.e., programs completed, technical or vocational courses, drug treatment while incarcerated, and drug education while incarcerated), information on waitlists for such programs, including numbers of offenders on each waitlist and time periods remaining on such waitlist by program and location.
15. Correspondence between and among tool developers (Dr. Zachary Hamilton and Dr. Grant Duwe) and/or Independent Review Committee members concerning available choices in how to create cut-points for minimum, low, medium, and high risk categories.
16. Correspondence between and among tool developers (Dr. Zachary Hamilton and Dr. Grant Duwe) and/or Independent Review Committee members concerning false positive rates, false negative rates, and the ratio between false positives and false negatives.
17. Information for how weights were assigned to the PATTERN factors according to Table 2 of the DOJ Report on pages 53-56. This request includes information on the specific weighting methodologies (e.g., unweighted or analytical weighting scheme) used to determine the final weights for each factor in PATTERN.
18. Information on inter-rater reliability scores for BRAVO and BRAVO-R between 2009-2019.
19. Information on inter-rater reliability scores for PATTERN.
20. A copy of the unpublished manuscript referred to in footnote 8 on page 64 of the DOJ Report: Harer, M., Langan, N., & Gwinn, J. (2019). *The Federal Bureau of Prisons Inmate Classification Instrument as a Behavioral-Change Predictor of Serious Prison Misconduct and Post Release Recidivism*).

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21. A copy of the document referred to in footnote 25 on page 66 of the DOJ Report. Puzzanchera, C. & Hockenberry, S. (2013). *An Interpretation of the National DMC Relative Rate Indices for Juvenile System Processing in 2010 (National Disproportionate Minority Contact Databook).*

II. Application for Waiver or Limitations of All Fees

NACDL requests a waiver of all search, review, and duplication fees associated with this Request. The requester is eligible for a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R.§ 16.10(c)(3), (d), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(1).

III. Miscellaneous

If the Request is denied in whole or in part, please justify all withholdings or redactions by reference to specific exemptions under the FOIA and provide all segregable portions of otherwise exempt material.

NACDL also requests that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. §552(a)(7)(B).

Being unsure which of the addressed offices holds the relevant materials sought by the Request, NACDL submits this request to both offices although only one response is expected.

Thank you for your prompt attention to this matter. Please furnish the applicable records to me at NACDL's office in Washington, DC.

Sincerely yours,

Norman L. Reimer

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Mr. CICILLINE. This reminds me of just one final question. On October 8th, it was a FOIA request from the National Association of Criminal Defense Lawyers, which, among other things, seeks specific information, including raw data, that was used to develop PATTERN. To the extent that such information is in your possession, will you commit to turn it over as part of that FOIA request?

Ms. BACON. We are in the process of reviewing that FOIA request and are processing it.

Mr. CICILLINE. Is that a yes—yes-ish?

Ms. BACON. I can say that we are processing the request.

Mr. CICILLINE. We look forward to receiving information from the committee, and we will go from there.

Ms. BACON. Thank you.

Mr. CICILLINE. We do thank you for your time and for the testimony before the committee.

At this time, thank you again, Director Sawyer and Ms. Bacon—we will now proceed to our second panel, and I would ask our second panel of witnesses to please come forward.

[Pause.]

Mr. CICILLINE. Thank you, and welcome to our witnesses.

We are delighted today to be joined by David Patton. Mr. Patton is the head of the Federal Public Defender Offices for the Southern and Eastern Districts of New York. He oversees all aspects of office and employees, while also chairing the National Federal Defender Legislative Committee and the Southern District of New York Panel Review Committee, which makes recommendations about attorneys to be selected as appointed counsel on the CJA panel. Mr. Patton teaches evidence to all new Federal defenders at annual national training and represents individual clients in Federal criminal cases, and we welcome you, Mr. Patton.

We are joined by Melissa Hamilton. Dr. Hamilton is an expert on risk assessments and holds a doctorate in criminology. She is a former judicial clerk on the United States Courts of Appeal for the Fifth Circuit and a former editor of the *Texas Law Review*. Today, Dr. Hamilton teaches at the University of Surrey School of Law in the UK. She is a member of the American Psychological Association and has published dozens of articles in law reviews and scientific journals on a variety of topics. Some of her main areas of focus are conducting interdisciplinary research on issues of risk assessment practices, policing sentencing, and corrections. Dr. Hamilton is a former police officer and a corrections officer. Welcome, Dr. Hamilton.

John P. Walters—Mr. Walters is the chair of the Independent Review Committee designed to oversee the implementation of the First Step Act. He is also the Chief Operating Officer of the Hudson Institute, Director of the Hudson Institute Political Studies, and Co-Director of the Center for Substance Abuse Policy Research of the Hudson Institute. Welcome, Mr. Walters.

Andrea James—Ms. James is the Founder and Executive Director of the National Council on Incarcerated and Formerly Incarcerated Women and Girls. She is also the Founder of Families for Justice as Healing and the author of *Upper Bunkies Unite: And Other Thoughts on the Politics of Mass Incarceration*. Ms. James is a 2015 Soros Justice Fellow and a recipient of the 2016 Robert F.

Kennedy Human Rights Award, which is a very distinguished award, so congratulations. Her work is focused on ending incarceration of women and girls. We welcome you, Ms. James.

We welcome all our distinguished witnesses and thank them for participation in today's hearing. Now, if you would all please rise I will begin by swearing you in.

Please raise your right hands. Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Mr. PATTON. I do.

Ms. HAMILTON. I do.

Mr. WALTERS. I do.

Ms. JAMES. I do.

Mr. CICILLINE. Thank you. Let the record show the witnesses answered in the affirmative. Thank you, and you may be seated.

Please know that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that time there is a timing light on your table. When the light switches from green to yellow you have one minute to conclude your testimony. When the light turns red it signals your five minutes is up.

Mr. Patton, you will begin. You are recognized for five minutes.

TESTIMONY OF DAVID PATTON

Mr. PATTON. Thank you, Mr. Chair, Members of the committee. Thank you very much for holding this hearing. As you said, I held the Federal Public Defender Office in New York City, and together with my colleagues around the country, fellow public defenders and appointed counsel, we represent anyone charged with a Federal crime too poor to afford a lawyer, and that means at any given time nationwide we represent 80 to 90 percent of all Federal criminal defendants.

I want to pause for a moment to join the expressions of sorrow about the loss of Representative Cummings. He was a great champion for our work and a great champion for our clients, and we are all going to miss him dearly.

The First Step Act and the Department of Justice's implementation of it, and the Bureau of Prisons' implementation of it will impact the lives of our clients enormously. First, as has been discussed, the Act requires DOJ to develop an algorithm, a scoring system, to assess every incarcerated—every federally incarcerated person's risk of recidivism and needs for programming and treatment.

That score that people receive will directly impact how much time they spend in prison. It is vital, because some people may receive no time off their sentence, others may receive many months or years off. It is vital that the scoring system, the development of it be transparent, that it is fair, valid, and that it is unbiased.

I have to say, unfortunately, I have some serious concerns about those at the outset. First, there has not been as much transparency as there should be in the development of this system, and I think we are going to hear more about that.

Secondly, what we do know about it suggests there is a real danger of very serious racial bias in the use of this system, and again, I think we are going to hear more about that.

In addition to the scoring system, so much of the success of the First Step Act will depend on the Bureau of Prisons greatly increasing the programs and treatment offerings that it currently offers, and on much more robust reentry planning. Once again, I think there is a lot of reason for concern. First, for years the Bureau of Prisons has not had sufficient programming and treatment for the demand. Many of its programs really do work, and they ought to be improved, and they ought to be added to, but they haven't been. With the First Step Act, that demand is only going to increase. So, if we haven't been able to do it for years, pre-FSA, I think there is real cause for concern moving forward.

Second, on reentry, the Bureau of Prisons has been moving in the wrong direction. They have been closing reentry centers for the past few years. Once again, the need is only going to grow under the First Step Act.

Last, I will say this about reasons to be worried about the Bureau of Prisons' performance moving forward. It has a very troubling history, certainly in my jurisdiction, of not creating conditions in prison to help people succeed when they get out. I wrote, in my written submission, at some length, about some of the really horrific problems we have had at the Metropolitan Detention Center in Brooklyn and the Metropolitan Correctional Center in Manhattan, two very large pretrial Federal detention centers.

In particular, last winter, during one of the coldest stretches in New York City's history, they lost power for a week and they had serious problems with their heating, and frankly, the MDC's response to that was disgraceful, and it included—and I don't use this word lightly—outright lies by MDC officials, minimizing what was going on, and providing incorrect information about what was going on, that did real harm to our clients. In the wake of that disaster, the warden of that prison, MDC, was promoted. He now oversees, to my understanding, three large institutions in Pennsylvania. So, I am very concerned about accountability at the Bureau of Prisons.

I also hope I will get a chance to respond to some of Director Sawyer's responses to Chair Nadler, because some of them were just plain incorrect, I am afraid to say.

I will conclude my opening remarks with this. The stakes for successful implementation of the First Step Act are very high. As everyone here has recognized, the overwhelming number of people who enter prison will be coming out and will become our neighbors again soon. If they are treated with harshness, neglect, and inhumanity while they are in prison they are much more likely to respond in kind when they get out. Robust programming, a fair assessment system, and real thoughtful reentry planning are key to making that happen. If history is a guide, without vigorous oversight it won't happen, and that is why I am grateful to this Committee for holding this year.

Thank you.

[The statement of Mr. Patton follows:]

Let's start with the problems it confirmed and amplified. The power problems had nothing to do with Con Edison. There were longstanding facilities management and building maintenance problems, and those problems were the cause of the crisis. There were in fact serious heat problems – problems that pre-dated the electrical fire and were exacerbated by MDC employees' mistakes. During the crisis, inmates were being locked down for extended periods of time. The majority were not given extra blankets or long sleeved clothing. Medical care was compromised. The provision of food was seriously impacted. There was no contingency plan for legal or family visitation. There was no plan for people who require electricity for medical equipment such as CPAPs. There was a serious lack of transparency and communication with the courts, attorneys, media, and the families of those incarcerated.

Unfortunately, the IG Report failed to discuss MDC officials' lies. The institution lied in its press release saying Con Edison was to blame. Warden Quay lied about there being no heat problems. He lied about inmates not being locked down. He lied repeatedly about the severity of the situation and its impact on medical care and safety.

And predictably, there has been no real accountability. Warden Quay was promoted. He now overseas multiple federal prisons in Pennsylvania. I say predictably because this lack of accountability is consistent with many years of IG reports finding severe mismanagement at the MDC. Earlier reports have detailed serious problems with the MDC's management of solitary confinement, the treatment of sentenced women housed in the East Building, and separately, multiple instances of serious sexual assaults of men and women by corrections officers. Many of the problems identified in those reports (and many others) remain.

Suicide at the MCC

The other pretrial federal jail in my home district that has gained notoriety recently is the MCC in downtown Manhattan. Media attention has focused on the death of Jeffrey Epstein whose high profile case and suicide at the MCC brought scrutiny to the management of the institution. I do not have any personal knowledge regarding the circumstances of Mr. Epstein's death, and I therefore cannot comment on what failings at the institution led to it.

But I can say with confidence that a variety of problems, similar to those at the MDC, plague the institution. Both institutions are chronically short-staffed, or so officials tell us when legal or social visitation is cancelled or when we wait for hours to be able to visit with clients. Both institutions have extremely limited educational or vocational programming. Corrections officers at both facilities have committed egregious sexual assaults against inmates. And in both, medical care is abysmal.

In addition to those problems, there is the matter of the physical space. The MCC is a cramped, vertical building with the only "outdoor" recreation located on the roof of the building in a space covered by thick fencing that barely allows for a view of the sky. The unit at the MCC where Epstein was housed, "9 South," keeps people in small, virtually

windowless cells for 23 hours a day. The MCC was built in the 1970s with a capacity for roughly half of the number of people now held there. And it was initially built without rooms for attorney visitation even though it is a pretrial detention facility. The limited number of attorney visitation rooms now create expensive and aggravating delays.

Here in New York City, the local jail at Rikers Island gets deserved attention for its deplorable conditions, yet in their own way, the federal pretrial facilities can be worse. I have often had clients who were initially held on state charges at Rikers and then brought to the MCC or MDC to face federal charges. Because of the conditions, many have asked me if it's possible to return to Rikers. Several years ago, the U.S. Attorney's Office for the Southern District of New York sued the local New York-run Rikers Island over jail conditions, but the office has never done anything about the MCC, the federal facility where the U.S. Attorney's Office itself sends people. Indeed, when legal action is taken against the MCC or MDC, it is the U.S. Attorney's Office that represents the institutions.

There are legal, administrative, and cultural barriers to U.S. Attorney's Offices playing the same role with respect to federal jails as they play with state and local facilities. For that reason, Congress should explore other avenues for providing outside accountability for places like the MCC and MDC that have thus far proved entirely resistant to change.

The First Step Act

Shortly before the fire at the MDC, Congress passed and the President signed the FSA. The FSA gives the DOJ, and the BOP specifically, significant additional authority and responsibility to help prisoners succeed in their communities upon release and thereby reduce recidivism. But it can only succeed if the DOJ and BOP faithfully implement the will of Congress.

A Lack of Programming

To meet the twin goals of improved public safety and reduced levels of incarceration, the FSA relies heavily on the BOP offering substantially increased programming and productive activities for incarcerated individuals. To date, the BOP has failed to provide adequate programming to meet current needs, much less the increased demand that will be required to make the FSA a success. The true extent of the deficit is not known because the BOP has not been transparent about the number of programs offered, the capacity of these programs, and the length of the waitlists for these programs. The BOP has failed to respond to requests from Congress for this information, and provides even less information to the public. What we do know indicates the BOP is not providing enough individuals with sufficient quality programming. Available data shows waitlists to participate in the BOP programs are long: 25,000 people are currently waiting to be placed in prison work

programs,[1] at least 15,000 are waiting for education and vocational training,[2] and at least 5,000 are awaiting drug abuse treatment.[3] And, assuming the sample used to develop the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) is representative, DOJ data indicates almost half (49%) of individuals serving federal sentences of incarceration complete no programs; that a vast majority have no technical/vocational courses (82%) or federal industry employment (92%) and well over half (57%) have not had drug treatment while incarcerated despite indication of need.[4] Access to quality programs also varies from one institution to another.[5] This is unfortunate because programs such as Federal Prison Industries (also known by its trade name, UNICOR) has been proven to reduce recidivism by 24%.[6] Participants in FPI are also 14% more likely than similarly situated individuals who did not participate to be employed after release for prison.[7]

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[1] *See* BOP: UNICOR, Federal Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (estimating the participation rate at 8%).

[2] *See Oversight of the Federal Bureau of Prisons Before the H. Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 115th Cong. 20 (2018) (BOP Director Inch).

[3] *See* Dep't of Justice, Bureau of Prisons, Drug Abuse Treatment Program, 81 Fed. Reg. 24484, 24488 (Apr. 26, 2016) ("over 5,000 inmates waiting to enter treatment"); Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections* 36 (Jan. 2016) ("at the end of FY 2014, more than 12,300 people systemwide were awaiting drug abuse treatment"). Substantial waitlists also exist for mental health programs and trauma therapy programs for female inmates. *See* Office of the Inspector General, U.S. Dep't of Just., *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* 51 (2017); Office of the Inspector General, U.S. Dep't of Just., *Review of the Federal Bureau of Prisons' Management of Its Female Inmate Population*, 19-22 (2018).

[4] *See* Office of the Attorney General, U.S. Dep't of Just. *The First Step Act of 2018: Risk and Needs Assessment* System 47, tbl.1 (2019) (DOJ Report).

[5] *See, e.g.*, BOP, Directory of National Programs, https://www.bop.gov/inmates/custody_and_care/docs/20170913_Directory_of_National_Programs1.pdf; Office of the Inspector General, U.S. Dep't of Just., *Review of the Federal Bureau of Prisons' Release Preparation Program* i (2016) (finding that the BOP "leaves each BOP institution to determine its own [Release Preparation Program (RPP)] curriculum, which has led to widely inconsistent curricula, content, and quality among RPP courses").

[6] *See FPI and Vocational Training Works: Post-Release Employment Project (PREP)* at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf; *see also* Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

[7] *See* Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

The BOP has a long history of not providing sufficient programs. Moving forward, because the recidivism reduction efforts of the FSA are meaningless without adequate programming, our primary concern is whether the BOP will provide a broad range of programs, and sufficient program capacity, to comply with the FSA requirement that the BOP "provide all prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs or productive activities according to their specific criminogenic needs, throughout their entire term of incarceration."[8] The BOP's past performance, with long waitlists, and inconsistent access and quality across institutions, makes it difficult to have confidence that the BOP will meet its statutory obligations in this regard.

The Risk and Needs Assessment System

Also critical to the success of the FSA is a risk and needs assessment system that is transparent, fair, and unbiased. Early signs indicate that the system will not meet any of those criteria.

The FSA required the DOJ to develop a risk and needs assessment system that, among other things, would determine "the recidivism risk of each prisoner" and "the type and amount of evidence-based recidivism reduction programming for each."[9] The system, through its impact on the ability of incarcerated people to earn early release credits, will directly govern how much time people serve in prison. This makes it a high-stakes tool, and testing for accuracy and bias is crucial. Indeed, Congress understood the stakes and called for transparency throughout the FSA, including a mandate that the risk and needs assessment system be "developed and released publicly."[10] Congress also repeatedly required that the system be monitored for bias.[11]

On July 19, the DOJ issued a report announcing the initial development of PATTERN. The DOJ Report on PATTERN provides very little information about its development. This is

[8] First Step Act of 2018 (FSA), Pub. L. 115-391, Title I, § 102(a) (Dec. 21, 2018) (codified at 18 U.S.C. § 3621(h)(6).

[9] FSA at, Title I, § 101(a) (codified at 18 U.S.C. § 3632(a)).

[10] *Id.*

[11] *See, e.g.*, FSA at Title I, § 103 (requiring the Comptroller General to conduct an audit of the use of the risk and needs assessment system every two years, which must include an analysis of "[t]he rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups, in such rates."); FSA at Title I, § 107(g) (requiring the Independent Review Committee to submit to Congress a report addressing the demographic percentages of inmates ineligible to receive and apply time credits, including by age, race, and sex); FSA at Title VI, § 610(a)(26) (requiring the Director of the Bureau of Justice Statistics to annually submit to Congress statistics on "[t]he breakdown of prisoners classified at each risk level by demographic characteristics, including age, sex, race, and the length of the sentence imposed.").

extremely troubling because the development of PATTERN, as with all risk assessment tools, necessarily relies on both empirical research and moral choices.[12] Based on the limited information provided in the DOJ Report, we have concerns, and even more questions, in both areas. Additional information is needed to assess many important issues including: PATTERN's accuracy; its scoring mechanisms; its fairness across age, gender, race and ethnicity; whether it will exacerbate racial disparity in the federal prison population; its impact on privacy interests; and whether it is consistent with the congressional mandate to "ensure" that "all prisoners at each risk level have a meaningful opportunity to reduce their classification during the period of incarceration."[13]

Transparency in the methods for developing, validating and bias testing PATTERN is vital. Full transparency is a primary way (along with accountability and auditability) to create and justify confidence by stakeholders and the public. Indeed, across risk assessments in criminal justice, the secrecy that permeates black box instruments causes significant concerns about how reasonable they are in practice. Full transparency requires the DOJ to release the same dataset used by Grant Duwe, Ph.D., and Zachary Hamilton, Ph.D., to create PATTERN.[14] This is consistent not only with the transparency directives in the FSA,[15] but also with the advice of leading organizations such as the National Center for State Courts, which recommends that independent evaluators determine whether their independent "research findings support or contradict conclusions drawn by the instrument developers."[16] For a fuller listing of the information that must be known and why, I am attaching as Exhibit A the Federal Defenders' letter to the NIJ.

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[12] Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 167 (2014).

[13] 18 U.S.C. § 3632(a)(5)(A).

[14] *See* DOJ Report at 42-43.

[15] *See supra* notes 10 & 11.

[16] Pamela M. Casey et al., *National Center for State Courts, Offender Risk & Needs Assessment Instruments: A Primer for Courts* 19 (2014) (stressing that third party audits are valued because "it is always helpful to know whether existing research descriptions about the reliability, validity, and fairness of a tool have been replicated by others." Any "decisions based on a [risk and needs] tool which grossly misclassifies the risk levels of offenders may not simply fail to improve outcomes; they may actually do harm to the offender." As a result, "[i]nstrument validation is not only important to ensure that decision making is informed by data, but to establish stakeholder confidence."); *see also* Nathan James, CONG. RESEARCH SERV., *Risk and Needs Assessment in the Federal Prison System* 11 (July 10, 2018) (Congressional Research Service report concerning risk assessment in the federal prison system positively citing the recommendation of the Council of State Governments that independent third parties should be permitted to validate the tool to assess accuracy by race and gender).

The importance of transparency is heightened by some of the initial known aspects of the system. For instance, the DOJ's definition of the central measured outcome in the risk assessment: recidivism. The definition the DOJ chose is unduly broad, sweeping in revocations for minor technical violations such as failure to timely report a change of residence, or failing to timely notify the probation officer of being questioned by police.[17] This broad definition of "recidivism" is inconsistent with the goals of the FSA to successfully reintegrate individuals in their communities and protect the public.

Another choice that signals the need for vigilance and concern is the decision to release a risk assessment tool that has a racially disparate impact, particularly on black males. According to DOJ data, white males are far more likely than black males to fall in the minimum and low risk categories, 57% versus 27% respectively.[18] We are concerned the BOP has not, and will not, take appropriate steps to ameliorate this disparity.

Relatedly, we are deeply troubled that there is still no needs assessment as required under the FSA, and that the BOP does not expect one to even be available for testing until the second quarter of 2020.[19] Until then, the BOP appears to be relying on its current "needs assessment" that was criticized by the Office of the Inspector General back in 2016.[20]

Management of FSA Timelines and Requirements

We are also concerned that the BOP will not implement other components of the FSA within the required timeframes, unnecessarily delaying access to programs that reduce recidivism, and incentives for participating in them. No information has been provided on whether the risk assessment tool has been finalized following public comment and is now ready to be used (or is already being used) by properly trained BOP employees to complete the initial intake for each incarcerated individual by January 15, 2020. No information has been provided regarding whether training is progressing such that BOP staff will be capable of completing that initial intake. While the DOJ indicated it would take four months to develop advanced training, it is not clear whether development efforts have begun.[21] No information has been provided on whether the BOP has started assessing newly-committed

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[17] *See, e.g.*, USSG §5D1.3(c)(4), (c)(5), (c)(9).

[18] DOJ Report at 62, tbl. 8.

[19] DOJ Report at 64, 78.

[20] Office of the Inspector General, U.S. Dep't of Just., *Review of the Federal Bureau of Prisons' Release Preparation Program* 14 (2016) ("the BOP's current method [of assessing risk and needs], which relies heavily on staff discretion to identify and tailor RPP programming efforts to inmate needs, may not be as effective or efficient as the more systematic tools that many state correctional systems use").

[21] DOJ Report at 86.

inmates. And critically, no information has been provided on how soon after the commencement of a sentence, individuals can expect to start participating in programming.

Time and again, the BOP has proven unable to meet even basic standards in the management and care of the federal inmate population. Indeed, virtually every time the BOP has been scrutinized—from managing its compassionate release program, to preparing individuals for reentry[22] —the agency has proven itself unable to effectively allocate its resources, collect data, and provide baseline care for the individuals in its keep.

Closing Residential Reentry Centers

Under the FSA, people who complete certain programs in custody will soon begin earning credits that, in theory, they can exchange for greater prelease time in community corrections, including the possibility of additional time at Residential Reentry Centers (RRCs). But if reentry capacity decreases instead of expands, these credits may be worthless. Sadly, because of the BOP's recent practices, that is exactly what is happening.

My colleague, Lisa Hay, the Federal Defender for the District of Oregon, has detailed this problem in a letter to the Director of the BOP, Kathleen Sawyer. (Attached as Exhibit B). In the letter she explains that at least 20 reentry centers have closed or ceased accepting federal inmates since 2017, and more closures appear likely. This loss of bed space cripples efforts to enhance successful reentry of incarcerated citizens, undermines the criminal justice goal of rehabilitation, and consequently threatens community safety. Reentry centers can provide the opportunity, in a less structured setting than prison, for individuals to engage in needed treatment, find employment, and continue reconnecting with their family and community. Once lost, these precious resources are difficult to replace.

The closing of RRCs is in keeping with a long history of the BOP failing to release people as early as the law provides. The Second Chance Act of 2007 doubled the amount of sentenced time that federal prisoners were eligible to spend in reentry centers from six months to up to one year. 18 U.S.C. § 3624(c). During this "prerelease time," the individual is not released from his or her federal sentence but is serving the sentence in an alternative

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[22] *See, e.g.*, Office of the Inspector General, U.S. Dep't of Just., *The Federal Bureau of Prisons' Compassionate Release Program* 53 (2013) ("[W]e found that the existing BOP compassionate release program is poorly managed and that its inconsistent and ad hoc implementation has likely resulted in potentially eligible inmates not being considered for release. It has also likely resulted in terminally ill inmates dying before their requests for compassionate release were decided."); Office of the Inspector General, U.S. Dep't of Just., *Review of the Federal Bureau of Prisons' Release Preparation Program* i (2016) ("Significantly, we found that the BOP does not ensure that the [Release Preparation Programs (RPPs)] across its institutions are meeting inmate needs. Specifically, BOP policy does not provide a nationwide RPP curriculum, or even a centralized framework to guide curriculum development. . . . [Further,] the BOP does not have an objective and formal process to accurately identify and assess inmate needs or determine which RPP courses are relevant.").

setting. Defenders were encouraged by this Congressional recognition that our clients and their communities both benefited when reentering individuals were given more time, in a gradually less structured setting, to engage in treatment, employment counselling, parenting classes, and other programs designed to ensure the safety of the community and the success of the resident after incarceration. Despite this mandate from Congress, however, the BOP was slow to change, and the amount of prerelease time that individuals were awarded to spend in reentry centers remained low. In 2011 Defenders wrote to then Director Thomas Kane to express concern about this failure to implement the Second Chance Act.[23] In 2012, the General Accountability Office issued a report that similarly noted the BOP's failure to adequately implement Congressional mandated alternative options to incarceration, including use of reentry centers.[24]

After the GAO report, the BOP did begin to utilize reentry centers more fully, awarding slightly greater prerelease time to individuals. But the amount of this prerelease time awarded by the BOP is again declining. According to the most recent report submitted by the BOP to the House and Senate Judiciary Committees, the average length of placement in reentry centers decreased by almost 20% from the first quarter measured (April – June 2017) to the last quarter (January-March 2018), resulting in almost a full month less of reentry time by the last quarter (an average of 119 days compared to 146 at the start of the year).[25] Notably, even the high, four-month average represents significantly less time than the one year authorized by Congress.

The BOP acknowledged in a 2017 memorandum that "due to fiscal constraints," the average length of stay was "likely to decline to about 120-125 days."[26] Anecdotal information from prisons indicates that counsellors have been told to limit the amount of prerelease time in reentry centers to even less than 120 days. At one prison, individuals reported seeing a printed sign on the counsellor's wall reading: "We will put you in for a maximum of 90 days of RRC time, but it will most likely be less. Yes we know what the Second Chance Act says." Numerous reentry centers confirm that lengths of stay have declined significantly over the last few years. The BOP's formal or informal restrictions on prelease time harm individuals serving federal sentences by limiting their opportunity for structured reentry into the

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[23] Letter of FPD Thomas Hillier to Bureau of Prisons' Director Thomas Kane, dated November 16, 2011. (Exhibit B, Attachment A).

[24] Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012) available at: https://www.gao.gov/products/GAO-12-320.

[25] Utilization of Community Corrections Facilities: Report to Congress (Apr. 2017- Mar. 2018). (Exhibit B, Attachment E).

[26] Memorandum of Acting Assistant Director, Hugh Hurwitz, Oct. 10, 2017. (Exhibit B, Attachment C).

community. The limits also harm reentry centers because the declining lengths of stay mean that facilities are not operating at full capacity. Many reentry centers increased capacity with the encouragement of the BOP and now find they are in difficult fiscal straits as individuals spend more time in prison and less time in reentry centers.

Conclusion

If past predicts future, there is good reason to question whether the BOP will comply with either the spirit or the letter of the FSA and take the steps Congress envisioned to reduce recidivism, improve public safety, and reduce unnecessary incarceration. I began my testimony with the story of last year's crisis at the MDC because I think it is sadly indicative of the lack of accountability throughout the BOP.

The stakes for successful implementation of the FSA are high. As Congress recognized, the overwhelming majority of people in prison will get out and become our neighbors again. If they are treated with harshness, neglect, violence, and inhumanity in prison, they are much more likely to respond in kind when they get out. Robust programming, use of a fair and unbiased system to award early release credits, and thoughtful planning for reentry are key to the FSA's success. It will not happen without vigorous oversight. I thank this Committee for recognizing that and holding this hearing.

EXHIBIT A

Federal Public & Community Defenders
Legislative Committee

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Co-Chairs

David Patton
Executive Director
Federal Defenders of New York

Jon Sands
Federal Defender
District of Arizona

September 13, 2019

David B. Muhlhausen, Ph.D.
Director
National Institute of Justice
Office of Justice Programs
Department of Justice
810 7th Street NW
Washington, DC 20531

Re: DOJ First Step Act Listening Session on PATTERN

Dear Dr. Muhlhausen:

Thank you for inviting comment from the Federal Public and Community Defenders regarding the Department of Justice's (DOJ) development of the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) as part of its obligations under the First Step Act (FSA). The Federal Public and Community Defenders represent the vast majority of defendants in 91 of the 94 federal judicial districts nationwide, and we welcome the opportunity to provide our views.

PATTERN will directly affect how much time many of our clients spend in prison. This makes it a high-stakes tool, and means testing for accuracy and bias is crucial. Indeed, Congress understood the stakes and called for transparency throughout the FSA, including a mandate that the risk and needs assessment system be "developed and released publicly."[1] Congress also repeatedly required that the system be monitored for bias.[2] The limited information released by the DOJ in its July 19, 2019

[1] First Step Act of 2018 (FSA), Pub. L. 115-391, Title I, § 101(a) (Dec. 21, 2018) (codified at 18 U.S.C. § 3632(a)).

[2] *See, e.g.*, FSA at Title I, § 103 (requiring the Comptroller General to conduct an audit of the use of the risk and needs assessment system every two years, which must include an analysis of "[t]he rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups, in such rates."); FSA at Title I, § 107(g) (requiring the Independent Review Committee to submit to Congress a report addressing the demographic percentages of inmates ineligible to receive and apply time credits, including by age, race, and sex); FSA at Title VI, § 610(a)(26) (requiring the Director of the Bureau of Justice Statistics to annually submit to Congress statistics on "[t]he breakdown of

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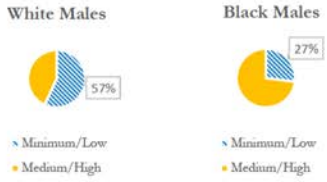
report (DOJ Report) confirms the need to assess PATTERN for accuracy and bias. For example, reported data indicates PATTTERN will have a racially disparate impact, particularly on black males. As illustrated in the charts below, based on the DOJ Report, white males are far more likely than black males to fall in the minimum and low risk categories.[3]

Racial Disparities in Eligibility for Full Earned Release Incentives



This matters because these are the categories that are eligible for higher rates of earned time credits and eligibility for supervised release and prerelease custody.[4]

The DOJ Report fails to provide the level of transparency required for meaningful evaluation of PATTERN. Below, we detail much of the additional information needed to fully assess PATTERN for accuracy and bias. We look forward to providing additional thoughts after the DOJ has released this information and hope our comment here is only the beginning of an ongoing dialogue with the DOJ regarding PATTERN.

I. RISK ASSESSMENT

PATTERN is a risk assessment tool "designed to predict the likelihood of general and violent recidivism for all BOP inmates."[5] It places "individuals into four categories: high, medium, low or

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prisoners classified at each risk level by demographic characteristics, including age, sex, race, and the length of the sentence imposed.").

[3] *See* U.S. Dep't of Just., *The First Step Act of 2018: Risk and Needs Assessment System* 62, tbl. 8 (2019) (DOJ Report) (reporting 57% of white males in the developmental sample fall in the minimum and low risk categories while only 27% of black males fall in those same categories).

[4] *See* FSA at Title I § 101(a) (codified at 18 U.S.C. § 3632(d)(4)(A), providing more earned time credits for some individuals in the lowest two risk categories); Title I § 102(b)(1)(B) (codified at 18 U.S.C. § 3624(g)(1), restricting eligibility to transfer to supervised release or prerelease custody to individuals in the minimum or low risk categories, absent warden approval under specified circumstances).

[5] DOJ Report at 43.

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minimum."[6] These risk categories determine the number of credits an individual may earn by participating in programs and productive activities, and also eligibility to attribute those credits toward supervised release or prerelease custody.[7] In other words, the risk categories will directly affect how much time many individuals spend in prison.

The development of PATTERN, as with all risk assessment tools, necessarily relies on both empirical research and moral choices.[8] Based on the DOJ Report, we have concerns, but even more questions, in both areas. Additional information is needed to assess many important issues including: PATTERN's accuracy; its scoring mechanisms; its fairness across age, gender, race and ethnicity; how much it will exacerbate racial disparity in the federal prison population; its impact on privacy interests; and whether it is consistent with the congressional mandate to "ensure" that "all prisoners at each risk level have a meaningful opportunity to reduce their classification during the period of incarceration."[9]

A. Transparency & Accountability: Development, Validation and Bias Testing

Transparency in the methods for developing, validating and bias testing PATTERN is vital. Full transparency is a primary way (along with accountability and auditability) to create and justify confidence by stakeholders and the public. Indeed, across risk assessments in criminal justice, the secrecy that permeates black box instruments causes significant concerns about how reasonable they are in practice.

1. Dataset

Full transparency requires DOJ to release the same dataset used by Grant Duwe, Ph.D., and Zachary Hamilton, Ph.D., to create PATTERN.[10] This is consistent not only with the transparency directives in the FSA,[11] but also with the advice of leading organizations such as the National Center for State Courts which recommends that independent evaluators determine whether their independent "research findings support or contradict conclusions drawn by the instrument developers."[12]

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[6] DOJ Report at 50.

[7] *See supra* note 4.

[8] *See* Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 167 (2014).

[9] FSA at Title I § 101(a) (codified at 18 U.S.C. § 3632(a)(5)(A)).

[10] *See* DOJ Report at 42-43.

[11] *See supra* notes 1 & 2.

[12] Pamela M. Casey et al., *National Center for State Courts, Offender Risk & Needs Assessment Instruments: A Primer for Courts* 19 (2014) (stressing that third party audits are valued because "it is always helpful to know whether existing research descriptions about the reliability, validity, and fairness of a tool have been replicated by others." Any "decisions based on a [risk and needs] tool which grossly

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- Access to the full dataset would permit independent researchers to assess validity and algorithmic fairness using a variety of measures and calculations.[13]
- Despite recognizing the existence of multiple measures and calculations concerning validity,[14] the DOJ Report focused mostly on the Area Under the Curve (AUC). The AUC, however, has limited utility as a measure of relative risk.[15] Further, when tools are assessed using multiple measures of predictive validity (*e.g.*, correlations, calibration metrics, Somers' D), results for the same tools vary.[16]
- Access to the dataset would allow interested parties to complete 2 x 2 contingency tables (number of false negatives, false positives, true negatives, true positives) for general and violent recidivism at each cutoff (minimum to low; low to medium; medium to high) by age, gender and race/ethnicity groupings. These contingency tables would provide important information on the degree to which the categorizations created by the cut-points capture true positives and true negatives (in addition to the associated recidivism rates that the DOJ Report included).[17]
- The dataset would allow independent researchers to compute the algorithmic fairness measures called balance for the positive and negative classes by calculating average scores by recidivists versus non-recidivists across each age, gender, and racial/ethnic groupings.

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misclassifies the risk levels of offenders may not simply fail to improve outcomes; they may actually do harm to the offender." As a result, "[i]nstrument validation is not only important to ensure that decision making is informed by data, but to establish stakeholder confidence."); *see also* Nathan James, CONG. RESEARCH SERV., *Risk and Needs Assessment in the Federal Prison System* 11 (July 10, 2018) (Congressional Research Service report concerning risk assessment in the federal prison system positively citing the recommendation of the Council of State Governments that independent third parties should be permitted to validate the tool to assess accuracy by race and gender).

[13] For example, release of the full dataset would allow independent researchers to calculate relevant measures such as false positive rates, false negative rates, positive predictive value, negative predictive value, equal calibration, balance for the positive class, balance for the negative class, diagnostic odds ratios, correlations, treatment equality, and demographic parity. The importance of these various measures are discussed and calculated regarding other risk tools in sources cited in the DOJ Report. *See* DOJ Report at 38-39 nn.20-24.

[14] *See* DOJ Report at 28 (discussing multiple algorithmic measures of racial bias).

[15] *See* Melissa Hamilton, *Debating Algorithmic Fairness*, 52 UC DAVIS L. REV. ONLINE 261 (2019); Jay P. Singh, *Predictive Validity Performance Indicators in Violent Risk Assessment*, 31 BEHAV. SCI. & L. 8, 16-18 (2013).

[16] *See generally* Sarah L. Desmarais et al., *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCHOL. SCI. 206 (2016).

[17] *See* Richard Berk et al., *Fairness in Criminal Justice Settings: The State of the Art*, SOC. METHODS & RES. (forthcoming 2019).

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- Access to the dataset would allow interested parties to complete the bivariate correlations between predictors and risk outcomes which the DOJ Report indicates were completed by the developers, but are not reported.[18]
- Access to the dataset would permit independent researchers to test for bias, including comparing each racial/ethnic grouping. As discussed above, the DOJ Report indicates the need for additional inquiry regarding racial disparity and other biases.[19] First, DOJ data show that black males are far less likely than white males to fall into the two lower risk categories that receive the full benefits of earned time credit and eligibility to use those credits for supervised release or prerelease custody.[20] In addition, the relative rate index (RRI) of 1.54 reported in Table 8, but not discussed in the text, comparing white to non-white males, also shows PATTERN has a racially disparate impact.[21] More information is needed, including data on Native-Americans and Asians, which is not included in the DOJ Report.[22]

  Access to the data would allow independent researchers to isolate individual factors and determine which contributed to any disparate impact. For example, research on the Post-Conviction Risk Assessment (PCRA) found that "Black offenders tend to obtain higher scores on the PCRA than do White offenders" and that "most (66 percent) of the racial difference in the PCRA scores is attributable to criminal history."[23] Because PATTERN plays a role in determining how much time a person spends in prison, a similar finding of racial difference with PATTERN could "exacerbate racial disparities in prison."[24] Identifying

[18] *See* DOJ Report at 65 n.17.

[19] *See supra* note 3 and accompanying text.

[20] *See id.*

[21] *See* DOJ Report at 62, tbl. 8

[22] *See* William Feyerherm et al., *Identification and Monitoring* in Dept. of Just. Office of Juvenile Justice and Delinquency Prevention, Disproportionate Minority Contact Technical Assistance Manual, 1-1, 1-2, 3 (4th ed. 2009) (recommending the RRI be calculated separately for each minority group that comprises at least 1% of the total population scored); BOP Statistics: Inmate Race, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

[23] Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 700 (2016).

[24] *Id.* at 705; *see also id.* at 703, 705 (explaining that as assessment of whether a tool produces "inequitable consequences" depends on "what decision they inform" and that "some applications of instruments might exacerbate racial disparities in incarceration").

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which factors generate the disparate impact would open an opportunity to brainstorm with people across disciplines about how to ameliorate such impact.[25]

- Access to the dataset would allow independent researchers to evaluate test bias employing the hierarchical modeling method considered best practice in the educational testing literature as referred to, but not reported in, the DOJ Report.[26]
- Access to the dataset would allow interested parties to determine whether there are mistakes in the DOJ Report regarding the recidivism rates by ordinal ranking. Table 5 reports *general* recidivism rates of 9% (minimum), 31% (low), 51% (medium), and 73% (high). Table 9 reports identical recidivism rates in each of these categories for *white males*,[27] which might either be coincidental or a mistake in reporting.
- Similarly, access to the dataset would allow independent researchers to determine the correct AUC for violent recidivism as defined by the developers. The DOJ Report is inconsistent, reporting in one table the AUCs for violent recidivism as .78 for males and .77 for females.[28] In another table, they are reversed, indicating AUCs of .77 for males and .78 for females.[29] These differences are not significant in terms of numbers, but flaws such as these (reasonable considering the tight time frame which the PATTERN team faced) call for independent audits to check for other potential errors.

2. Eligibility

Additional information is needed regarding the assumptions behind the assertion that "99% of offenders have the ability to become eligible for early release through the accumulation of earned time credits even though they may not be eligible immediately upon admission to prison. That is . . . nearly all have the ability to reduce their risk score to the low category."[30] Without more information it is impossible to test this assertion, but it appears suspect in light of: the percentage of the developmental sample that fell in the medium and high categories (52% of all and 58% of men);[31] that high scores are likely driven by static factors such as age of first conviction and criminal history

[25] *See* Richard Berk, *Accuracy and Fairness for Juvenile Justice Risks Assessments*, 16 J. EMPIRICAL LEG. STUD. 175, 184 (2019).

[26] *See* DOJ Report at 29 (referring implicitly to what is known as the Cleary method).

[27] *See* DOJ Report at 59, tbl. 5 & 62, tbl. 9.

[28] *See* DOJ Report at 57, tbl. 3.

[29] *See* DOJ Report at 60, tbl. 7.

[30] DOJ Report at 57-58.

[31] *See* DOJ Report at 59, tbls. 5 & 6.

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score; and the limited number of programs/productive activities currently available (with correspondingly far fewer points allocated by the tool).[32]

3. Developmental Sample

Additional information is needed regarding the developmental sample.

- Additional information is needed regarding the attributes of the developmental sample. The DOJ Report includes apparently contradictory, or at least confusing information, about the composition of the developmental sample.
  - The DOJ Report indicates the BOP provided its contractors, Duwe and Hamilton, with a dataset used to "develop and validate"[33] PATTERN containing 278,940 BOP inmates released from BOP facilities between 2009 and 2015," which included "only those inmates released to the community," and excluded "released inmates who died" and those "scheduled for deportation."[34] DOJ also reports that developers relied on a smaller "eligible sample size" of 222,970, described as "those who were released from a BOP facility to a location in the United States and had received a BRAVO assessment," which may mean that 55,970 individuals from the original dataset (20%) were excluded from what became the developmental sample because they had not been scored on BRAVO.[35] More information is needed regarding the excluded individuals, including demographic characteristics, and reasons they may have been released but not scored on BRAVO. Such a reduction in the sample size could introduce sample bias.
  - It appears that the training sample contained individuals who were released in 2009-2013, and the test (or validation) sample contained individuals who were released in 2014-2015.[36] More information is needed about why the training and test samples were drawn from different years. Information is also needed regarding what consideration was given to the possibility that there were risk-relevant differences between the groups. For example, policy changes, such as the retroactive 2014 amendment to the drug guidelines, may have resulted in a different composition of

[32] *See* Emily Tiry, Julie Samuels, *How Can the First Step Act's Risk Assessment Tool Lead to Early Release from Federal Prison?*, Urban Wire, Crime and Justice (Sept. 5, 2019), https://www.urban.org/urban-wire/how-can-first-step-acts-risk-assessment-tool-lead-early-release-federal-prison.

[33] DOJ Report at 43.

[34] DOJ Report at 42-43.

[35] DOJ Report at 46.

[36] *See* DOJ Report at 49 & 50.

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individuals released in 2015 than in prior years.[37] It is important for stakeholders to understand whether the differentials in samples here also embed bias into the tool.

- More information is needed regarding why the size of the developmental sample used in the DOJ Report is significantly lower than the number of federal prisoners released in those years, as indicated from another official database. An online tool for calculating the number of released prisoners offered by the Bureau of Justice Statistics indicates that 385,405 individuals were released from federal correctional institutions from 2009-2015.[38] Yet, the DOJ Report specifies that its developmental sample includes only 278,940 released prisoners.[39] Specifically, it is important to know whether the reported exclusions for death and deportation[40] account for the entire differential or whether there are additional explanations. Similarly, more information is needed about the size of the training and test groups. The DOJ Report indicated the training group as 66% of the total developmental sample, with the test group as 33% of the sample, but also described the training group as including 5 years of releases, with the test sample including only 2 years of releases. Information is needed to explain this apparent discrepancy.[41]

- Additional information is needed regarding the sample descriptive statistics (including recidivism rates). Table 1 provides data on the entire eligible developmental sample, but is also needed separately for each of the (a) training sample and (b) test sample.[42]
- Additional information is needed regarding the sample descriptive statistic on "BRAVO-R Initial: History of Escapes." The total reported percentage is 86%, but no information is provided regarding whether this means there is 14% missing data on this factor, and if so, how missing data cases were scored.[43]
- Information is needed regarding the inter-rater reliability scores for the evaluators concerning the development sample, both training and then test data. These statistics will provide information relevant to whether PATTERN can be scored consistently, as

[37] *See* Remarks for Public Meeting of the U.S. Sentencing Comm'n, Washington, D.C., at 2 (Jan. 8, 2016) (Honorable Patti B. Saris, Chair) (recognizing that approximately 6,000 offenders were released on or about November 1, 2015 as a result of the 2014 amendment to the drug guidelines).

[38] These were calculated using an online tool and narrowing to federal prisoners. *See* Bureau of Justice Statistics, Corrections Statistical Analysis Tool-Prisoners, https://www.bjs.gov/index.cfm?ty=nps.

[39] *See* DOJ Report at 42.

[40] *See* DOJ Report at 42-43.

[41] *See* DOJ Report at 49-50.

[42] *See* DOJ Report at 46-48, tbl. 1.

[43] *See* DOJ Report at 48, tbl. 1.

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recognized by the DOJ Report, but for some reason not reported.[44] Low inter-rater reliability outcomes decrease the utility of a tool.

4. Weighting

The DOJ Report indicates that PATTERN involves "analytically weighting assessment items,"[45] but more information is needed on whether the weights are assigned solely through the points identified for each of the factors included in Table 2,[46] or are somehow reweighted in an algorithm not discussed in the report. The DOJ Report provides so few details on weighting, it is unclear what type(s) of models were used (such as regressions) and/or whether any type of machine learning (supervised or unsupervised) was employed. If the former, more information is needed regarding whether and how step-wise procedures were used, data on intercorrelations, and if multicollinearity exists. If the algorithm was developed with any form of machine learning, this more "black box" method has different and profound implications on transparency of the developmental procedures.

5. Overrides

The DOJ Report does not mention overrides. Information is needed regarding whether PATTERN allows for policy overrides and/or discretionary (also referred to as professional) overrides, and if so, whether there will be a supervisory approval process for discretionary overrides. Information is also needed as to whether any of the final scores in the development sample (training and/or testing) involved overrides of original scores and the reasons for such overrides.

6. Relevant Research

Copies of two governmental papers cited in the DOJ Report, but not readily available to the public, must be made available. Specifically, documents detailing the BRAVO-R, from which "PATTERN builds,"[47] and relevant RRI computations are cited as important to understanding PATTERN[48] but are not readily available to the public.

7. Definitions & Scoring

More information is needed regarding the definitions of key terms and rules for scoring.

- **Recidivism.** It appears that for purposes of developing and testing PATTERN, "general recidivism" is broadly defined to include "any arrest or return to BOP custody following release."[49] More information is needed to determine whether this is as (unduly) broad as it appears, and includes revocations for minor technical violations such as failure to timely

[44] *See* DOJ Report at 27.

[45] DOJ Report at 50.

[46] *See* DOJ Report at 53-56.

[47] DOJ Report at 44; 64 nn.8 & 9.

[48] *See* DOJ Report at 66 n.25.

[49] DOJ Report at 50.

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report a change of residence, purportedly lying in response to queries from a probation officer, or failing to timely notify the probation officer of being questioned by police.[50]

Similarly, it appears that for purposes of developing and testing PATTERN, "violent recidivism" is defined as "violent arrests following release."[51] More information is needed here, as well, regarding what kinds of arrests are considered "violent." A separate discussion in the DOJ Report regarding whether the instant offense was violent, appears to cite a definition of "violent recidivism."[52] More information is needed regarding whether this is also the intended definition of violent recidivism. If so, more information is needed about what is included in "other violent."[53]

Defenders are concerned that revocations, arrests, and misdemeanor convictions are poor and biased proxies for the kind of serious re-offenses targeted by the recidivism-reduction programming at the core of the FSA.

In addition, more information is needed regarding whether any mechanism was used to exclude pseudo-recidivism (prior offenses that were not detected and pursued—subject to arrest or return to prison as a result—until after the instant offense).

- **Age of First Arrest/Conviction.** More information is needed regarding whether the first risk factor for purposes of developing, testing and implementing PATTERN is age of first *arrest* or age of first *conviction*. The DOJ Report contains contradictory information, referring to both arrest and conviction without explanation for the inconsistency.[54] If looking to *conviction*, is the relevant age determined by the individual's age on the date of the alleged conduct, date of arrest, or date of conviction? More information is also needed about what is being counted in the "under 18" category. It is unclear whether this factor sweeps in all juvenile adjudications (including status offenses), or is limited to convictions in adult court. Among our many concerns with this factor is the relative unreliability of juvenile

[50] *See, e.g.*, USSG §5D1.3(c)(4), (c)(5), (c)(9).

[51] DOJ Report at 50.

[52] DOJ Report at 46 n.16; 65 n.15.

[53] DOJ Report at 65 n.15.

[54] *Compare* DOJ Report at 46, tbl. 1 (age of first *arrest*) *with* DOJ Report at 45; 53, tbl. 2; 65, n.14 (age of first *conviction*).

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adjudications[55] and that "youth of color—and especially black youth—experience disproportionate court involvement."[56]

- **Infractions.** More information is needed regarding the infraction factors. First, what is meant by an "infraction," a "conviction" for an infraction, and a "guilty finding" for purposes of these factors? It is unclear whether the infraction factors will count any and all disciplinary misconduct. Second, how are infractions scored? Would multiple acts during a single course of conduct be counted as one or more? Would multiple acts processed at the same time (whether a single course of conduct or not) be considered one or more? Third, what is the empirical basis for treating all 100 and 200 level offenses the same, such that refusing a Breathalyzer and possessing pot are scored the same as killing and taking hostages?[57] Fourth, is there any limitation on the reach of this factor? For example, does it look only to infractions in the past year, all infractions while in prison for the instant offense (and whether serving the original sentence or a revocation sentence), all infractions while serving any federal sentence, or for any offense ever, regardless of jurisdiction?

  We have numerous concerns about counting infractions in any form, and particularly minor infractions, for the purposes of determining eligibility for earned time credits and release under the Act. First, there is minimal due process structure over BOP disciplinary actions. Second, likely varied and divergent infraction cultures and practices from one BOP facility to another would mean the likelihood of attracting an infraction may be due to luck of the draw on institutional assignment. In addition, we are concerned about ex post facto use of infractions to negatively score defendants on PATTERN when individuals had no notice such infractions would count against them for these purposes, particularly in light of the FSA provisions indicating past participation in programs will not be counted to positively score individuals.[58]
- **Programs & Technical/Vocational Courses.** More information is needed on the types and descriptions of the programs and technical or vocational courses for which points were given for these two variables. For example, information is needed on the name of the programs/courses, the providers, the personnel involved, the number of hours required, the length of the programs/courses, the program/course goals, the definition of completion,

[55] For example, the vast majority of states do not provide jury trials for juveniles, and "children routinely waive their right to counsel without first consulting with an attorney." Nat'l Juvenile Defender Ctr. (NJDC), *Defend Children: A Blueprint for Effective Juvenile Defender Services* 10 (Nov. 2016); NJDC, Juvenile Right to Jury Trial Chart (last rev. July 17, 2014), http://njdc.info/wp-content/uploads/2014/01/Right-to-Jury-Trial-Chart-7-18-14-Final.pdf.

[56] Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 LA. L. REV. 47, 52 (Fall 2016).

[57] *See* Dep't of Justice, Bureau of Prisons, Inmate Discipline Program, Program Statement 5270.09, tbl. 1, (July 8, 2011).

[58] *See* FSA at Title I, § 101(a) (codified at 18 U.S.C. § 3632(d)(4)(B)).

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and the locations where the programs/courses were made available. Information is needed about why the direction of the points for the number of technical/vocational courses is the reverse of what might be expected. Specifically, information is needed on why the tool penalizes an individual for taking a technical/vocational course.[59] In addition, information is needed on whether there is an error in the description of the technical/vocational factor when it references the number of courses "created" rather than "completed," and if not, what is meant by courses "created."

- **Drug Treatment and Drug Education.** More information is needed regarding the difference between drug treatment and drug education for purposes of scoring the PATTERN. More information is also needed regarding how drug treatment "need" is determined and scored, including whether it is based on self-report. The DOJ Report suggests it is tied to the BRAVO drug/alcohol abuse indicator, but it is not clear what data informs this factor, particularly without access to the BRAVO-R document requested above.
- **Instant Offense Violent.** More information is needed regarding what constitutes a violent offense. The DOJ Report is unclear on the scope of this factor. The discussion in the text of the DOJ Report points to endnote 16, though it appears the content of the note is actually included under endnote 15.[60] But even this is not clear because, in contrast with the "instant" offense discussed in the text, endnote 15 defines "violent recidivism" and looks at the nature of the "arrest."[61] If this definition of violent recidivism is consistent with the definition of instant violent offense, more information is needed regarding whether an instant violent offense requires a conviction in the listed categories, and what is meant by the category of "other violent."[62] In addition, information is needed on the empirical basis for including this factor. It appears to be contrary to DOJ studies of national samples that show lower risk of general recidivism for individuals with an instant violent offense, compared with others.[63] Is this factor essentially operating as a policy override for other purposes?
- **Sex Offender.** Additional information is needed on how this factor is scored, including whether it is limited to convictions for sex offenses, or is broader and informed by arrests, self-report, hearsay, and whether it includes exonerated charges. As with other factors, additional information is also needed on whether there are any time limits on how recent the

[59] *See* DOJ Report at 54, tbl. 2.

[60] *See* DOJ Report at 46, n.16 & 65, n.15. The numbering of the Chapter Three endnotes is off, such that the content of the notes does not always match the text. It appears that the mismatch begins with endnote 14, which according to the text should have provided information on "non-compliance with fiscal responsibility" but instead discusses "Age at first conviction."

[61] *See* DOJ Report at 46, n.16 & 65, n.15.

[62] *See* DOJ Report at 46, n.16 & 65, n.15.

[63] *See* Mariel Alper & Matthew R. Durose, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2006-2014)* (2019) (Special Report, U.S. Dep't of Just.).

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conduct must be for it to count. In addition, information is needed regarding the empirical basis for including this factor. It appears contrary to DOJ studies of national samples that show lower risk of recidivism for individuals convicted of sex offenses than other types of offenses.[64] Is this factor essentially operating as a policy override for other purposes?

- **Criminal History Score.** Information is needed on whether this is a static figure based strictly on the U.S. Sentencing Commission guidelines' criminal history score at the time of sentencing or whether it can increase at reassessment because of events between sentencing and reassessment. Further, can the criminal history score be reduced at reassessment pursuant to a time decay mechanism?
- **History of Violence.** Information is needed regarding the definition of violence, and whether it requires a conviction for a violent crime. Specifically, which crimes are considered "violent" for purposes of this factor? If not limited to convictions for violent offenses, more information is needed regarding the sources of information that may be considered when assessing this factor, and whether it permits consideration of arrests, prison disciplinary records, hearsay, and/or self-reports. In addition, information is needed on whether there is any time limit for this factor, or some time decay mechanism, as would be supported by available research on desistence.
- **History of Escapes**. Information is needed regarding the definition of escape, including, for example, whether it would include failure to appear in a pre-trial context, or walking away from a halfway house. Information is also needed regarding whether there is a time limit for inclusion of old escapes, or a time decay mechanism.
- **Education Score.** Information is needed regarding the ordinal rankings for the education score for the violent recidivism tool.
- **Databases.** Several factors rely on past criminal conduct. More information is needed regarding the databases that will be accessed to determine recidivism, and the known gaps and biases in such databases.
- **Missing Data.** Information is needed regarding what adjustments were made for missing data, and the rate of missing data for each predictor. In addition, information is needed regarding the policy going forward when there is missing data in one of more factor in an individual case. For example, will information about missing data be communicated with the risk score and classification?

8. Double Counting

More information is needed to determine the scope of double counting under PATTERN, and whether any consideration has been given about ways to ameliorate it.

[64] *See* Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014) (Special Report, U.S. Dep't of Just.).

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- **Age.** Young age will be counted twice for young first offenders, who will be young at time of first arrest/conviction,[65] as well as at time of assessment.
- **Infractions.** Information is needed on whether a single "infraction conviction" that is deemed "serious and violent" would count as both "any" and then again as "serious and violent" infraction. In addition, would an "infraction conviction" that resulted in a criminal conviction also count toward a criminal history score if criminal history is not static? And could an "infraction conviction" also result in points under the history of violence and/or "sex offender" factors?
- **History of Violence**. Information is needed on whether a person with multiple violent priors receives multiple point scores in this single variable. For example, in the male general recidivism tool, if an individual had a minor violent offense < 5 years and a serious violent offense > 15 years, would the individual receive 5 points or 7?
- **Violence.** Information is needed on whether the same violent offense can be counted multiple times, such as in the criminal history score, infraction convictions, instant offense violent, history of violence and/or sex offender.
- **Sex Offense.** Information is needed on whether the same sex offense can be counted multiple times, such as in the criminal history score, infraction convictions, instant offense violent, history of violence and/or sex offender.
- **Criminal History.** Information is needed on whether consideration was given to ameliorating the repeated counting of criminal history, first in the imposition of the sentence based on a guideline calculation that relies heavily on criminal history and then throughout PATTERN, including age of first arrest/conviction, sex offender, criminal history score and history of violence. We are concerned about the inclusion and weight (repeatedly) given to this factor for a number of reasons. Some concerns arise from the unique way in which the guidelines count criminal history, such as including all juvenile adjudications on par with adult convictions (with some difference in decay periods), and using sentence imposed rather than time served as a proxy for seriousness of the offense (affecting the number of points received).[66] In addition, as mentioned above, research on other risk tools has shown racial differences in scores with black individuals obtaining higher scores than white individuals, where most of the difference "is attributable to criminal history."[67] Criminal history correlates with race because it reflects prior instances of racial disparity in the criminal justice system or disadvantage earlier in life. Criminal history is not just the product of participation in crime, but of biased practices throughout the criminal justice system. Blacks do not sell

[65] *See supra* note 54 and related text regarding issue of whether the first predictor looks to age of first *conviction* or *arrest*.

[66] *See* USSG §4A1.2(d), (e).

[67] Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 700 (2016).

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drugs or possess guns at a greater rate than Whites.[68] Studies show that Blacks are stopped and frisked or searched at higher rates than Whites, but that Whites who are frisked or searched are found with contraband at higher rates than Blacks who are frisked or searched.[69] And Blacks are arrested more than twice as often as Whites.[70] Charging decisions and bail determinations further compound these racial disparities as individuals move through the criminal justice system.[71] We urge the DOJ to open discussion to a multidisciplinary team on methods to ameliorate the overreliance upon, and negative impacts of, criminal history.

9. Protective & Promotive Factors

Additional information is needed on whether there are any plans to incorporate additional protective and promotive factors in PATTERN. Currently, program/course participation and educational attainment appear to be the only proxies for protective factors included in PATTERN. Similarly, additional information is needed on whether there are plans to incorporate a desistance factor into PATTERN that would significantly adjust the risk rating according to the literature on the age-crime curve and the literature on cessation of offending.[72] We urge DOJ to engage with a multidisciplinary team to consider incorporating more protective and promotive factors to better meet the goals of the FSA.

10. Policy Decisions

Risk assessments are not simply math. Every risk assessment involves moral choices and tradeoffs. Some of our questions in this area are incorporated above, such as whether consideration has been given to ameliorating the effects of certain factors that are unacceptable regardless of predictive value. In addition, information is needed generally regarding the mechanisms in place to ensure that issues which have distinct policy implications will be resolved by appropriate personnel—ideally a

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[68] *See* Amy Baron-Evans & David Patton, *A Response to Judge Pryor's Proposal to "Fix" the Guidelines: A Cure Worse than the Disease*, 29 FED. SENT'G. REP. 104, 112 (Dec. 1, 2016-Feb. 1, 2017).

[69] *See id.* at 112-13 (collecting studies); *see also* Radley Balko, Op-Ed., *There's Overwhelming Evidence that the Criminal-Justice System is Racist. Here's the Proof*, WASH. POST, Updated Apr. 10, 2019 (collecting studies).

[70] *See* Bureau of Justice Statistics, Arrest Data Analysis Tool, 2014 (most recent data available), https://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#.

[71] *See supra* note 69; *see also* USSC, Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders 7, 33-36, figs. 13-14 (2018).

[72] *See* Cecelia Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142405; Ralph C. Serin & Caleb D. Lloyd, *Integration of the Risk Need, Responsivity (RNR) Model and Crime Desistance Perspective: Implications for Community Correctional Practice*, 7 ADVANCING CORRECTIONS 37, 38 (2019).

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multidisciplinary team that includes policymakers and stakeholders[73]—rather than solely data scientists. For example, the decisions on the cut-points, which necessarily impact fairness measures such as false positive rates and positive predictive values, appear to have been made by the researchers and based on arbitrary fractions or multiples of the recidivism rates.[74] Yet, where those decisions affect moral and political outcomes with real-world consequences to individuals, they should instead be made by a multidisciplinary team that has the authority and direct interest in such consequences.

Risk tool developers have a natural incentive to focus on overall accuracy. However, accuracy may need to yield to other important goals, such as differential validity, group fairness, and individual rights. Selecting the right tradeoff between these sometimes competing goals are more rightly within the power of policymakers and stakeholders.

Here, it appears the cut-points were established somewhat arbitrarily without regard to such consequences as the false discovery rate and false omission rate (the reciprocals of positive predictive value and negative predictive value) and equal calibration, among other validity and fairness measures discussed above.[75] Because PATTERN was developed to meet the obligations of the FSA, a preferable method for setting cut-points would be attuned to the goal of maximizing incentives for participation in rehabilitative programs and courses. Increasing the cut-point between low and medium would be more suitable to achieve this goal. Relatedly, information is needed regarding the process, and who was involved, in setting the rules governing the combined (final) RLC. The current rule dictates that the highest risk category from the general and violent scales will be used to set the final RLC. Different choices could have been made that would be more suitable to achieve the FSA's goal of incentivizing and rewarding *more* individuals to complete programs and courses. For example, a person who scores low or minimum on one scale and medium on the other should have a final RLC of low. And a person who scores high risk on one scale, yet medium risk on another should be classified for purposes of the final RLC as medium.

Additional information is also needed regarding the process for deciding on the definition of "recidivism." This is a policy decision that requires identifying the scope of conduct that should be included, consistent with the purpose of the FSA to successfully reintegrate individuals in the community. For example, what was the process for deciding to include all revocations, including

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[73] *See* Partnership on AI, *Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System* 31 (2019), https://www.partnershiponai.org/wp-content/uploads/2019/04/Report-on-Algorithmic-Risk-Assessment-Tools.pdf (suggesting an oversight body including "legal, technical, and statistical experts, current and formerly incarcerated individuals, public defenders, public prosecutors, judges, and civil rights organizations"); Danielle Kehl et al., *Algorithms in the Criminal Justice System* 34 (2017), https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf?sequence=1&isAllowed=y.

[74] *See* DOJ Report at 50.

[75] *See* DOJ Report at 50-51.

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technical violations, and for looking to arrests, despite the literature showing the serious racially disparate impact of looking to arrests, rather than convictions?[76] In light of the FSA's purpose, a more limited definition of recidivism focused on serious offending would be more appropriate than the broad definition used to develop PATTERN.

B. Transparency & Accountability: Implementation

Transparency and accountability are both mandated and essential in the implementation of PATTERN. While much remains unknown in this area, we already have several questions which warrant the attention of a multidisciplinary team as PATTERN is implemented.

1. Privacy/Confidentiality

It appears that several of the factors in PATTERN, and the yet-to-come needs assessment, may require interviews and be based at least partially on self-reporting. This raises several questions and concerns. Additional information is needed on what protections will be in place to honor an individual's right to be free of self-incrimination. More information is needed on what protections will be in place to prohibit the use of any interview admissions against an individual, either in a new prosecution or prison disciplinary proceeding. Information is also needed regarding how scores and information obtained in the scoring process will be maintained and confidentiality protected. And information is needed on the data retention policies for risk scores, needs assessments, and information obtained to complete the tools.

2. Challenges

As discussed above, PATTERN scores and accompanying risk categories will directly affect how much time many individuals spend in prison. Information is needed on the procedures for contesting individual scores and category assignments. Risk assessment is unique enough that treating a challenge like any other grievance is not a sufficient process. Potential concerns include discovering factual errors, contesting judgment calls, challenging an override decision, and correcting a scoring miscalculation.

To equip individuals to assess and challenge their PATTERN scores we expect individuals will be provided not only with their final PATTERN score and related risk category, but also scores on each of the individual factors, and information on the limitations of the scores, including the warnings set forth below. And individuals challenging their PATTERN score and category will need more. Indeed, much of the information individuals will need to challenge their scores tracks the information requested above regarding the development, validation and bias testing of PATTERN. In addition, among other information, individuals will need codebooks and scoring sheets, training materials, and inter-rater reliability scores for those scoring the tool. Additional information is needed regarding the plans to ensure adequate information and processes are provided to individuals challenging their PATTERN scores.

[76] *See* Jennifer Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94 (2017).

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3. Risk Communication

Information is needed on the manner in which risk scores and categories will be reported both within and outside the BOP. Studies show that risk communication format matters in how decision-makers understand the results and can be manipulated.[77] We are concerned that the scores and categories will not be communicated with sufficient context to make the scoring and results translatable to those who were not deeply involved in the development of the tool. To that end, we recommend reporting risk results as the ordinal bins plus that bin's relevant observed (a) recidivism rate and (b) success rate (1-recidivism rate). The communication should also include the definition of recidivism to contextualize the meaning of the rates. In addition, we recommend including a set of warnings to ensure users of the scores and categories understand the tool's limits.[78] The following list includes ideas on the warnings we believe appropriate in light of our current understanding of PATTERN:

- PATTERN is based on group statistics and cannot assess an individual's probability of reoffending;
- (as relevant) PATTERN disproportionately judges minorities at higher risk than whites;
- PATTERN relies on arrest data, which may merely replicate biases in policing practices;
- PATTERN does not include all protective or promotive factors that may reduce the individual's risk prediction;
- PATTERN does not predict the aspects of risk regarding imminence, frequency, severity, or duration;
- PATTERN's rankings of risk (minimum, low, medium, high) are merely relative to the population studied;
- PATTERN's score includes criminal history measures that did not require conviction and thereby may overestimate risk because of faulty data;
- PATTERN's score may be higher based on evidence of juvenile offending;
- PATTERN may increase risk when the individual does not engage in various types of programming; however, such programs may not have been made available to this individual for reasons not within the individual's control;
- (as relevant) PATTERN factors can count the same events twice or multiple times;

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[77] *See* Ashley B. Batastini et al., *Does the Format of the Message Affect What Is Heard? A Two-Part Study on the Communication of Violence Risk Assessment Data*, 19 J. FORENSIC PSYCHOL. RES. & PRAC. 44, 46 (2019); Daniel A. Krauss et al., *Risk Assessment Communication Difficulties: An Empirical Examination of the Effects of Categorical Versus Probabilistic Risk Communication in Sexually Violent Predator Decisions*, 36 BEHAV. SCI. & L. 532, 534 (2018); Nicholas Scurich, *The Case Against Categorical Risk Estimates*, 36 BEHAV. SCI. & L. 554, 558 (2018).

[78] *See Wisconsin v. Loomis*, 881 N.W.2d 749, 765 (Wis. 2016) (identifying necessary cautions, that may evolve, before considering risk assessment at sentencing).

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- (as relevant) this PATTERN score represents an override of the algorithm and the reason for the override.

4. User Buy-In

Research studies and anecdotal evidence indicate that users (*e.g.*, those scoring the tool and relevant decision-makers who receive scores) tend to distrust, and find ways to deviate from, algorithmic risk results if they are not included enough in the process and program.[79] Information is needed on the methods planned to achieve sufficient user buy-in to improve compliance and consistency in order to achieve the FSA's goals in this endeavor.

II. NEEDS ASSESSMENT

A core purpose of Title I of the FSA is to help prisoners succeed in their communities upon release and thereby reduce recidivism. The Act contemplates accomplishing this by providing all individuals in prison evidence-based programming that is designed to help them succeed upon release and that has been shown by empirical evidence to reduce recidivism.[80] We are deeply concerned that the DOJ has not yet released the needs assessment required by the FSA. We understand from DOJ's Report that the needs assessment is in the works, and there will be an opportunity to comment on that aspect of the DOJ's FSA obligations at a later time. In light of that, we raise only a few critical issues here.

1. Programs

Evidence-based programming is the bedrock of the FSA. Other aspects of the risk and needs assessment system only make sense if there is programming. Assessing (and reassessing) needs and assigning (and reassigning) individuals to programming based on those needs require that appropriate and available programming exist.[81] In addition, the incentives and rewards identified in the law are contingent on participation in appropriate and available programming.[82] DOJ's Report, however, suggests there are few programs or courses available, as indicated by the relatively few individuals who were scored on them in the developmental sample.[83] This is consistent with other information that waitlists to participate in BOP programs are long: 25,000 inmates are currently

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[79] *See* Jean-Pierre Guay & Geneviève Parent, *Broken Legs, Clinical Overrides, and Recidivism Risk: An Analysis of Decisions to Adjust Risk Levels with the LS/CMI*, 45 CRIM. JUST. & BEHAV. 82, 83-84 (2018).

[80] *See* FSA at Title I, § 101(a) (codified at 18 U.S.C. §§ 3632, 3635(3)) and § 102(a) (codified at 18 U.S.C. § 3621(h)).

[81] *See* FSA at Title I, § 101(a) (codified at 18 U.S.C. § 3632(a)(3)-(4)).

[82] *See* FSA at Title I, § 101(a) (codified at 18 U.S.C. § 3632(a)(6), (a)(7), (d)).

[83] *See* DOJ Report at 47, tbl. 1 (showing almost half (49%) of the developmental sample had completed no programs, a vast majority had no technical/vocational courses (82%) or federal industry employment (92%) and well over half (57%) had not had drug treatment while incarcerated despite indication of need).

Federal Public & Community Defenders
Legislative Committee

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waiting to be placed in prison work programs,[84] at least 15,000 are waiting for education and vocational training,[85] and at least 5,000 are awaiting drug abuse treatment.[86] More information is needed on how programming will be expanded to ensure the goals of the FSA are met.

2. BOP Current Needs Assessment

The DOJ Report indicates the BOP is using its current needs assessment until one is developed pursuant to the FSA. More information is needed on BOP's current needs assessment and processes.

3. Responsivity

Information is needed about how responsivity will be considered in connecting needs to programs. Relatedly, additional information is needed on the availability of culturally-sensitive programming (*e.g.*, programs in Spanish for those with weak English skills and modification of 10 Step-like programs for non-Christians).

III. CONCLUSION

PATTERN is a high-stakes tool that directly affects how much time many people will spend in prison. High levels of transparency, accountability and auditability are both required and critical. We appreciate the opportunity to share our questions and concerns and hope there will be additional opportunities for feedback and dialogue after we have received the information identified above.

Very truly yours,

/s
David Patton
Executive Director, Federal Defenders of New York
Co-Chair, Federal Defender Legislative Committee

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[84] *See* BOP: UNICOR, Federal Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (estimating the participation rate at 8%).

[85] *See Oversight of the Federal Bureau of Prisons Before the H. Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 115th Cong. 20 (2018) (BOP Director Inch).

[86] *See* Dep't of Justice, Bureau of Prisons, Drug Abuse Treatment Program, 81 Fed. Reg. 24484, 24488 (Apr. 26, 2016) ("over 5,000 inmates waiting to enter treatment"); Colson Task Force, at 36 ("at the end of FY 2014, more than 12,300 people systemwide were awaiting drug abuse treatment").

EXHIBIT B

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In memoriam
Nancy Bergeson
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▲ Eugene Office
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★ Research/Writing Attorney

October 14, 2019

Kathleen Hawk Sawyer
Director
Federal Bureau of Prisons
320 First Street, NW
Washington, DC 20534

Re: *Request for Assistance to Avert Further Reentry Center Closures*

Dear Ms. Sawyer:

This letter is to express the deep concern of the Oregon Federal Public Defender and other federal defender organizations over the collapsing infrastructure necessary to implement statutorily-approved expansions of pre-release custody for federal inmates in residential reentry centers. As a result of Bureau of Prisons' policies and practices, at least 20 reentry centers have closed or ceased accepting federal inmates since 2017, and more closures appear likely. This loss of resources cripples efforts to enhance successful reentry of incarcerated citizens, undermines the criminal justice goal of rehabilitation, and consequently threatens community safety. As a public defender and a board member of the reentry center in Portland, I have seen first-hand how reentry centers provide the opportunity, in a less structured setting than prison, for inmates to engage in needed treatment, find employment, and continue reconnecting with their family and community. Once lost, these precious resources are difficult to replace. I am requesting your urgent assistance to end Bureau of Prisons' practices that have undermined and caused closure of reentry centers and to ameliorate harm already caused.

The background for this request is grounded in the Second Chance Act of 2007, which doubled the amount of sentenced time that federal prisoners were eligible to spend in reentry centers (also called "community corrections") from six months to up to one year. 18 U.S.C. §3624(c). During this "prerelease time," the prisoner is not released from his or her federal sentence but is serving the sentence in an alternative setting. Defenders were cheered by this congressional recognition that our clients and their communities both benefited when people reentering society were given more time, in a gradually less structured setting, to engage in treatment, employment counselling, parenting classes, and other programs designed to ensure the

safety of the community and the success of the resident after incarceration. Despite this mandate from Congress, however, the Bureau was slow to change, and the amount of prerelease time that prisoners were awarded to spend in reentry centers remained low. In 2011, Defenders wrote to then Director Thomas Kane to express concern about this failure to implement the Second Chance Act.[1] In 2012, the General Accountability Office issued a report that similarly noted the Bureau's failure to adequately implement Congressional mandated alternative options to incarceration, including use of reentry centers.[2]

After the GAO report, the Bureau did begin to utilize reentry centers more fully, awarding greater prerelease time to inmates. Defender knowledge of this change comes from interactions with federal prisoners and from conversations with reentry centers.[3] Reentry centers report that during this period, the Bureau encouraged reentry centers to expand capacity in order to serve the greater number of prisoners needing placement. For example, the long-established reentry centers in Bangor, Maine, and Portland, Oregon, took out mortgages to remodel their facilities and to expand bed capacity.

Unfortunately, the Bureau apparently has now reversed its support for reentry centers, and as a result the system is losing bed capacity just when the First Step Act, enacted by a bipartisan congressional majority in December 2018, may require even greater use of reentry centers. Under the First Step Act, prisoners who complete certain programs in custody will soon begin earning credits that, in theory, they can exchange for greater prelease time in the community. But if reentry capacity decreases instead of expands, prisoners may find they have no way to use those credits. For all of these reasons, I urge you to take immediate action to end the Bureau practices that have resulted in reentry center closures.

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[1] Attachment A, Letter of FPD Thomas Hillier to Bureau of Prisons' Director Thomas Kane, dated November 16, 2011.

[2] Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb.2012) available at: https://www.gao.gov/products/GAO-12-320

[3] Actual utilization data was reported by the Bureau to Congress each year pursuant to the directive in 18 U.S.C. § 3624(c)(5), which requires an annual report to the House and Senate Judiciary Committees describing use of alternatives to incarceration and the average length of placements in community corrections facilities. The reports were not immediately available.

A. As A Result Of Bureau Practices And Policies, Reentry Centers Have Closed, Ceased Accepting Federal Inmates, Or Are Critically Endangered.

Bureau of Prisons' actions affect the functioning of reentry centers through many channels. This letter does not address the effects of ordinary, bureaucratic impediments such as late payments to reentry centers; outdated or overly technical audit requirements; or increased delays in processing referrals of residents, although each of these can pose significant hardships to reentry centers. Instead, this letter identifies three systemic practices – non-renewal of contracts; solicitation of contracts for fewer beds and with fewer guaranteed beds; and decreased length of stays for residents–that decrease reentry bed capacity and should be addressed from the highest level of the Bureau.

Practice 1: The Bureau of Prisons did not renew contracts with reentry centers and did so without consulting the chief judge of the judicial district affected.

In 2017 the Bureau chose not to renew contracts with 16 reentry centers around the country.[4] The Bureau attributed the decision to the "fiscal environment" and budgetary considerations, and not to any study on the effect of reentry placement on inmates.[5] Numerous states were affected, including Colorado, Kentucky, Illinois, Michigan, Minnesota, Montana, New York, Ohio, South Dakota, Texas, West Virginia, and Wisconsin. Although the Bureau reported that these closures involved only a small percentage of beds under contract nationwide, for the affected districts, the results were stark. For example, non-renewal of the contract for the Great Lakes Recovery Center in Marquette, Michigan, which had been in operation for 30 years, left the geographically isolated community in the Upper Peninsula without a reentry center for federal inmates. The federal judges in the affected judicial districts were not consulted, and apparently no provision was made for immediate alternative incarceration options within the districts. As a result, federal inmates either remained in prison rather than receiving reentry center services, or were sent to reentry centers far from their home towns and release addresses.

Practice 2: For contracts subject to renewal, the Bureau of Prisons is decreasing the number of reentry beds it seeks and significantly reducing the minimum number of beds for which it will guarantee payment.

In recent solicitations ("Requests for Proposals") for bids for renewal of reentry center contracts, the Bureau of Prisons has reduced the number of beds it is seeking to use in reentry centers. In addition, the Bureau has sought to significantly reduce the *minimum* number of beds

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[4] Attachment B, list of reentry centers selected for non-renewal and related media articles.

[5] Attachment C, Memorandum Of Bureau of Prisons' Acting Assistant Director, Hugh Hurwitz, October 10, 2017.

for which it is contractually obligated to pay. As a result, some well-established reentry center vendors have determined that bidding on the contract with reduced beds and limited guarantee of payment is not financially viable, and have chosen not to bid. Other reentry centers have tendered bids, but the cost per bed has, necessarily, significantly increased in order to cover the overhead of a large facility now projected to be only partially used. Reentry centers are closing or threatened with closure as a result. A few examples make the point.[6]

Honolulu, Hawaii: Closed

TJ Mahoney and Associates, a private non-profit company, operated "Mahoney Hale" (also called the "Mahoney House") reentry center in Honolulu for many years. Approximately 30 beds were under contract for the Bureau of Prisons to use for reentry services for federal inmates, and more inmates in fact were often housed there. When the Bureau issued a Request for Proposals as part of the contract renewal process this year, however, it sought only 16 beds. TJ Mahoney did not bid for this contract and neither did any other company, because the 16-bed proposal was not financially feasible. By the time the Bureau changed its renewal proposal to offer more beds, it was too late for TJ Mahoney to bid. The facility in Honolulu had already notified its landlord that it would not renew its lease, and the property was lost. The facility closed September 30, 2019. The state of Hawaii is now without any federal reentry center. Lack of residential re-entry services in a whole state or large geographic area defeats the goal of assisting transition to a person's home community. It does not allow for successful family reunification, undermines the work done to obtain and maintain employment, and as a result reduces the likelihood of success in transitioning back into society. And, not only do federal inmates in Hawaii have no option for in-state prerelease time at reentry centers, but federal inmates from Hawaii who are entitled to serve 4 months in a reentry center as part of the Residential Drug and Alcohol Treatment Program have no in-state reentry center option.

Bangor, Maine: No longer accepting federal prisoners

Volunteers of America long operated a successful reentry center for federal prisoners in Bangor, Maine. The facility was capable of serving about 32 inmates, and in the past had served that many, but the Bureau of Prisons' contract only covered beds for 12 inmates. During the

[6] Many individuals involved with currently operating reentry centers were unwilling to discuss their Bureau of Prisons' contracts, both because the contracts restrict contact with the media and because reentry centers do not want to jeopardize their relationship the Bureau of Prisons. The examples offered here are compiled from interviews with judges, probation officers, residents at reentry centers, and former staff from reentry centers; review of documents; internet searches for federal contracts; and newspaper reports. Many numbers are approximate and based on the memory of persons formerly involved in the reentry centers.

contract renewal process this year, the Bureau declined to increase the number of beds under contract, despite having encouraged the facility to expand and to increase capacity a few years earlier. Efforts to negotiate with the Bureau were fruitless, and the facility opted not to bid on the 12-bed contract. No other company bid either, and Bangor, Maine, now lacks a federal reentry center.

Charlotte, North Carolina: Closed

The McLeod Reentry Center served federal inmates in Charlotte, North Carolina. A few years ago, they invested in a new building that could serve 130 inmates. According to media reports, in 2018 the Bureau of Prisons abruptly stopped sending as many residents there. It is unclear if this decrease was part of a contract renewal, or merely enforcement of the prior contract cap. In either case, the sudden decrease in beds used by the Bureau of Prisons resulted in a fiscal crisis for the non-profit, and the center closed in May 2018. Other reentry centers have similarly reported that the Bureau recently began to strictly enforce the contract cap on beds, even though the facilities were able and willing to serve many more residents than the contract required. This change in practice has caused fiscal strain in reentry centers.

Sacramento, California: No longer accepting federal prisoners

The longtime reentry center operated in Sacramento stopped accepting federal inmates this year. According to a federal judge in the district, the loss of reentry beds came as a complete shock. The Bureau had not notified the court of any difficulties, and when asked for an explanation, the Bureau disclosed only that they "could not reach a deal" with the reentry center. It seems likely that this is one more example of a request for proposals that reduced the number of beds or the guaranteed minimum of beds and was not economically feasible.

Oklahoma City, Oklahoma: in danger of closing

The Oklahoma City Halfway House is a non-profit that has served Oklahoma residents for over 30 years. Under their federal contract, they have housed over 100 inmates at times, although the contract only requires them to hold 54 beds available for the Bureau. Beginning in 2018, in accordance with the Memorandum of Hugh Hurwitz, the Bureau began to delay placements of residents at the Halfway House until the facility population was at the contract level of 54, even though the facility had capacity to serve more residents. The contract is now up for renewal. Rather than issue a request for proposals to serve 54 or more residents in Oklahoma City, the Bureau issued a request for one bidder to operate reentry centers in all three judicial districts. The Bureau proposes requiring that a total of 125 beds be available in the Northern, Western, and Eastern districts (70, 40, and 15 beds respectively), but agrees to guarantee placement in only 38 beds.[7]

[7] The contract summary is available on-line and in Attachment D.

According to Oklahoma's Federal Public Defender, it is not financially feasible for the current reentry center to bid for this contract with expanded obligations but reduced guarantees. The contract closing date is November 25, 2019. The deadline for bidding on a previous request for proposals, also requiring services in more than one location, has passed.

Portland, Oregon: in danger of closing

The Northwest Regional Reentry Center in Portland, Oregon, has served exclusively federal inmates for over 40 years, since 1976. In 2016, they undertook a major remodeling project and expanded bed capacity to 150, at the recommendation and encouragement of the Bureau of Prisons. The facility is highly regarded by the federal court and probation office. The facility's current contract calls for 50-120 beds to be available for federal inmates, but the Bureau's new contract solicitation (to take effect in 2020) calls for only 18-72 beds. The drastic decrease in the guaranteed minimum to 18, along with the overall decrease in expected resident population, makes operation of the facility as a federal reentry center financially impossible. The NWRRC nevertheless submitted a bid for the new contract, with the price per bed being necessarily higher than under the current contract. If the Bureau rejects this contract bid as "too costly," this will have been a problem of its own making. The NWRRC would have bid to maintain the current number of beds at a significantly lower price, but the Bureau did not offer this option. Losing 120 reentry beds in Oregon would harm federal inmates and potentially increase risk to the community, as residents may return to the Portland area without the structured reintegration provided by the NWRRC.

Many Other States Have Reentry Centers Facing Contract Renewals

In addition to those described above, the Bureau currently has more than 30 published requests for proposals for reentry services at sites across the country, including Las Vegas, Nevada; Albuquerque, New Mexico; Clarksburg, West Virginia; Fort Myers, Florida; Boise, Idaho; Pittsburgh, Pennsylvania; among others. To the extent these renewal requests decrease the guaranteed minimum number of beds, or decrease the total beds required, or restructure the contract to include required reentry facilities in new locations, currently operating reentry centers in these states may also face financial insecurity that results in closure.

Practice 3: The Bureau of Prisons has decreased the amount of prerelease time it considers awarding to federal inmates, despite Congress's directive that up to one year of community corrections be available.

Although Congress authorized the Bureau to allow inmates to spend up to a year of the last part of their sentence in reentry centers instead of prison, the amount of this pre-release time awarded by the Bureau is again declining. According to the most recent report submitted by the Bureau to the House and Senate Judiciary Committees pursuant to 18 U.S.C. § 3624(c)(5), the

average length of placement in reentry centers decreased by almost 20% from the first quarter measured (April – June 2017) to the last quarter (January-March 2018), resulting in almost a full month less of reentry time by the last quarter (an average of 119 days compared to 146 at the start of the year).[8] Notably, even the high, 4-month average represents significantly less time than the one year authorized by Congress.

The Bureau acknowledged in a 2017 memorandum that "due to fiscal constraints," the average length of stay was "likely to decline to about 120-125 days."[9] Anecdotal information from prisons indicates that counsellors have been told to limit the amount of prerelease time in reentry centers to even less than 120 days. At one prison, inmates reported seeing a printed sign on the counsellor's wall reading: "We will put you in for a maximum of 90 days of RRC time, but it will most likely be less. Yes we know what the Second Chance Act says." Numerous reentry centers confirm that lengths of stay have declined significantly over the last few years. The Bureau's formal or informal restrictions on prelease time harm federal inmates by limiting their opportunity for structured reentry into the community. The limits also harm reentry centers because the declining lengths of stay mean that facilities are not being operated at full capacity. Many reentry centers increased capacity with the encouragement of the Bureau of Prisons and now find they are in difficult fiscal straits as inmates spend more time in prison and less time in reentry centers.

B. Several Measures Should Be Immediately Implemented To Address The Crisis Facing Reentry Centers And The Federal Inmates Who Rely On These Key Resources.

In order to avoid additional loss of reentry centers, I urge you to immediately implement the following actions:

Regarding New and Pending Solicitations for Reentry Services:

1. Issue a temporary directive prohibiting any decrease in the number of reentry center beds sought within a judicial district in new contract negotiations or Requests For Proposals. Further mandate that, for any reentry Request For Proposals that has already issued, the Bureau of Prisons may not reject the bid of a current reentry center without first (1) offering an extension of the current contract for six months; (2) consulting with the Chief Judge of the judicial district or other designee identified by Congress; and (3) re-issuing the Request For Proposals with the goal of avoiding loss of reentry beds.

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[8] Attachment E, Utilization of Community Corrections Facilities: Report to Congress (April 2017- March 2018).

[9] Attachment C, Memorandum of Acting Assistant Director, Hugh Hurwitz, October 10, 2017.

2. Establish a committee to review reentry center pricing mechanisms with the goal of developing alternatives to the current structure that uses a guaranteed minimum number of beds paired with a required maximum available. A sliding scale should be studied, for example, that would decrease or increase the price charged per bed based on the degree of occupancy. The committee should include delegates from the judiciary as well as small and larger reentry centers.

Regarding Length of Pre-Release Time:

3. Issue a directive that rescinds any Bureau policy (formal or informal) that restricts the amount of pre-release time that an inmate may serve in a reentry center to an amount less than authorized by Congress in 18 U.S.C. § 3624(c), unless an individualized determination establishes that for the specific inmate, less time is appropriate; and

4. Issue a directive that each Bureau facility should engage in an individualized assessment of inmate needs for reentry services with sufficient time in advance of the inmate's release date to allow for awarding a full year of pre-release time in reentry centers or home confinement when supported by the inmate's needs; and

5. Issue a directive that each Bureau facility should report monthly to you on the amount of pre-release time granted, and that your expectation is that this time should be increasing rather than decreasing.

These emergency directives may help avoid additional reentry center closures and thereby ensure that adequate reentry capacity exists for federal inmates eligible for pre-release time in the community.

C. The Bureau Should Formalize Policies And Practices That Support And Expand Utilization Of Reentry Centers.

In addition to doubling the available pre-release community corrections time from six to twelve months, 18 U.S.C. § 3624(c), the Second Chance Act required that, within 90 days of enactment, the Bureau "shall" implement the reforms to the pre-release community placement statute through the formal procedures provided under the Administrative Procedure Act (APA). 18 U.S.C. § 3624(c)(6) ("The Director of the Bureau of Prisons *shall* issue regulations" regarding the "sufficient duration" of community corrections) (emphasis added)). "[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). Here, Congress used the mandatory word "shall." The Bureau must follow procedural requirements for an exercise of discretion to be lawful: "[T]he promulgation of [the] regulations must conform with any procedural requirements

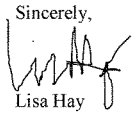
imposed by Congress" because "agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (citations omitted).

The Second Chance Act explicitly refers to the need for reentry policies to be empirically based. 42 U.S.C. § l 754l(d). Congress's intention that the Bureau engage in notice-and-comment rule-making effectuates this approach by giving the public and interested organizations, like the Defenders, the opportunity to provide input regarding the duration of community corrections. *See Chrysler Corp.*,441 U.S. at 316 ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment."); *see also* Conf. Rep. to Consolidated Appropriations Act of 2010, 155 CONG. REC. Hl3631-03, *Hl3888 (daily ed. Dec. 8, 2009) (directing the Bureau to consult with the public and experts regarding reentry issues). Congress also made the judgment that agencies must do more than simply repeat statutory language: agencies are required to articulate their rationale and explain the data upon which the rule is based. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962).

The Bureau has yet to issue adequate, evidence-based regulations addressing the appropriate length of reentry stays for federal prisoners. Implementing the requirements of the Second Chance Act through empirically-based research, consultation with interested parties through the notice-and-comment process, and issuance of regulations should rise to a top priority within the Bureau.

I appreciate your attention to these important issues that affect thousands of people who are preparing to reenter our communities.

Sincerely,



Lisa Hay
Federal Public Defender

LH:jll
cc: Senator Ron Wyden
Senator Jeff Merkley
Representative Earl Blumenauer
Chief Judge Michael Mosman, U.S. District Court of Oregon
Federal Public Defenders

ATTACHMENT A

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

November 16, 2011

Thomas R. Kane
Acting Director, Federal Bureau of Prisons
c/o Rules Unit
Office of General Counsel, Bureau of Prisons
320 First Street, NW
Washington, DC 20534

Re: Comment On Proposed Regulations
Pre-Release Community Confinement
76 Fed. Reg. 58197-01 (Sept. 20, 2011)

Dear Director Kane:

This letter is to provide comment on behalf of the Federal Public and Community Defenders regarding the proposed regulation implementing the pre-release community confinement provision of the Second Chance Act (SCA). The Defenders represent the indigent accused in almost every judicial district of the United States pursuant to authorization in 18 U.S.C. § 3006A. The Defenders viewed as a very favorable development the bipartisan support for the SCA's increase of available pre-release community corrections from six to twelve months in 18 U.S.C. § 3624(c). We anticipated that the increased utilization of halfway houses and home detention would promote our clients' more successful reintegration into the community through earlier family reunification, establishment of employment, treatment in the community, and separation from the negative aspects – and dangers – of prison life. The increased length of reentry programming would also reduce prison over-crowding, resulting in safer prisons and lower prison costs.

In contrast to the optimism generated by the SCA's statutory shift in favor of more pre-release community confinement, the Defenders have been disappointed in the Bureau of Prisons (BOP)'s failure to implement meaningful change by continuing the informal rule that effectively limits pre-release community confinement to six months. The proposed regulation does nothing to correct the BOP's failure to effectuate Congress's directive that the optimum duration of community corrections should be addressed by regulation and that the available period of community corrections for individual prisoners should be doubled from six to twelve months. Our comments address three aspects of the new regulation. First, the regulation appears to violate Congress's requirement that the BOP "shall" promulgate regulations to ensure that the length of community corrections is "of sufficient duration to provide the greatest likelihood of successful reintegration into the community." 18 U.S.C. § 3624(c)(6)(C). Second, the regulation should presume that the maximum period of community corrections should be provided, absent individualized factors disfavoring community corrections for a particular prisoner. Third, the regulation implementing the SCA should reject the

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current informal limitation to six months of community corrections, absent extraordinary circumstances, which is unsupported by empirical evidence and, in effect, nullifies the SCA's increase in the available time in community corrections.

A. The Proposed Regulation Does Not Comply With The Congressional Instruction To Address The Optimal Duration Of Pre-Release Community Corrections.

An essential component of the SCA's change in reentry policy was the doubling of the available pre-release community corrections – halfway houses and home detention – from six to twelve months. 18 U.S.C. § 3624(c). The same statute required that, within 90 days of enactment, the BOP "shall" implement the reforms to the pre-release community placement statute through the formal procedures provided under the Administrative Procedure Act (APA). 18 U.S.C. § 3624(c)(6) ("The Director of the Bureau of Prisons *shall* issue regulations" regarding the "sufficient duration" of community corrections) (emphasis added)). "[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). Here, Congress used the mandatory word "shall." The BOP must follow procedural requirements for an exercise of discretion to be lawful: "[T]he promulgation of [the] regulations must conform with any procedural requirements imposed by Congress" because "agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (citations omitted).

The SCA explicitly refers to the need for reentry policies to be empirically based. 42 U.S.C. § 17541(d). Congress's intention that the BOP engage in notice-and-comment rule-making effectuates this approach by giving the public and interested organizations, like the Defenders, the opportunity to provide input regarding the duration of community corrections. *See Chrysler Corp.*, 441 U.S. at 316 ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment."); *see also* Conf. Rep. to Consolidated Appropriations Act of 2010, 155 CONG. REC. H13631-03, *H13888 (daily ed. Dec. 8, 2009) (directing the BOP to consult with the public and experts regarding reentry issues). Congress also made the judgment that agencies must do more than simply repeat statutory language: agencies are required to articulate their rationale and explain the data upon which the rule is based. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962). Nevertheless, the proposed regulation provides none of the material required for informed rule-making. Instead, the BOP issued the informal memoranda with no support in best practices, no social science studies, and no articulated rationale with any support in the literature. The proposed regulation appears to be unlawful because it fails to address a critical question that Congress determined should be addressed by fair and neutral rule-making, not by administrative fiat.

B. The Regulation Should Incorporate A Presumption of Maximum Community Corrections In Order To Promote Successful Reentry And To Save Taxpayer Money.

The SCA's amendment of § 3624(c) rests on three assumptions apparent from the legislation: the amount of available time in community corrections should be doubled; the likelihood of successful reentry will be enhanced by earlier reintegration through family reunification, employment, and treatment in the community; and the costs of incarceration can be ameliorated by greater utilization of community resources for those determined not to create substantial risks in the community. The proposed regulation does nothing to further these legislative goals. The BOP should promulgate a regulation that furthers the SCA's reentry goals by presumptively permitting the maximum time available for community corrections, with less time depending on individualized safety factors and availability of facilities.

Congress's intent that placements be longer is reinforced by the Consolidated Appropriations Act of 2010, which provides:

> Because BOP has indicated that approximately $75,000,000 is required to implement fully its Second Chance Act responsibilities, the conferees expect the Department to propose significant additional funding for this purpose in the fiscal year 2011 budget request, including significant additional funding for the enhanced use of Residential Reentry Centers (RRC) as part of a comprehensive prisoner reentry strategy. The conferees also urge the BOP to make appropriate use of home confinement when considering how to provide reentering offenders with up to 12 months in community corrections.

155 CONG. REC. at H13887. Congress thus clearly expressed its continued intention that the BOP fully use its authority to place federal prisoners in the community for as long a period as appropriate to ensure the greatest likelihood of successful reintegration – including greater utilization of halfway houses and home confinement. Congress has indicated that funding considerations will not be tolerated as an excuse for failing to implement fully BOP's responsibilities under the SCA. The six month limit is inconsistent with the statutory instruction to enhance and to improve utilization of community confinement for federal prisoners.

By increasing pre-release community corrections, the BOP can substantially reduce prison over-crowding in facilities that are currently at about 137% of capacity. With greater over-crowding, the danger to both prisoners and correctional officers increases. At the same time, the agency can save scarce resources, redirecting them toward more effective rehabilitative programs. With the exception of foreign nationals, almost all of the 217,363 federal prisoners are eligible for community corrections under the SCA (about 26% of federal prisoners are aliens with immigration holds), with about 45,000 transferred to the community each year.

Besides the greater freedom at stake, enormous saving are available. For one year, incarceration in prison costs about $28,284.00; in a halfway house $25,838.00; and home detention about $3,000.00.[1] So if prisoners were transferred from prison to home confinement even one month earlier, the BOP could save about $94.8 million each year.[2] By increasing the average time in home detention by three months, the BOP would save about $284.4 million every year. Similarly, the cost to keep prisoners in halfway houses rather than in prison for an additional month would save about $9.2 million.[3] The difference for three months would be $27.6 million. And these savings would multiply with each additional year that the SCA is fully implemented. The proposed regulation does not address either the financial or human costs associated with maintaining the status quo.

The BOP should honor both the spirit and letter of the rule-making process. The regulation should be precise so that the public has a meaningful opportunity to comment. The Defenders suggest that the final regulation include, or at a minimum address, the following:

- A presumption of maximum community confinement to facilitate reentry and to save money, with less time based on individual risk factors and resource availability;
- A description of any studies and analyses considered in arriving at criteria for the exercise of discretion to maximize the duration for community confinement to achieve successful reintegration;
- Early placement of prisoners in residential reentry facilities to maximize the home confinement component of community corrections.

In times like these when prisoners are facing great obstacles to successful reintegration, the BOP, through its policies and regulations, should strive to make the difficult transition easier. The SCA provides a clear message that up to the full available year of community corrections should be

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[1] Annual Determination Of Average Cost Of Incarceration, 76 Fed. Reg. 57081 (Sept. 15, 2011); Memorandum from Matthew Rowland to Chief Probation Officers Cost of Incarceration (May 6, 2009).

[2] With 1/12 of the $3000 yearly cost of home confinement equaling $250 for one month, subtracted from one month of prison at $2357 (1/12 of the 28,284 annual costs), equals $2,107, multiplied by 45,000, the number of prisoners released each year to community corrections, equals $94,815,000.

[3] The difference every month of $204.00, multiplied by the 45,000 prisoners released equals $9,180,000.

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utilized to reach the greatest likelihood of success on supervised release. The BOP should promulgate a regulation to achieve the SCA's goal by presuming that the prisoner should receive the maximum available community corrections, limited by individualized assessments regarding public safety and available community resources.

C. The Six-Month Informal Rule Should Be Rejected.

The need for a regulation regarding the duration of community corrections is especially acute because, in the absence of a regulation on the subject, the default directive is the BOP's informal six-month rule under memorandums to staff and program statements. The only rationale for the six-month rule proffered by the BOP related to the supposed optimum time in a halfway house. In fact, the evidence presented in the case in which Judge Marsh invalidated the earlier regulation established that the six-month norm was based on erroneous assumptions. Most glaringly, the evidence disclosed that the Director of the BOP erroneously believed there were studies supporting the rule, but the BOP's own records established that no such studies exist:

- The Director claimed that "our research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better. The six months seems to be a limit for most of the folks, at which time if they go much beyond that, they tend to fail more often than offenders that serve up to six months."[4]

- The BOP's research department could not back up the Director's claim, stating "I am trying to find out if there is any data to substantiate the length of time in a 'halfway house' placement is optimally x number of months. That is, was the '6-month' period literally one of tradition, or was there some data-driven or empirical basis for that time frame? . . . I've done a lot of searching of the literature, but so far have not found anything to confirm that the '6-months' was empirically based."[5]

Because the BOP had no meaningful experience with community corrections greater than six months, the erroneous assumption regarding "research" was especially prejudicial. Rather than being

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[4] United States Sentencing Commission, *Symposium On Alternatives To Incarceration*, at 267 (July 15, 2008).

[5] *Sacora v. Thomas*, CV 08-578-MA, CR 48-9 (D. Or. Mar. 1, 2010) (exhibit in support of memorandum of law).

based in empirical research, the six-month rule may simply be a vestige of litigation positions that have been superseded by the SCA.[6]

Even if the erroneous belief regarding halfway house studies had not been debunked, the SCA could still have been implemented to make a difference: even with a six-month limit on the duration of halfway house placements, earlier placement would allow for up to six months of additional time in home detention under § 3624(c)(2). The SCA clearly permits such a change, which would result in significant savings. More importantly for prisoners, earlier community corrections would enable them to accelerate their reintegration into the community through family reunification, work, treatment, and other appropriate community-based programming. The proposed regulation fails to address this aspect of the SCA, leaving intact the informal and unsupported six-month rule.

The six-month informal rule is also irrational because its "extraordinary justification" exception is indistinguishable from "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c). The informal rule states that pre-release community corrections exceeding six months may be permitted only with "extraordinary justification." Program Statement 7310.04 at 8 (Dec. 16, 1998). But under § 3582(c), the BOP is supposed to alert the district court by filing a motion to reduce the sentence for "extraordinary and compelling reasons." The informal rule, by using an indistinguishable standard, creates an irrational and unworkable system in which BOP personnel, instead of permitting more than six-months of community corrections, should be mooting the question by moving the district judge to reduce the sentence.

Conclusion

An essential component of the SCA is the doubling of the available time for pre-release community corrections. By essentially maintaining the pre-SCA status quo, and by failing to promulgate a regulation on the optimal duration for community corrections, the BOP misses the opportunity to implement Congress's intent that reentry be eased by increased custody in the community, with its concomitant promotion of family unity, community-based treatment, and employment in the prisoner's home region. The Defenders speak in one voice in encouraging the BOP to implement the SCA by promulgating a regulation on the duration of pre-release community

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[6] Starting in 2002, the BOP has argued that no community confinement could exceed six months. The pre-SCA litigation depended on two things: the discretion to place prisoners in community confinement under 18 U.S.C. § 3621(b); and the six-month limitation on pre-release custody under the former § 3624(c). With the SCA, Congress has reaffirmed the BOP's authority to place prisoners in community confinement at any time and expanded the pre-release custody to twelve months. Thus, the informal six-month rule no longer has any basis in the relevant statutes.

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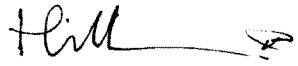
corrections that abandons the informal six-month limitation and presumes the maximum available community corrections, limited only by individualized safety and resource considerations.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender

TWH/mp

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ATTACHMENT B

RRCs Expiring and/or Not Exercising Option Years

CONTRACTOR	LOCATION	BED NUMBERS	Notes
COMCOR, INC.	COLORADO SPRINGS, CO	21	CONTRACT WILL EXPIRE 10/31/2017
ARC COMMUNITY SERVICES	MADISON, WI	4	CONTRACT WILL EXPIRE 10/31/2017
DAKOTA COUNSELING INSTITUTE	MITCHELL, SD	15	CONTRACT WILL EXPIRE 12/31/2017
GREAT LAKES RECOVERY CENTER	MARQUETTE, MI	12	NOT EXERCISING OPTION YEAR - CONTRACT WILL EXPIRE ON 1/31/2018
LARIMER COUNTY COMMUNITY CORR.	FORT COLLINS, CO	IN HOUSE: 10 HC: 3	NOT EXERCISING OPTION YEAR - CONTRACT WILL EXPIRE ON 11/30/2017
ORIANA HOUSE, INC.	AKRON, OH	IN HOUSE: 36 HC: 18	NOT EXERCISING OPTION YEAR - CONTRACT WILL EXPIRE ON 10/31/2017
BANNUM, INC.	WHEELING, WV	GUARANTEE MINIMUM: 12 ESTIMATED MAXIMUM: 15	CONTRACT EXPIRED 09/30/2017
ALVIS, INC.	DAYTON, OH	24	NOT EXERCISING OPTION YEAR - CONTRACT EXPIRED 7/31/2017
REALITY HOUSE PROGRAM, INC.	COLUMBIA, MO	20	CONTRACT EXPIRED 06/30/2017
VOLUNTEERS OF AMERICA, WESTERN NY	BINGHAMTON, NY	10	CONTRACT EXPIRED 08/31/2017
TRANSITIONS, INC.	ASHLAND, KY	GUARANTEE MINIMUM: 8 AND ESTIMATED MAXIMUM: 20	NOT EXERCISING OPTION YEAR - CONTRACT EXPIRED 06/30/2017
TRANSITIONS OF YOUTH, INC.	DURHAM, NC	16	CONTRACT EXPIRED 05/31/2017
DULUTH BETHEL SOCIETY	DULUTH, MN	12	CONTRACT EXPIRED 05/31/2017
PRAIRIE CENTER HEALTH SYSTEMS	CHAMPAIGN, IL	15	CONTRACT WILL EXPIRE 10/31/2017
BANNUM, INC.	BEAUMONT, TX	GUARANTEE MINIMUM IN HOUSE: 21 ESTIMATED MAXIMUM IN HOUSE: 42 GUARANTEE MINIMUM HC: 4 ESTIMATED MAXIMUM HC: 9	NOT EXERCISING OPTION YEAR - CONTRACT WILL EXPIRE ON 02/28/2018
COMMUNITY COUNSELING & CORRECTIONAL SERVICES	BUTTE, MT	IN HOUSE: 15 HC: 8	NOT EXERCISING OPTION YEAR - CONTRACT WILL EXPIRE ON 02/28/2018

HC = Home Confinement

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POLITICS OCTOBER 13, 2017 / 2:41 PM / 2 YEARS AGO

Exclusive: Trump administration reduces support for prisoner halfway houses

Sarah N. Lynch, Julia Harte 5 MIN READ

WASHINGTON (Reuters) - The administration of President Donald Trump has been quietly cutting support for halfway houses for federal prisoners, severing contracts with as many as 16 facilities in recent months, prompting concern that some inmates are being forced to stay behind bars longer than necessary.

FILE PHOTO: The Department of Justice (DOJ) logo is pictured on a wall after a news conference in New York December 5, 2013.
REUTERS/Carlo Allegri/File Photo

The Federal Bureau of Prisons spokesman Justin Long confirmed the cuts in response to an email inquiry from Reuters, and said they only affect areas with small populations or underutilized centers.

"The Bureau remains firmly committed to these practices, but has had to make some modifications to our programs due to our fiscal environment," Long said.

Halfway houses have been a part of the justice system since the 1960s, with thousands of people moving through them each year. For-profit prison companies such as Geo Group Inc have moved into the halfway house market, though many houses are run directly by government agencies or non-profit organizations.

A Geo spokeswoman declined to comment for this article.

The bureau, which falls under the U.S. Department of Justice, last year had about 180 competitive contracts with "residential reentry centers" run by non-profit and for-profit companies, such as Geo.

The International Community Corrections Association says on its website there were about 249 separate halfway houses in communities nationwide that are covered by the 180 contracts.

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Federal judges who spoke to Reuters said the cuts are having an impact in their districts, particularly in states with fewer facilities or larger geographic areas where the nearest center might be several hundred miles away.

Judge Edmund Sargus of the Southern District of Ohio said it was a real "stumper" when in July the government ended its contract with the Alvis facility serving the Dayton area.

Long said that the cuts have not reduced referral rates or placements, and only impact "about 1% of the total number of beds under contract."

However, the changes coincide with other major criminal justice policy shifts by U.S. Attorney General Jeff Sessions, who has pushed for more aggressive prosecutions of drug offenses and a crackdown on illegal immigrants who commit crimes.

In May, Sessions ordered prosecutors to charge defendants with the highest provable offense, a move that is likely to trigger lengthy prison sentences.

In 2016, of the 43,000 inmates released from federal prison, 79 percent were released into a halfway house or home confinement, according to the trade association.

"We need to improve re-entry services ... This move flies in the face of that consensus," said Kevin Ring, whose non-profit Families Against Mandatory Minimums has recently launched a Twitter campaign to raise awareness of the problem.

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Sessions is scheduled to testify next week before the Senate Judiciary Committee. Ring said he hopes lawmakers will ask Sessions about the changes underway for halfway houses.

"Is cutting re-entry opportunities really going to make us safer? Congress needs to ask the Justice Department if this is part of their strategy," he said.

LONGER PRISON TIMES

For Kymjetta Carr, the cuts have had a personal impact. The 30-year-old from Cincinnati said she had expected her fiance Anthony Lamar to get out of prison and go to a halfway house in November, after serving seven years on a drug charge.

But she now has to tell their 10-year-old son his father won't be out for Christmas or his birthday because Lamar's release to a halfway house will not come until late July.

"It seems like the rug has been pulled out from under us," she said, in an interview arranged through Families Against Mandatory Minimums, a nonprofit advocacy group.

Halfway houses are low-security residences for thousands of convicted prisoners serving alternative sentences or on release from prison into partial freedom programs on the outside. The facilities are meant to help prisoners reenter their communities, find a job and get their lives back on track.

A study commissioned last year by the Justice Department found that centers have come under greater strain in recent years, as more people have been released from prison.

Blair Campmier, executive director of Reality House in Columbia, Missouri, said he was notified in early June that the center's eight-year-old contract would be terminated.

Some of his clients were sent to halfway houses in Kansas City and Springfield, more than two hours away. "They were not happy, and their families were not happy," said Campmier.

Ricardo Martinez, the Chief U.S. District Judge in the Western District of Washington and Chairman of the Committee on Criminal Law of the Judicial Conference of the United States, told Reuters he has sent a letter to the Bureau of Prisons' new Director Mark Inch requesting discussions.

"From our perspective, these facilities are not only useful - they are essential," Martinez said.

Editing by Kevin Drawbaugh and Alden Bentley

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MORE FROM REUTERS

Bureau of Prisons ending contracts with 16 halfway houses

By Eli Watkins, CNN

Updated 5:04 PM ET, Mon November 20, 2017

Attorney General Jeff Sessions speaks about domestic security in New York on November 2, 2017.

STORY HIGHLIGHTS

The Bureau of Prisons listed 16 contracts it was considering ending or had ended

'I never really got the full story,' said the director of one halfway house

Members of both parties were taken aback

Washington (CNN) — The Bureau of Prisons is cutting off funding for halfway houses throughout the country, saving money the bureau says it needs at the expense of what reform advocates say are vital programs to help prisoners transition effectively and safely out of the corrections system.

Some 16 facilities around the country have seen or will see their contracts with the federal prison system end. The cuts are coming weeks into the tenure of newly minted Bureau of Prisons Director Mark Inch, whom Attorney General Jeff Sessions tapped earlier this year to lead the federal prison system. Inch, a retired Army major general, hails from the military's corrections and law enforcement system.

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Halfway houses, or "residential re-entry centers" in federal prison lingo, help manage the transition for federal prisoners from incarceration to freedom. According to the Bureau of Prisons, the facilities "provide a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance and other programs and services."

Kara Gotsch, director of strategic initiatives for The Sentencing Project, a criminal justice reform group, said the cutback won't necessarily mean that prisoners will go straight from prison to the outside world, but that it could diminish the time they spend getting acclimated to post-prison life.

Asked about the closures, the bureau provided a list of 16 contracts due for expiration around the country, from West Virginia to Michigan to Colorado. Each is contracted for at most a few dozen beds, with some managing people in home confinements as well. Some expiration dates had already passed and others indicated the bureau would exercise its authority to end them soon.

The Bureau of Prisons also issued a statement saying the decision on the 16 contracts "does not reflect any change in the Bureau's long-standing commitment to provide transitional services to inmates releasing back to our communities, or to provide the courts with an alternative to incarceration when appropriate."

The decision affects only a small share of the "total number of beds under contract," the bureau added, and was the product of a months-long review.

"Over the past several months, the bureau conducted a comprehensive analysis of current RRC resources to determine how to most effectively use our resources. As a result, we decided to discontinue some contracts that were underutilized or serving a small population," the bureau said.

'A big surprise'

For at least one contractor, the bureau's decision came as an unwelcome shock.

Tim Hand, the head of Larimer County Community Corrections in Fort Collins, Colorado, runs a halfway house that he said houses several hundred state offenders along with a "relatively small" federal contract.

Hand said he got an email from Washington out of the blue notifying him his federal contract would end in 30 days -- by the end of November.

"I never really got the full story," Hand said. "It sure is sad."

Hand said he pushed back but was unsuccessful, and described his experience working with the federal government as difficult. He said his facility recently invested resources and time, including building a new software program, for its federal work -- without getting a heads up from the bureau that his facility was on the chopping block.

"Everything is secret, top secret," Hand said. "It came as a big surprise to us."

He added that he had not heard any overtures from the federal government about opening a new contract with them, and if he did hear from Washington, Hand said, "I don't know if I would even be interested."

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Greg Toutant, the executive director of Great Lakes Recovery Centers, Inc., wrote a letter requesting the bureau reconsider closing its re-entry center in Michigan. The letter said Great Lakes had operated services for federal parolees going back 30 years and served a wide region.

"Please do not let what appears to be a unilateral, knee-jerk reaction override quality systems of care," Toutant wrote.

Toutant said he found out his contract was ending in a "very abrupt letter" and that the bureau had not made itself available to talk about the decision or what would happen to the federal parolees.

"No one has talked with us about what's going to happen," Toutant said.

He said their "minor use" facility cycled about 25 to 30 people from the Bureau of Prisons every year and that he is "a little scared" for what the decision means for those affected.

Toutant said the facility, based out of the upper peninsula city of Marquette, was important because of the unique geography of the area and the isolation of its community. He stressed that the relatively small decision would have an outsize impact.

"Nobody has really picked up on what this is going to do to communities," Toutant said.

Bureau spokesman Justin Long told Reuters last month, when the news agency first reported the decision, that although the bureau supported halfway houses, it was forced "to make some modifications to our programs due to our fiscal environment."

Gotsch, the Sentencing Project staffer, challenged the bureau's reasoning that fiscal realities were behind the decision to close the facilities.

"It's kind of curious to me that BOP is claiming they're having these big financial problems because they've had a huge dip in their prison population," Gotsch said. "What are they talking about? They don't have enough funding?"

Gotsch said a quality period of time in a halfway house can be essential to transitioning from prison and noted that halfway houses offer not only proximity to offenders' home and communities, but that they can also access counseling and classes to help them acclimate back to society.

"It definitely compromises the re-entry process," Gotsch said of the contracts ending.

Cuts against trend

The Bureau of Prisons' decision to cut funding for halfway houses has alarmed members of both political parties, who have begun to move toward a consensus that the federal government must implement some degree of reform to its criminal justice system in order to reduce the US prison population. The federal prison population makes up about 13% of the overall US prison population, and the nation's overall incarceration rate is the highest recorded in the world.

A group of eight senators sent a letter in late October to Inch and Deputy Attorney General Rod Rosenstein, expressing dismay at the cuts and asking for the move to be reversed.

The letter notes concern about eliminating cognitive behavioral programming in addition to the closure of the 16 federal halfway house programs.

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"These changes, particularly in the absence of a justification, threaten to make our communities less safe while increasing BOP operating costs over time," the letter said.

The senators on the letter were a bipartisan group, made up of John Cornyn of Texas and Judiciary Committee Chairman Chuck Grassley of Iowa as well as Rob Portman (R-Ohio), Thom Tillis (R-North Carolina), Sheldon Whitehouse (D-Rhode Island), Amy Klobuchar (D-Minnesota), Al Franken (D-Minnesota) and Brian Schatz (D-Hawaii).

The cuts are at odds with public actions and statements by the administration. White House adviser Jared Kushner, the President's son-in-law, met with members of both parties at the White House in September to discuss improvements to the federal prison system, including better ways to reintegrate convicts into society.

And last week, Sessions appeared to offer a mixed assessment of programs targeted at reducing recidivism when asked in a House Judiciary Committee hearing, but said he believed pre-release programs can be effective.

"Most of the time, according to my experience, they don't achieve huge results, but if they achieve 10, 15, 20% improvement, that's of value," Sessions told GOP Rep. Doug Collins of Georgia last Tuesday.

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ATTACHMENT C

U.S. Department of Justice
Federal Bureau of Prisons

Reentry Services Division
Washington, DC 20534
October 10, 2017

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Hugh J. Hurwitz, Acting Assistant Director
Reentry Services Division

SUBJECT: Residential Reentry Center Operations

This memorandum is being issued to provide information regarding several measures being taken to ensure the Federal Bureau of Prisons' (Bureau) Residential Reentry Center (RRC) program remains within budgetary allocations. These steps include:

- Discontinuing sixteen RRC contracts that were underutilized. These cancellations affect 146 beds or about 1% of the total bed space.
- Bringing all RRC contracts into compliance with their contracted operating capacity. Many RRCs are operating above the population limits specified in their contracts. In order to address these overages, Residential Reentry Management Branch (RRMB) staff are delaying some new placements or adjusting placements until populations in those facilities decrease to within contract limits.
- The average length of stay for BOP inmates in RRCs has increased in recent years to approximately 145 days. Due to fiscal constraints and the contract actions described above, the average length of stay is likely to decline to about 120-125 days. RRMB staff will continue to carefully assess, on a case-by-case basis, each inmate's programming needs and determine the appropriate length of stay for each placement. This action is consistent with the discussion the RRMB Administrator, (b)(6),(b)(7)(C) recently had with all CMCs.

We continue to carefully examine all cases to ensure compliance with the Second Chance Act and to ensure that inmates who are participating in the Residential Drug Abuse Program receive the required amount of community based treatment to remain eligible for any early release benefit granted under 18 USC 3621(e).

If you or your staff have any questions or concerns please contact (b)(6),(b)(7)(C) Administrator, Residential Reentry Management Branch at (b)(6),(b)(7)(C) or (b)(6),(b)(7)(C).

ATTACHMENT D

Residential Reentry Center (RRC) Services and Home Confinement Services Located Within the State of Oklahoma

Solicitation Number: 15BRRC19R00000247

Agency: Department of Justice
Office: Bureau of Prisons
Location: Acquisitions Branch

Notice Type:
Solicitation

Original Posted Date:
August 7, 2019

Posted Date:
September 25, 2019

Response Date:
Nov 25, 2019 2:00 pm Eastern

Original Response Date:
Nov 25, 2019 2:00 pm

Archiving Policy:
Automatic, on specified date

Original Archive Date:
March 31, 2021

Archive Date:
March 31, 2021

Original Set Aside:
N/A

Set Aside:
N/A

Classification Code:
G -- Social services

NAICS Code:
623 -- Nursing and Residential Care Facilities/623990 -- Other Residential Care Facilities

Synopsis:

Added: Aug 07, 2019 1:41 pm Modified: Sep 25, 2019 12:21 pm Track Changes

The Federal Bureau of Prisons is seeking concerns having the ability for providing Residential Reentry Center (RRC) services (in-house RRC beds) and Home Confinement services (home confinement placements) for male and female Federal offenders held under the authority of United States Statutes located throughout the state of Oklahoma.

Both the RRC services for in-house RRC beds and the Home Confinement services for home confinement placements shall be in accordance with the Federal Bureau of Prisons Statement of Work entitled, "Residential Reentry Center, April 2017, Revision 1 - April 2019".

This will be for an indefinite delivery, indefinite quantity type contract with firm fixed unit prices with a one year base period, and four one-year option periods.

The RRC In-House requirement will be for a guaranteed minimum of 38 beds (34 male beds and 4 female beds) and a maximum total of 125 beds (112 male beds and 13 female beds) and will consist of one identified site location within the Northern judicial ditrict of Oklahoma and one identified site location in either the Western or Eastern judicial district of Oklahoma to include the following maximum RRC beds: Northern District will consist of 70 RRC beds (63 male beds and 7 female beds) and the Western or Eastern District will consist of 55 RRC beds (49 male beds and 6 female beds).

The Home Confinement requirement will be for a guaranteed minimum of 19 home confinement placements and a maximum total of 63 home confinement placements and will consist of the following maximum Home Confinement Placements: Northern District will consist of 35 Home Confinement Placements and Western or Eastern District will consist of 28 Home Confinement Placements.

A Day Reporting Center may be proposed to monitor portions of or all of the home confinement population. Day Reporting Center services shall be in accordance with the Federal Bureau of Prisons State of Work entitles, "Day Reporting Centers, April 2019".

The Home Confinement Radius will be within each judicial district.

It is the intent of the Government to award all line items (RRC in-house beds and home confinement placements) to a single provider, as these services are interconnected and rely upon each other to ensure adequate programming and case management of offenders. The Government reserves the right to potentially make an award which is deemed to be in the best interest of the Government.

15BRRC19R00000247 will be available on or about September 25, 2019, and it will be distributed solely through the General Services Administration's Federal Business Opportunities (FBO) website at http://www.fbo.gov. Hard copies of the solicitation will not be available. The site provides downloading instructions. Future information about this acquisition will also be distr buted through this site. Interested parties are responsible for monitoring this site to ensure that they have the most up-to-date information about this acquisition. The estimated closing date of 15BRRC19R00000247 will be on or about November 25, 2019.

All responsible sources may submit a proposal which will be considered by this agency. No collect calls will be accepted. No telephone request or written requests for the solicitation will be accepted.

Faith-Based and Community Organizations can submit offers/bids/quotations equally with other organizations for contracts for which they are eligible.

Solicitation 1

Type: Solicitation
Posted Date: September 25, 2019

01_15BRRC19R00000247_Solicitation_Cover_Letter.pdf (928.54 Kb)
Description: 01 - Solicitation Cover Letter

02_15BRRC19R00000247_Solicitation_Cover_Sheet.pdf (485.50 Kb)
Description: 02 - Solicitation Cover Sheet

03_15BRRC19R00000247_Solicitation_Document.pdf (427.17 Kb)
Description: 03 - Solicitation Document

04_15BRRC19R00000247_Statement_of_Work_-_Revision_1.pdf (1,837.18 Kb)
Description: 04 - RRC Statement of Work

05_15BRRC19R00000247_Performance_Summary_Table.pdf (154.75 Kb)
Description: 05 - Performance Summary Table

06_15BRRC19R00000247_Environmental_Checklist.pdf (50.34 Kb)
Description: 06 - Environmental Checklist

07_15BRRC19R00000247_Sample_Community_Notification_Letter.pdf (35.90 Kb)
Description: 07 - Sample Community Notification Letter

08_15BRRC19R00000247_Sample_Client_Notification_Letter.pdf (21.86 Kb)
Description: 08 - Sample Client Notification Letter

09_15BRRC19R00000247_Sample_Bank_Notification_Letter.pdf (20.18 Kb)
Description: 09 - Sample Bank Notification Letter

10_15BRRC19R00000247_Service_Contract_Business_Management.pdf (140.04 Kb)
Description: 10 - Business Management Questionnaire

11_15BRRC19R00000247_Compliance_Matrix.pdf (453.34 Kb)
Description: 11 - Compliance Matrix

12_15BRRC19R00000247_RRC_Cert_of_Compliance.pdf (21.89 Kb)
Description: 12 - RRC Certificate of Compliance

13_15BRRC19R00000247_Local_Area_Concerns.pdf (27.17 Kb)
Description: 13 - Local Area of Concerns Form

14_15BRRC19R00000247_Wage_Determinations.pdf (452.30 Kb)
Description: 14 - Wage Determinations

15_15BRRC19R00000247_Subcontracting_Plan.pdf (1,182.00 Kb)
Description: 15 - Subcontracting Plan

16_15BRRC19R00000247_DRC_Statement_of_Work.pdf (629.51 Kb)
Description: 16 - DRC Statement of Work

Amendment 1

Type: Mod/Amendment
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Amendment_001.pdf (64.74 Kb)
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Contracting Office Address:
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Solicitation 1

Sep 25, 2019

01_15BRRC19R00000247_S
02_15BRRC19R00000247_S
03_15BRRC19R00000247_S
04_15BRRC19R00000247_S
05_15BRRC19R00000247_F
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12_15BRRC19R00000247_F
13_15BRRC19R00000247_L
14_15BRRC19R00000247_V
15_15BRRC19R00000247_S
16_15BRRC19R00000247_D

Amendment 1

Sep 25, 2019

Amendment_001.pdf

Opportunity History

- **Original Synopsis**
  Presolicitation
  Aug 07, 2019
  1:41 pm
- **Changed**
  Sep 25, 2019
  12:41 pm
  Solicitation
- **Changed**
  Sep 25, 2019
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ATTACHMENT E

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

August 27, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Second Chance Act of 2007 (P.L. 110-199; codified at Title 18 § 3624 (c)(5)) requires the Bureau of Prisons (Bureau) to transmit to the Committees on the Judiciary of the Senate and the House of Representatives an annual report describing the Bureau's use of community corrections. A copy of the 2018 report is enclosed.

Sincerely,

Hugh J. Hurwitz
Acting Director

Enclosure

Utilization of Community Corrections Facilities
Report to Congress

Status Report: Covering data from April 2017 through March 2018.

Legislative Summary: On April 9, 2008, the President signed the Second Chance Act of 2007 into law (P.L. 110-199). Section 251(a) of the law, codified at Title 18 U.S.C. § 3624(c)(5), requires the Director of the Bureau of Prisons (Bureau) to transmit to the Senate and House of Representatives Committees on the Judiciary an annual report describing the Bureau's use of community corrections facilities.

The Bureau of Prisons refers to community corrections facilities or halfway houses as Residential Reentry Centers. Most Federal inmates are placed in a Residential Reentry Center (RRC) and/or home confinement during the final year of their sentence. RRCs and home confinement, two forms of community-based confinement, help inmates gradually re-adapt to the community after spending time in prison. Community-based confinement is a critical component of the Bureau's comprehensive reentry strategy.

Residential Reentry Centers: RRCs help inmates transition to the community by providing a structured, supervised environment, and by helping individuals find employment and housing, complete necessary programming (e.g., transitional drug abuse treatment), participate in counseling, and strengthen ties to family and friends.

The Bureau makes RRC placement decisions based on each inmate's need for reentry services. For example, inmates serving long sentences, with limited employment skills, little family support, no established home to which they can return, and limited financial resources have a much greater need for RRC placement than do inmates serving short sentences, and having positive family support, a home, and job skills.

Home Confinement: This program is most appropriate for lower-risk inmates who are not in need of significant residential transitional services. Inmates on home confinement are subject to curfews, in-person check-ins, telephonic monitoring, and sometimes electronic monitoring. Home confinement is substantially less costly than RRC placement; however, it is statutorily limited to the shorter of six months or 10 percent of an inmate's term of imprisonment.[1]

Inmates can transition to home confinement directly from a Bureau institution or from an RRC. Inmates placed on home confinement may be supervised either by RRC staff or by U.S. Probation staff as part of the Federal Location Monitoring program. Inmates are carefully screened prior to their release from a Bureau institution to determine appropriateness for direct home confinement placement. Many minimum security inmates who have a viable release residence and minimal need for residential transitional services are referred for direct placement into home confinement programs upon reaching their statutory eligibility date. Inmates who transfer to RRCs are expected to transition into home confinement as soon as adequately prepared and statutorily eligible.

Statistical Summary: Most but not all inmates are referred for transfer to community confinement (i.e., to RRCs, home confinement, or both).

Ineligible Inmates:

The following list comprises reasons why inmates were ineligible for transfer to RRCs or home confinement (including the total number for each category) from **April 2017 through March 2018:**

- The inmate was released to a detainer (22,304).[2]
- The inmate had a sentence of six months or less (9,125).
- The inmate refused to satisfy his/her obligation under the Bureau's Financial Responsibility Program (2,243).[3]

Eligible Inmates:

From April 2017 through March 2018, 34,738 inmates were eligible for transfer to RRCs, or home confinement. Among these 34,738 inmates, the Bureau transferred 72% (25,000) from correctional institutions to RRCs or home confinement. Of the 34,738 inmates eligible for transfer to RRCs or home confinement, 28% (9,738) did not transfer to RRCs or home confinement during this period.

Reasons why these eligible inmates may not have been placed in RRCs or home confinement include the following:

- The inmate refused RRC placement.
- The RRC denied placement of the inmate.
- The inmate had medical or mental health needs that could not be accommodated at an RRC or on home confinement.
- The inmate had a pending charge that might have resulted in his/her arrest if placed in the community.
- There was insufficient time to process an RRC referral (e.g., due to a sentence reduction, last-minute lifting of a detainer, or resolution of a pending charge).[4]
- The inmate's behavior in a Bureau institution indicated that he/she was unlikely to succeed in an RRC.

Among inmates who released through an RRC from April 2017 through March 2018, the average expected length of stay in an RRC was 136.8 days. The average expected length of stay decreased from FY 2017 (149.1) by 12 days. The following table provides data on the average expected length of stay by quarter.

Fiscal Quarter	Average Expected Length of RRC Stay
April - June 2017	**145.6 days**
July - September 2017	**146.8 days**
October - December 2017	**132.2 days**
January - March 2018	**118.8 days**

Recent Activities and Future Goals: The Bureau continues to seek ways to expand the use of community resources to facilitate effective RRC and home confinement placements for inmates as part of their community reentry. For example, day reporting centers are non-residential facilities that allow for programming and other services to be provided in a centralized location while providing increased accountability and security functions for inmates on home detention. This type of facility does not require the zoning typically required of an RRC which allows for substantial services to be provided in areas where the agency has not been able to site a traditional RRC facility.

The Bureau has solicited for Day Reporting Centers in three locations: Memphis, TN; Sacramento, CA; and Richmond, VA. The solicitations are for a maximum placement of 30 inmates per site. The Memphis location began performance on November 1, 2017, the Sacramento location is anticipated to begin performance on November 1, 2018, and the Richmond location was determined not to be a viable location.

A new RRC Statement of Work (SOW) was completed in April 2017. The revised SOW emphasizes cost savings while aiming to provide for the ongoing transitional needs of inmates related to employment and housing.

The web-based electronic RRC application has been implemented in all RRM offices and RRCs nationally. The program provides automated processing and tracking of RRC referrals and provides instant feedback on the status of RRC referrals. It allows for improved inmate RRC population management via monitoring of movement to and from RRCs. To date over 200,000 referrals have been processed using this system resulting in significant increases in efficiency and decreases in costs through the elimination of mailing and processing referral packets from institution to RRM offices and then to RRC facilities.

Notes:

1. 18 U.S.C. 3624(c)(2).

2. The vast majority of these detainers were lodged by Immigration and Customs Enforcement on non-U.S. citizen inmates.

3. The Inmate Financial Responsibility Program requires inmates to make payments from their earnings to satisfy court-ordered fines, victim restitution, child support, and other monetary judgments. One sanction for failing to satisfy those obligations is loss of RRC eligibility.

4. If there is insufficient time for the Bureau to process an RRC referral and the inmate requires the services of a community corrections facility, RRC services can be required by the sentencing United States District Court as a condition of post-release supervision.

Supplemental Statement of David E. Patton
Executive Director, Federal Defenders of New York

Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security

October 17, 2019 Oversight Hearing on
"The Federal Bureau of Prisons and
Implementation of the First Step Act"

Mr. Chairman and Members of the Subcommittee:

Thank you for opportunity to testify before the Subcommittee on the October 17, 2019. At the hearing, Chairman Nadler inquired whether Section 404 of the First Step Act, which makes the Fair Sentencing Act of 2010 retroactive, is being implemented as Congress intended. The following supplemental statement addresses that inquiry.

DOJ Has Aggressively Resisted Implementation of Section 404 of the First Step Act, Contrary to the Plain Language of the Statute and Congressional Intent.

As Congress recognized in enacting the Fair Sentencing Act, the former penalty scheme for crack offenses was far too harsh and its excessive severity fell disproportionately on African Americans. But the Fair Sentencing Act was not made retroactive, leaving thousands of people in prison serving unjust sentences under the old law. Congress passed Section 404 of the First Step Act to rectify that problem. As you know, those sentenced under the old law who remain in prison have been incarcerated for at least 10 years, and many for 20 or 30 years, for being convicted of possessing, selling, or conspiring to possess or sell a relatively small amount of crack. Most of these prisoners are at or past the age when recidivism is likely.[1] And most have engaged in rehabilitative programming and have little or no serious disciplinary history.

Unfortunately, the Department of Justice (DOJ) has aggressively resisted implementation of Section 404, by directing prosecutors to make specific arguments that are disingenuous at best. As courts have noted, these arguments are "inconsistent with the plain language," and if adopted, would be "unjust," "draconian and contrary to the remedial purpose of [] Act," "completely impractical," "lead to absurd results," "perpetuate an unconstitutional practice,"

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[1] "Even those individuals who commit crimes at the highest rates begin to change their criminal behavior as they age. The data show a steep decline at about age 35." National Institute of Justice, Five Things About Deterrence (May 2016), at 2, available at https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.

"impugn the integrity of the judiciary [and] the judicial proceeding," and "generate disrespect for the criminal justice system."[2] Fortunately, the government has been unsuccessful in most cases thus far, but with significant costs. Protracted litigation in case after case has delayed release of prisoners who have already served more time than the court finds appropriate, and has resulted in a significant waste of resources. What is worse, courts have accepted the government's arguments in a few cases, resulting in the denial of relief for an unfortunate few, while at least 2,000 similarly situated people have been granted relief.[3] Perhaps most concerning, defendants in certain corners of the country are denied counsel, requiring them to face an aggressive adversary on their own. When this happens in a court of appeals, the law is at risk for everyone in that circuit.

Section 404 is a straightforward statute with a clear remedial purpose. It defines a "covered offense" as a violation of a "Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 [] that was committed before August 3, 2010."[4] It then provides that a court that "imposed a sentence for a covered offense may," in its discretion, "impose a reduced sentence as if" section 2 and 3 of the FSA "were in effect." It prohibits relief in two narrow circumstances: the sentence was already imposed or reduced in accordance with sections 2 and 3 of the Fair Sentencing Act, or a court has denied a Section 404 motion "after a complete review of the motion on the merits." Otherwise, relief is discretionary. Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841 note).

In short, every defendant sentenced for a crack offense before the FSA's date of enactment who is still serving that sentence is eligible for consideration of a reduced sentence. As concisely summarized by its sponsors:

> Section [404] allows prisoners sentenced before the Fair Sentencing Act of

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[2] *See United States v. Rose*, 379 F. Supp. 3d 223, 229-30 (S.D.N.Y. 2019); *United States v. Washington*, 2019 WL 4750575, at *3 (C.D. Ill. Sept. 30, 2019); *United States v. Thompson*, 2019 WL 4040403, at **7-8 (W.D. Pa. Aug. 27, 2019); *United States v. Taylor*, 2019 WL 3852383, at **3, 4-5 (N.D. Ohio Aug. 16, 2019); *United States v. Stone*, 2019 WL 2475750, at *2 (N.D. Ohio June 13, 2019).

[3] According to the Sentencing Commission, 1,674 First Step Act motions had been granted as of July 31, 2019. U.S. Sentencing Commission First Step Act of 2018 Resentencing Provisions Retroactivity Data Report, tbls. 1, 3 (Aug. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20190903-First-Step-Act-Retro.pdf. This figure does not include a number of motions that had been granted by that date, and in any event, it is safe to say that over 2,000 motions have been granted by now.

[4] In 2012, the Supreme Court held that sections 2 and 3 of the FSA applied to defendants who committed the offense before August 3, 2010 if they were sentenced on or after that date. *See Dorsey v. United States*, 567 U.S. 260, 282 (2012).

> 2010 reduced the 100-to-1 disparity in sentencing between crack and powder cocaine to petition the court for an individualized review of their case.[5]

And that is exactly how the vast majority of courts have applied it. Eligibility turns on a simple categorical question: Were the "statutory penalties" for a "statute" of which the defendant was convicted "modified by" section 2 of the Fair Sentencing Act?[6] If so, the defendant is eligible, and the court decides in its discretion whether, and to what extent, to impose a reduced sentence. In doing so, it considers the applicable statutory limits, the

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[5] S. Comm. on the Judiciary, 115th Cong., The First Step Act of 2018 (S.3649) – as introduced by Senators Grassley, Durbin, Lee, Whitehouse, Graham, Booker, Scott, Leahy, Ernst, Klobuchar, Moran, and Coons (Nov. 15, 2018). *See also* 164 Cong. Rec. S7020, S7021, 2018 WL 6004155 (Nov. 15, 2018) (statement of Sen. Durbin) ("What we [] set out to do with this bill … is to give a chance to thousands of people who are still serving sentences for offenses involving crack cocaine under the old 100-to-1 ruling to petition individually. . . to the court for a reduction in the sentencing."); 164 Cong. Rec. S7753-01, S7774, 2018 WL 2018 WL 6624758 (Dec. 18, 2018) (statement of Sen. Feinstein) ("Unfortunately, this new law did not apply retroactively . . . . The bill before us today fixes that and finally makes the Fair Sentencing Act retroactive so that people sentenced under the old standard can ask to be resentenced under the new one."); 164 Cong. Rec. S7745-01, S7748 (Dec. 18, 2018) (statement of Sen. Klobuchar) ("[The bill simply allows people to petition courts . . . for an individualized review based on the particular facts of their case."); 164 Cong. Rec. S7753-01, S7756 (Dec. 18, 2018) (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime."); Executive Business Meeting on S. 1410, Smarter Sentencing Act of 2013 Before the S. Comm. on the Judiciary, 113th Cong. (Jan. 30, 2014, 50:37) (statement of Sen. Durbin) ("[T]he bill would allow individuals incarcerated for crack cocaine to petition judges . . . for review of their cases on a case by case basis . . . If they can make the case on an individual basis to a judge for adjustment of their sentence, we give them the opportunity under this bill."); 159 Cong. Rec. S6184-01, S6185, 2013 WL 3957272 (Aug. 1, 2013) (statement of Sen. Durbin) ("Because of the timing of their sentences, some individuals are still in jail serving lengthy, pre-Fair Sentencing Act sentences [so the bill] allows individuals sentenced under the old [law] to petition courts … for a review of their case.").

[6] *See, e.g.*, *United States v. Rose*, 379 F.Supp.3d 223 (S.D.N.Y. 2019); *United States v. Boulding*, 379 F.Supp.3d 646 (W.D. Mich. 2019); *United States v. Thompson*, 2019 WL 4040403 (W.D. Pa. Aug. 27, 2019); *United States v. Williams*, 2019 WL 4014241 (N.D. Ill. Aug. 25, 2019); *United States v. Williams*, 2019 WL 4014241 (N.D. Ill. Aug. 25, 2019); *United States v. Moore*, 2019 WL 3966168 (D. Neb. Aug. 22. 2019); *United States v. Taylor*, 2019 WL 3852383 (Aug. 16, 2019); *United States v. Billups*, 2019 WL 3884020, at *2 (S.D.W. Va. Aug. 15, 2019); *United States v. Askins*, 2019 WL 380022 (D. Ariz. Aug. 6, 2019); *United States v. Vanzant*, 2019 WL 3468207 (S.D. Ala. July 31, 2019); *United States v. Terrell*, 2019 WL 3431449 (E.D. Tenn. July 29, 2019); *United States v. White*, 2019 WL 3228335, at *4 (S.D. Tex. July 17, 2019) (collecting dozens of cases); *United States v. Henderson*, 2019 WL 3211532 (W.D. La. July 15, 2019); *United States v. Barber*, 2019 WL 2526443 (D.S.C. June 19, 2019); *United States v. Shaw*, 2019 WL 2477089 (W.D. Wis. June 13, 2019); *United States v. Pride*, 2019 WL 2435685 (W.D. Va. June 11, 2019); *United States v. Smith*, 2019 WL 2092581 (W.D. Va. May 13, 2019); *United States v. Allen*, 384 F.Supp.3d 238 (D. Conn. 2019); *United States v. Davis*, 2019 WL 1054554 (W.D.N.Y. Mar. 6, 2019).

advisory guideline range, the § 3553(a) purposes and factors, and the defendant's post-sentencing conduct.[7]

DOJ, however, seeks to prevent individualized consideration of a reduced sentence for most defendants. According to DOJ, a defendant is *ineligible* when the government says it "could have charged" the defendant with the new threshold quantity under the Fair Sentencing Act — based on uncharged, unconvicted conduct. This theory would "require the court to employ a prosecutor-friendly 'way-back machine'" to hypothesize charges that were never brought and convictions that were never obtained, under a remedial statute intended to benefit defendants subjected to the unfair crack penalty scheme. *United States v. Pierre*, 372 F.Supp.3d 17, 22 (D.R.I. 2019). Courts have rejected this theory because (1) it is contrary to the plain language of Section 404(a); (2) it would exclude a great many prisoners contrary to Congress's remedial intent; (3) Congress did not authorize courts to retroactively amend the indictment or conviction; (4) Congress could not have intended the courts to violate the Constitution; (5) uncharged, unconvicted quantities recited in "hearsay-riddled presentence reports" are unreliable and were often uncontested by the defendant because they made no difference[8]; and (6) if Congress had wanted to burden the courts with fact-finding beyond the elements of conviction, it would have specifically mandated it.

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[7] *See, e.g.*, *Boulding*, 379 F.Supp.3d at 652-53; *Rose*, 379 F.Supp.3d at 234–35; *United States v. Mack*, 2019 WL 3297495, at *11 (D.N.J. July 23, 2019); *United States v. Shelton*, 2019 WL 1598921, at *2 (D.S.C. Apr. 15, 2019); *Wright v. United States*, 393 F.Supp.3d 432, 440 (E.D. Va. 2019); *United States v. Valentine*, 2019 WL 2754489, at *5 (W.D. Mich. July 2, 2019); *United States v. Jones*, 2019 WL 3767474, at *4 (W.D. Va. Aug. 9, 2019); *United States v. Vanburen*, 2019 WL 3082725, *3 (W.D. Va. July 15, 2019); *United States v. Martin*, 2019 WL 2571148, at *2 (E.D.N.Y. June 20, 2019); *United States v. Stone*, 2019 WL 2475750, at *2 (N.D. Ohio June 13, 2019); Memorandum at 6, *United States v. Matos*, No. 08-30019 (D. Mass. June 4, 2019); *Boulding*, 379 F.Supp.3d at 656 n.7; *United States v. Smith*, 2019 WL 2092581 at *3 (W.D. Va. May 13, 2019); *United States v. Francis*, 2019 WL 1983254 (S.D. Ala. May 3, 2019); *United States v. Dodd*, 372 F.Supp.3d 795, 797-98 (S.D. Iowa 2019); *United States v. Allen*, 384 F.Supp.3d 238, 242-43 (D. Conn. 2019); *United States v. Simons*, 2019 WL 1760840 at *6 (E.D.N.Y. Apr. 22, 2019).

[8] The information to which the government points for its hypothetical charges is known as "relevant conduct," which by definition, was not charged in an indictment, found by a jury beyond a reasonable doubt, or admitted by the defendant as an element in a guilty plea, U.S.S.G. § 1B1.3, and is permitted to be used only to calculate the advisory guideline range. At best, it is found by a judge by a "preponderance" of "information without regard to its admissibility under the rules of evidence applicable at trial." U.S.S.G. § 6A1.3. No drugs need be actually seized, or actually possessed or sold by the defendant. U.S.S.G. § 2D1.1, cmt. n. 5. It often consists of estimates based on hearsay from informants in law enforcement reports. The government conveys the information to a probation officer, who puts it in a presentence report. The defendant does not object when it makes no difference, for example, a mandatory exceeds the guideline range or the applicable guideline range is not based on drug quantity. *See, e.g.*, *United States v. Taylor*, 2019 WL 3852383, at *3 (Aug. 16, 2019). As Justice Scalia explained, "*judges* determine 'real conduct' on the basis of bureaucratically prepared, hearsay-riddled presentence reports." *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part). And that is why the Supreme Court held that the mandatory guidelines violated the Sixth Amendment.

Another theory of non-eligibility, which the government argued in every available case until DOJ conceded error in the Fourth Circuit two months ago, was that defendants whose sentences were partially commuted by President Obama were *ineligible* because they were now serving a "sentence imposed by the President," which Congress and the courts were powerless to reduce. Courts rejected this argument because Section 404 contains no such limitation, and the government's theory would violate the separation of powers. *See, e.g.*, *United States v. Pugh*, 2019 WL 1331684, at *3 (N.D. Ohio Mar. 25, 2019) ("[T]he President has no constitutional role in 'defining crimes or fixing penalties' which are legislative functions," and a commuted sentence is "a modification of [a sentence] previously imposed by a court which Congress and the courts have the power to reduce.").

Even if the defendant is eligible, the government argues, the court has little or no discretion under one of two theories. First, in determining the statutory range "as if" the FSA were in effect, the court must purportedly use uncharged, unconvicted conduct, rather than the facts established by the defendant's conviction; hence, the mandatory minimum and statutory maximum remain the same. Courts have rejected this argument because it would violate the Constitution, Congress knows that it is unconstitutional, and "Congress would not have expected federal courts to then double-down on ... unconstitutional findings in applying the First Step Act." *United States v. Williams*, 2019 WL 4014241, at *5 (N.D. Ill. Aug. 25, 2019).

Second, if the defendant's statutory range is lower but the guideline range is not, the government claims that the court's discretion is circumscribed by the limits in 18 U.S.C. § 3582(c)(2) and a Sentencing Commission policy statement, which require a guideline range that has been lowered by the Commission and prohibit a sentence below the guideline range. Accordingly, the government claims, the court has no discretion to consider mitigating factors to impose a sentence below the guideline range; put another way, the guidelines are mandatory.[9] Courts have rejected this argument because § 3582(c)(2) and its policy statement apply only to retroactive guideline amendments. Section 404 contains no such restrictions, and instead gives the court discretion whether and to what extent to impose a reduced sentence "after a complete review ... on the merits." Further, treating the guidelines as mandatory is unconstitutional.

In sum, although the government is free to argue that the court should exercise its discretion to deny or limit relief for any reason grounded in § 3553(a), it most often concentrates its efforts on claiming that the defendant is ineligible for any individualized review, or telling the courts that they have little or no discretion.

To my knowledge, courts have denied relief based on one of the arguments outlined above in about 20 cases. This not only perpetuates the unwarranted disparities Congress sought to remedy in those cases, but creates unwarranted disparities between these few defendants and

[9] For a typical example, *see United States v. Thompson*, 2019 WL 4040403, at **2-3 (W.D. Pa. Aug. 27, 2019).

the approximately 2,000 similarly situated defendants who have already been granted relief. Assuming these defendants will prevail on appeal, relief for them will be long delayed.

Another source of disparity is government appeals. To my knowledge, the government is appealing less than a dozen of the hundreds of orders rejecting its argument that defendants are ineligible based on hypothetical charges and convictions. Should the government succeed in any case, it will seek to return that person to prison. Yet these defendants are no different than the 2,000 who have already been granted relief. Through this litigation tactic, DOJ is creating unwarranted disparity.

Inconsistent Appointment of Counsel is Another Obstacle to the Full Implementation of Section 404 of the First Step Act.

There are two federal districts (of 94) in which there is no Federal Public Defender Office. In those districts, which rely entirely on panel attorneys to represent people who cannot afford counsel, judges have refused to appoint counsel to represent defendants in Section 404 and similar proceedings. Even in a few districts that do have Federal Public Defender Offices, some individual judges have refused to appoint counsel in these cases. If counsel is not appointed in the district court, counsel is also not appointed on appeal. This threatens the orderly development of the law. In these courts, individuals in prison, many of whom lack basic education much less a law degree, are forced to respond on their own to the kinds of government arguments described above. Without any adversarial process, these courts have already issued numerous denials. Indeed, there have been orders deeming counsel "unnecessary" because the court—without counsel—denied the defendant's Section 404 motion based on its erroneous conclusion that an entirely different statute applies.

Again, I appreciate the opportunity to testify before the Subcommittee and the opportunity to supplement my testimony. As mentioned in my testimony, vigorous oversight is integral to the successful implementation of the First Step Act. I appreciate the Subcommittee's commitment to the success of all parts of the Act.

Mr. CICILLINE. Thank you, Mr. Patton.

The chair now recognizes Dr. Hamilton for five minutes.

TESTIMONY OF MELISSA HAMILTON

Ms. HAMILTON. Thank you, Chair and Ranking Member, for this opportunity to speak on this important piece of legislation and to educate about this risk assessment tool.

There is a bright side here whereby the PATTERN tool has been unveiled, at least so now I understand the initial version, despite the very short time frame given. Still, as with any newly developed risk tool there are many concerning issues that must be addressed in its implementation to achieve the well-intended goals of the First Step Act.

I wish to address three key topics: Transparency, accuracy, and fairness.

On transparency, an unfortunate problem with many risk tools is their black-box nature by which developers keep much information secret from the public and the users. This sort of secrecy plagues PATTERN as well. Even though the DOJ released a report that contains some interesting data about PATTERN, the document is conspicuously vague, while not disclosing a host of information that is necessary to fully understand PATTERN and its warts.

Secrecy often undermines risk tool implementation because stakeholders just do not trust it. Confidence by stakeholders is a necessary condition for success. For example, the Brennan Center for Justice reports that it requested a document regarding BRAVO, which is the preexisting BOP-owned risk assessment tool on which PATTERN is based. Yet, Brennan reports they were rebuffed with a claim that it was proprietary.

The issue of trust is further evidenced whereby the National Association of Criminal Defense Lawyers has an outstanding FOIA request for the datasets, which was presented a little bit earlier, that would allow independent researchers then to conduct a third-party audit about PATTERN's abilities and fairness, because of the gaps in transparency thus far. I urge the DOJ and NIJ to comply with what is a reasonable FOIA request.

This leads me to the second point about accuracy. The report asserts the tool was validated, but for validation developers used a very limited definition, which simply signifies the tool's ability to rank recidivists better than a coin toss.

The tool produces high error rates. By sort of reverse-engineering the numbers that DOJ has provided, I found high false positive rates, which means assessing individuals at higher risk when they actually did not reoffend. Overall, PATTERN produces a false positive rate for general recidivism of 32 percent. For violent recidivism, the false positive rate is at 46 percent. Indeed, the acceptance of a much higher false positive rate over false negatives appears contrary to the aims of the First Step Act to incentivize more prisoners to pursue rehabilitative programs and productive activity.

The high number of false positives seems unnecessary considering the risk outcomes here are not meant to inform immediate release unless public safety is not compromised. Indeed, prisoners who committed the most serious offenses were already excluded from the First Step law in the first place.

There is an easy fix here. Simply move the cut points higher so that a greater number of individuals have at least the opportunity to earn rewards for taking measures to reduce their risk profiles.

My third point is fairness. PATTERN exhibits disparate impact, as evidenced by the DOJ report itself. PATTERN assesses as medium- and high-risk a substantially larger percentage of minorities. For instance, consider those in those higher-risk categories, and thus not able to gain the full benefits of the First Step Act. For males, the rates of higher-risk categories for whites are 43 percent, compared to Hispanics at 53 percent, and then African Americans at 73 percent, in the highest-risk categories.

Further evidence of racial and ethnic disparities is that PATTERN, at least as it now stands, simply is not calibrated equally across racial and ethnic groups. In other words, a medium- or high-risk score is associated with different recidivism rates along racial lines, indicating either over- or under-prediction.

A potential fix to this problem, though, is to limit what is counted to serious crimes, because as it currently stands, PATTERN counts any criminal act, even minor acts of deviance, in its criminal history measures and recidivism outcomes. Changing these definitions may well reduce the inequities for minorities.

Overall, I believe PATTERN has some merit, yet improvements could better serve this reform.

Thank you for your time.

[The statement of Ms. Hamilton follows:]

Written Testimony of Melissa Hamilton to the

United States House of Representatives

Committee on the Judiciary

Subcommittee on Crime, Terrorism, and Homeland Security

Oversight Hearing on the Bureau of Prisons and Implementation of the First Step Act

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The Department of Justice, National Institute of Justice, and the Bureau of Prisons are to be commended for managing the challenges of a tight time frame given by the First Step Act on introducing a risk and needs system. Further, offering a gender-sensitive scoring system is supportable by scientific studies and is likely to withstand most legal challenges considering that criminal justice statistics consistently show that women recidivate at far lower rates than males.[1] The DOJ has released a risk and needs system, as required by the First Step Act. Yet, as with any newly developed risk assessment system, improvements can be made. I address herein three major points applicable to any risk assessment tool: transparency, validity, and fairness. I then make suggestions on how the risk and needs tool initially released can be modified to better serve the legislation's purposes, while also addressing broader concerns.

Transparency

A critical foundation for successful implementation of a new risk assessment system is trust by stakeholders (e.g., judges, prosecutors, defense counsel, corrections officials). The black-box nature of most tools is commonly cited as undermining confidence that these tools have sufficient predictive ability, are reliably scored, and are equitable. Users and stakeholders who did not have faith in the tool can undermine the system by finding ways to score the tool differentially, blatantly or secretly override scores, ignore scores when making decisions, and otherwise challenge the system.[2] These responses would be unfortunate considering the many benefits that the First Step Act is designed to achieve for improving efficiencies, saving taxpayer dollars, incentivizing offenders to undertake beneficial programming, and protecting the public.

[1] *See generally* Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015), http://epubs.surrey.ac.uk/id/eprint/842342.

[2] Faye S. Taxman & Amy Dezember, *The Value and Importance of Risk and Need Assessment (RNA) in Corrections & Sentencing: An Overview of the Handbook, in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 22, 40 (Faye S. Taxman ed., 2017).

The BOP can bolster stakeholder trust by doing more to gain their buy-in. Transparency is "critically" important to stakeholder and user acceptance.[3] External trust and support can further leverage proper use by internal staff.[4] One reason to focus on the inclusion of stakeholders is that successful implementation will require a significant cultural shift in the criminal justice agencies involved and those who participate in it.

> Policymakers' need to know the subsequent strategies for public safety and recidivism reduction might begin with a simple question: Do risk assessment instruments reliably predict recidivism? The short answer, according to years and volumes of research, is resoundingly: yes. But we must be mindful of what saying yes may mean. Adoption of a risk assessment tool goes hand-in-hand with fundamentally altering approaches to reentry and correctional management, supervision, services, and more broadly criminal justice practice. Ultimately, the process of implementing risk assessments within an agency should consist of more than simply adding a tool to the agency portfolio; it should result in a shift of corrections culture, practices, and policies.[5]

Reference will be made herein to a report titled *The First Step Act of 2018: Risk and Needs Assessment System* issued by the DOJ on July 19, 2019 ("DOJ Report"). The DOJ Report implies that involved agencies have been transparent by reporting on a variety of information points about PATTERN. It is appreciated that the DOJ Report is clear about the point scoring system. It is also the case that the DOJ Report provides some statistics on its validation and recidivism results. However, the DOJ Report is lacking in so many other transparency areas and, as a result, the buy-in and confidence of key stakeholders may be lacking.

For example, the National Association of Criminal Defense Lawyers has submitted a FOIA request on October 8, 2019, to release the datasets on which PATTERN was developed and validated. Independent audits by third parties is consistently highlighted as a key mechanism for trust in risk assessment tools. Releasing criminal justice datasets for independent researchers to conduct audits is not novel. The U.S. Sentencing Commission, for example, releases its datasets quarterly and annually with a host of specific information on offending behavior, sociodemographic information, and sentencing outcomes. It is not evident that there have been any negative consequences to such practices.

The datasets requested are readily available. They have already been anonymized and delivered to the external PATTERN developers. Hence, there is no obvious burden to personnel

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[3] Faye S. Taxman & Amy Dezember, *The Value and Importance of Risk and Need Assessment (RNA) in Corrections & Sentencing: An Overview of the Handbook, in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 22, 37 (Faye S. Taxman ed., 2017).

[4] Faye S. Taxman & Amy Dezember, *The Value and Importance of Risk and Need Assessment (RNA) in Corrections & Sentencing: An Overview of the Handbook, in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 22, 47 (Faye S. Taxman ed., 2017).

[5] Faye S. Taxman & Amy Dezember, *The Value and Importance of Risk and Need Assessment (RNA) in Corrections & Sentencing: An Overview of the Handbook, in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 22, 22 (Faye S. Taxman ed., 2017).

or resources for the BOP and NIJ to publicly release these datasets. Doing so would be consistent with the First Step Act's intention regarding public availability of detailed information about the BOP risk and needs system developed and implemented under the legislation. The datasets would allow researchers to replicate the data points in the DOJ report, which is particularly important considering the existence of multiple data errors evident therein. Independent researchers would also then be able to calculate a host of measures that are absent in the DOJ Report yet are relevant to a more holistic analysis of the validity, reliability, and equity of the PATTERN tool as it exists. Further discussion about what a third party audit may helpfully reveal is discussed later herein.

Issues with transparency are also evident with the DOJ Report containing citations to papers that are not publicly available (e.g., reports cited at note 8 on page 64 and note 25 on page 66). The Brennan Center for Justice in a submission to the NIJ concerning PATTERN dated September 3, 2019 complains that it requested release of information on the BRAVO/BRAVO-R tools that the DOJ Report indicates are foundations for PATTERN (e.g., note 8 on page 64 of the DOJ Report), yet were rebuffed because of proprietary claims. This initial assertion of secrecy is deeply concerning.

Validity

The terms "validation" and a "validated tool" imply a strength of predictive ability. Yet, in reality, the terms only refer to a tool that can perform slightly better than chance. Thus, a validated tool simply means one that distinguishes recidivists from non-recidivists marginally better than the proverbial flip of a coin.[6]

The DOJ Report claims that PATTERN has been "validated." It uses as its primary basis for such claim a metric known as the area under the curve (AUC). The AUC is derived from a statistical plotting of true positives and false positives across a risk tool's rating system.[7] More specifically, the AUC is a discrimination index that represents the probability that a randomly selected recidivist received a higher risk classification than a randomly selected non-recidivist.[8] The size of the risk scale differential between them is irrelevant; as long as the risk classification of the

[6] KiDeuk Kim & Grant Duwe, *Improving the Performance of Risk Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 189, 217 (Faye S. Taxman ed., 2017).

[7] Jay P. Singh, *Predictive Validity Performance Indicators in Violent Risk Assessment*, 31 BEHAV. SCI. & L. 8, 15 (2013).

[8] Jay P. Singh et al., *Measurement of Predictive Validity in Violence Risk Assessment Studies*, 31 BEHAV. SCI. & L. 55, 64 (2013).

recidivism is even minimally higher, it will count positively toward the AUC.[9] The PATTERN AUC shows it performs better than chance and thus the DOJ Report declares it is thereby validated.

However, the AUC has serious limitations and thus cannot present a holistic portrait of a tool's abilities.[10] Validity has two main features: discrimination and calibration. *Discrimination* indicates the tool's ability to distinguish recidivists from non-recidivists. Discrimination, thus, represents the tool's relative accuracy (in terms of the ability to differentiate recidivisms from non-recidivists). Discrimination is retrospective in nature as it is calculated after the recidivists and non-recidivists are identified. In other words, discrimination determines how well the tool would have classified the recidivists versus the non-recidivists.

In contrast, *calibration* concerns how accurate the tool statistically estimates recidivism, and it measures the tool's absolute predictive accuracy. Calibration is prospective (i.e., forward looking) by indicating how well a tool predicts future recidivism. Hence, discrimination and calibration offer distinct contributions to judging a tool's validity. As a result, a tool may vary in how well it meets either of these metrics.

> A scale that ranks well, but systematically overestimates or underestimates risk might have good discriminative properties but be poorly calibrated to the population under examination; in contrast, a very simple scale (e.g., one that merely divided offenders into ever violent/never violent, or male/female groups) might be very well-calibrated but have only modest discriminative validity.[11]

An analogy may be useful here. Take a bathroom scale. Suggest you have two people, one of whom is clearly heavier than the other. Each gets on the scale and the weight given the heavier person is, indeed, higher than that of the lighter person. But the scale mistakenly begins at 50 pounds rather than 0 pounds. Thus the scale gives the heavier person a weight of 250 pounds when in reality the person weights 200 pounds. The scale discriminates between the two but is not calibrated well. It overestimates actual weight.

The AUC is a simple metric for discrimination. It provides little information on calibration. The AUC has further limits. The AUC cannot calculate how well an instrument selects those at medium or high risk.[12] The AUC can indicate performance better than chance even if no recidivists were ranked as medium and/or high risk. The AUC regrettable fails to distinguish between types of errors. Whether the errors are predominantly false positives or false negatives is simply not picked up in this single statistic. False positives are wrongful predictions of recidivism while false negatives are wrongful predictions of non-recidivism. But these differences likely matter to officials who generally have an interest in whether they prefer a higher rate of false positives

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[9] Philip D. Howard, *The Effect of Sample Heterogeneity and Risk Categorization on Area Under the Curve Predictive Validity Metrics*, 44 CRIM. JUST. & BEHAV. 103, 107-08 (2017).

[10] Jay P. Singh, *Predictive Validity Performance Indicators in Violent Risk Assessment*, 31 BEHAV. SCI. & L. 8, 16-18 (2013).

[11] Philip D. Howard, *The Effect of Sample Heterogeneity and Risk Categorization on Area Under the Curve Predictive Validity Metrics*, 44 CRIM. JUST. & BEHAV. 103, 105 (2017).

[12] Jay P. Singh, *Predictive Validity Performance Indicators in Violent Risk Assessment*, 31 BEHAV. SCI. & L. 8, 17 (2013).

versus false negatives.[13] Another flaw is that AUC accuracy rates between groups may be comparable, but the type of error may differ between groups. As an example, equivalent AUCs will mask whether one group has a higher rate of false positives, yet another a higher rate of false negatives.[14]

The disadvantages of the AUC in judging a tool's validity is well known. Here, we can draw on prior reports by the two external consultants hired to create PATTERN's: Dr. Zachary Hamilton and Dr. Grant Duwe. Each has previously written about such limitations. Hamilton has previously warned about "the mark of 'validated' [by an AUC as] a criterion that is rather easily achieved" as being slightly better than chance even though this may be a "*trivial* and *unexceptional accomplishment*."[15] Duwe agrees, writing that the AUC mark of validation may be "not practically meaningful" and that reliance upon it is "simple-minded."[16] Further, Duwe notes that the AUC is "casually misinterpreted as the probability that the [tool] accurately predicts who will reoffend and who will not. In other words, it is a measure of how well a risk assessment instrument can rank order recidivists and non-recidivists regardless of the predicted (absolute) risk."[17]

> [T]he AUC has the disadvantage of not being able to tell how likely individuals are to reoffend, which is a feature of well-calibrated risk assessment instruments. Calibration refers to the extent to which the predicted probabilities of risk agree with the occurrence of an actual outcome.[18]

Hence, Duwe argues that researchers "recognize the importance of not relying solely on the summary AUC" to evaluate a tool's performance.[19] Indeed, in the same article and others, Duwe actually computes preferred validity measures. In agreement, as a result of these limitations Hamilton has encouraged tool "creators to look to additional metrics of discrimination, calibration and accuracy to assure users of their instrument's strengths and weaknesses."[20] In sum, a claim about achieving a certain AUC level is far from a conclusive or holistic endorsement to support a claim that a tool is well-validated. For some unknown reason, the DOJ Report fails to follow through on providing evidence of these better visions of how well PATTERN performs from discrimination and calibration purposes.

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[13] Jorge M. Lobo et al., *AUC: A Misleading Measure of the Performance of Predictive Distribution Models*, 17 GLOBAL ECOLOGY & BIOGEOGRAPHY 145, 146 (2008).

[14] Solon Barocas et al., *Big Data, Data Science, and Civil Rights* (2017), https://arxiv.org/pdf/1706.03102.

[15] Zachary Hamilton et al., *Customizing Criminal Justice Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 536, 569 (Faye S. Taxman ed., 2017) (emphasis in original).

[16] KiDeuk Kim & Grant Duwe, *Improving the Performance of Risk Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 189, 216 (Faye S. Taxman ed., 2017).

[17] KiDeuk Kim & Grant Duwe, *Improving the Performance of Risk Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 189, 206 (Faye S. Taxman ed., 2017).

[18] KiDeuk Kim & Grant Duwe, *Improving the Performance of Risk Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 189, 206-07 (Faye S. Taxman ed., 2017).

[19] KiDeuk Kim & Grant Duwe, *Improving the Performance of Risk Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 189, 217 (Faye S. Taxman ed., 2017).

[20] Zachary Hamilton et al., *Customizing Criminal Justice Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 536, 596 (Faye S. Taxman ed., 2017).

Error Rates

The DOJ Report contains some numerical evidence that permits a third party to calculate relevant performance metrics beyond the AUC. Several measures of discrimination and calibration require the use of what is referred to in the risk assessment literature as a contingency table. It is also known as a 2 × 2 table because it has two rows and two columns. Table 1 provides the elements to a contingency table.

Table 1

A Contingency Table to Compute Error Rates

		Outcome		
		Recidivist	Non-Recidivist	
Assessment	High/Medium Risk	True Positives (TP)	False Positives (FP)	*False Discovery Rate (FDR)*
	Minimum/Low Risk	False Negatives (FN)	True Negatives (TN)	*False Omission Rate (FOR)*
		False Negative Rate (FNR)	*False Positive Rate (FPR)*	

The internal boxes in the contingency table require four statistics:

- TP are true positives, those correctly predicted to recidivate.
- FP are false positives, those wrongly predicted to recidivate.
- TN are true negatives, those correctly predicted not to recidivate.
- FN are false negatives, those wrongly predicted not to recidivate.

These four measures (TP, FP, TN, FN) require that one create two dichotomous (dividing a whole into two parts) factors. One is whether one is a recidivist or a non-recidivist, as in recidivist = yes or no. The other is the risk level. PATTERN has four risk levels (minimum, low, medium, high). The most appropriate way to divide risk levels is to combine medium and high into a group as the predicted recidivists and then combine the minimum with low into another grouping as the predicted non-recidivists. These recidivist and non-recidivists groupings are justified as the First Step Act provides substantive consequences to those whose risk scores land them in minimum and low, on the one hand, versus in medium and high categories, on the other.

The external figures in the contingency table are error rates which are computed using the numbers from the internal boxes. Table 2 conceptualizes them.

Table 2

False Positive Rate (FPR)	Retrospective; a measure of discrimination	Of those known to be non-recidivists, what percentage was classified as higher risk?
False Negative Rate (FNR)	Retrospective; a measure of discrimination	Of those known to be recidivists, what percentage was classified as lower risk?
False Discovery Rate (FDR)	Prospective; a measure of calibration	Of those classified as higher risk, what percentage did not recidivate?
False Omission Rate (FOR)	Prospective; a measure of calibration	Of those classified as lower risk, what percentage become recidivists?

Notice that the first two of these measures (FPR and FNR) are retrospective in nature in that they are computed after knowing which offenders actually did (or did not) recidivate. The FPR and FNR are calculated in the columns in the contingency table. The second two (FDR and FOR) are prospective in that they look at the groups as predicted to reoffend (or not) and whether they actually did go onto recidivate. The FDR and FOR are calculated in the rows of the contingency tables. The more exact computations of these error rates are compiled in Table 3.

Table 3

Definition(s)	*Measure*	*Calculation*
False negative error rate balance	False Negative Rate (FNR)	$\frac{FN}{FN+TP}$
False positive error rate balance	False Positive Rate (FPR)	$\frac{FP}{FP+TN}$
Type I Error	False Discovery Rate (FDR)	$\frac{FP}{FP+TP}$
Type II Error	False Omission Rate (FOR)	$\frac{FN}{FN+TN}$

Before revealing the various error rates in PATTERN, a bit more context is required. The DOJ Report outlines four risk scales: (1) general recidivism for males, (2) violent recidivism for males, (3) general recidivism for females, (4) violent recidivism for females. These scales have much overlap in risk factors, but not entirely, and their numeric scoring systems (i.e., points assigned) vary across the four.[21] However, these four scales do not determine a person's final risk category that drives whether they are eligible for significant rewards under the First Step Act. Instead, final risk categories were created by combining the risk outcomes from the general and violent

[21] DOJ Report Chapter 3, Table 2.

recidivism scales (by gender). According to the DOJ Report, it appears that the final risk categories are assigned as follows:

Final (Combined) Risk Outcome

- If minimum risk on both scales, then minimum risk outcome overall
- If less than medium risk on both scales, then low risk outcome overall
- If high risk on either scale, then high risk outcome overall
- All other cases, medium risk outcome overall

The error rates provided below, therefore, use the final risk categories as the relevant measure. In sort of reverse engineering the data provided in the DOJ Report[22], these error rates are shown here in Tables 4(a) and 4(b) for general and violent recidivism, respectively. (For these tables, the genders are combined as they are in relevant part of the DOJ Report.)

Table 4(a)

Error Rates in PATTERN

General Recidivism

		Outcome		
		Recidivist	Non-Recidivist	
Assessment	High/Medium Risk	25179 (TP)	13083 (FP)	34% *(FDR)*
	Minimum/Low Risk	7711 (FN)	27607 (TN)	22% *(FOR)*
		23% *(FNR)*	32% *(FPR)*	

Notice the FPR and FDR, both of which are about erroneously classifying individuals as higher risk (combining medium and high risk categories), are at about an error rate of one-third (i.e., 32% and 34%). The FNR and FOR, which are about erroneously classifying individuals as lower risk (combining minimum and low risk) occurs over one-fifth of the time (i.e., 23% and 22%). One can observe that for general recidivism, false positives are more "acceptable" than false negatives.

Two other relevant metrics can supplement our understanding. One is the cost ratio, which shows whether a tool produces a greater number of false positives over false negatives. Indeed, the cost ratio of false positives over false negatives for PATTERN general recidivism is 1.7, indicating almost twice as many false positives as false negatives. Another way to judge calibration is to compare a tool's predicted recidivism rate to the actual observed recidivism rate.

[22] DOJ Report Chapter 3, Table 5.

We can observe a calibration issue as the tool predicts a 52% general recidivism rate while 45% did reoffend.[23] In other words, PATTERN over overpredicts general recidivism risk.

Next, Table 4(b) provides error rates for PATTERN with violent recidivism.

Table 4(b)

Violent Recidivism

Assessment	Outcome: Recidivist	Outcome: Non-Recidivist	
High/Medium Risk	9352 (TP)	28910 (FP)	76% *(FDR)*
Minimum/Low Risk	1383 (FN)	33935 (TN)	4% *(FOR)*
	13% *(FNR)*	46% *(FPR)*	

PATTERN has significantly large error rates for its higher risk attributions for violent recidivism. The retrospective False Positive Rate is 46% while the prospective False Discovery Rate is 76%. The error rates for lower risk attributions are small. Clearly, the final risk categories are not reasonably predicting violent reoffending.

The cost ratio of false positives over false negatives is 20.9, indicating a significant preference for false positives. Then, PATTERN predicts 52% will violently recidivate, while only 15% did. This is a significant overprediction of violent reoffending overall.

It would likely be informative to stakeholders to understand what such error rates may be across racial groups. In other words, is the false positive rate higher or lower for Whites as compared to African-Americans or Hispanics? This type of analysis would help confirm the DOJ Report's claim that PATTERN is racially fair. Unfortunately, the DOJ Report does not provide the numbers to be able to make those calculations. This is a significant example of a gap in transparency.

Dimensions of Risk

Importantly, one should be aware of the significantly limited nature of what PATTERN predicts. Even advocates of evidence-based practices acknowledge that a key question is—measuring the risk of what?[24] PATTERN predicts the probability of a single event: any recidivism, which it defines as any arrest (serious or nonserious) or return to prison (e.g., technical violation).

[23] The 45% general recidivism figure here is slightly off of the 47% recidivism statistic reported in the DOJ Report because the exact numbers in this document were based on percentages given in the DOJ Report that did not include decimals to allow more precise figures here.

[24] Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 743 (2011).

Presumably, though, the concept of risk that is the foundation of the First Step Act is not some singular feature focused solely on an abstract likelihood of being charged with some infraction at some point in the future. Instead, at least six different dimensions of risk are conceivably pertinent. Probability is only one of them. The other important dimensions include offense type (e.g., terrorism, violent, property, white collar, drugs), severity of harm, imminence, frequency, and duration of offending.[25] Unfortunately, PATTERN ignores most of those additional, yet important, dimensions. While PATTERN has a violence scale, it counts any serious or nonserious arrest for a violence-related offense, which presumably then includes minor threats or assaults.

Reliability

Another critical component of accuracy is entirely missing from the DOJ Report. Reliability refers here to consistency in scoring a tool across evaluators. A desirable trait exists whereby the same individual will receive the same score by different evaluators. A PATTERN developer has confirmed the salience of this aspect, writing in another article: "One of the important first steps in implementing a risk assessment instrument is to ensure that the instrument is administered consistently by those who collect and score risk factors."[26] Indeed, the developer (correctly) concedes that reliability and validity are the two principal properties to evaluate the ability of the instrument.[27] An unreliable tool will undermine its validity. The most common metric is the inter-rater reliability score to check for the degree of consistency in scoring between raters.[28] As the DOJ Report makes no mention of inter-rater reliability, the (limited) validity measures it does provide remain suspect.

Fairness

Algorithmic fairness is of growing interest as algorithms pervade society and public institutions. The literature now offers many different definitions about how to conceptualize and test for algorithmic fairness. The usual interest here is fairness across sociodemographic groups.

Statistical/Demographic Parity

One of the most popular group fairness definitions is statistical parity. Statistical parity exists when the percentages of offenders predicted to recidivate and those predicted not to recidivate are the same across groups.[29] Hypothetically, if 40% of those assessed in one group are predicted

[25] Michael H. Fogel, *Violence Risk Assessment Evaluation: Practices and Procedures, in* HANDBOOK OF VIOLENCE RISK ASSESSMENT AND TREATMENT: NEW APPROACHES FOR FORENSIC MENTAL HEALTH PROFESSIONALS 41, 43 (Joel T. Andrade ed., 2009).

[26] Grant Duwe, *Why Inter-Rater Reliability Matters for Recidivism Risk Assessment* 2 (2017), https://psrac.bja.ojp.gov/ojpasset/Documents/PB-Interrater-Reliability.pdf.

[27] *Id.*

[28] Zachary Hamilton et al., *Customizing Criminal Justice Assessments, in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 536, 568 (Faye S. Taxman ed., 2017).

[29] Richard Berk, *Accuracy and Fairness for Juvenile Justice Risks Assessments*, 16 J. EMPIRICAL LEG. STUD. 175, 184 (2019).

to recidivate, statistical parity would require that the tool predict 40% of the other group to recidivate. The literature also refers to this measure of equity as demographic parity if the groups at issue are distinguished by some demographic characteristic (e.g., race, class, gender).[30] A lack of demographic parity suggests disparate treatment.

How does PATTERN fare on demographic parity? The same dichotomous groupings mentioned earlier are used here. PATTERN's combined medium and high risk categories comprise the predicted recidivists, while the minimum and low categories combined represent the predicted non-recidivists. Table 5(a)[31] shows the rates of predictions across race/ethnicity for males.

Table 5(a)

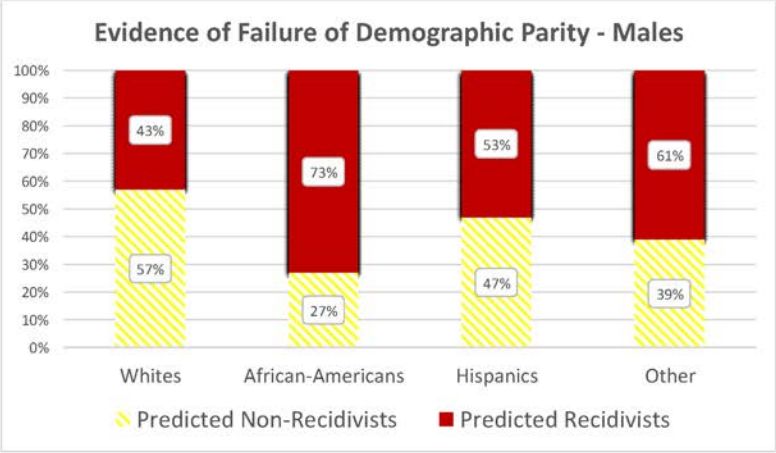


Table 5(a) evidences the lack of statistical/demographic parity of PATTERN for males. The tool predicts unequal proportions of recidivists across racial/ethnic groups, from 43% for White males, 53% for Hispanic males, and a significantly larger 73% for African-American males. Table 5(a) reflects another inequality. The First Step Act provides the greatest benefits to those scoring in the minimum and low risk categories. Notice that only 27% of African-Americans are able to gain the greatest benefits from the First Step Act, while more than twice that percentage, 57%, of Whites are eligible for those benefits. Indeed, PATTERN is significantly less likely (not shown in Table 5(a)) to classify White males into the extreme "High" risk category at 29%, compared to

[30] *See, e.g.*, James E. Johndrow & Kristian Lum, *An Algorithm for Removing Sensitive Information: Application to Race-Independent Recidivism Prediction*, 13 ANNALS APPLIED STAT. 189 (2019), https://www.e-publications.org/ims/submission/AOAS/user/submissionFile/30728?confirm=1d6331c2.

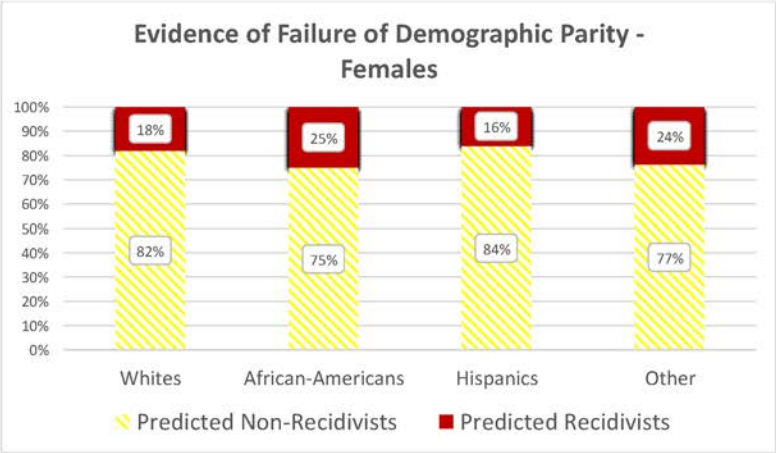
[31] This table is calculated from the DOJ Report Table 8. The percentages do not exactly match as the DOJ Report table does not add to 100% likely because of rounding.

53% of African-American males. This means that a African-American males are far less likely to ever earn the best incentives and rewards from the First Step Act.

The DOJ Report acknowledges a racial/ethnic disparity for males, though implicitly. The document uses the Relative Rate Index but does not discuss the adverse result in the text. Here, instead of again using the four racial/ethnic categories, the DOJ Report creates two groups: Whites and non-Whites. An RRI over 1.0 indicates disparity between groups.[32] The DOJ Report indicates an RRI of 1.54 for males,[33] which reflects racial disparity. Non-Whites are one-and-a-half times more likely to be assessed as medium/high risk than Whites. Thus, non-Whites face substantially reduced opportunities to gain early release credits through the First Step Act. It is odd that RRIs were computed in this way of Whites versus non-Whites. A DOJ technical manual indicates that best practices dictate that the RRI be calculated separately for each minority group that comprises at least one percent of the total population scored.[34] Thus, the document would more appropriately have calculated RRI's to compare Whites with African-Americans and Hispanics separately. The "Other" category used is also of concern. Native-Americans and Asian-Americans are often ignored racial groupings, yet each comprises greater than one percent of federal defendants and thus their numbers should separately have been included.

A vision of demographic parity for females is provided in Table 5(b).

Table 5(b)



[32] Zachary Hamilton et al., *Recrafting Youth Risk Assessment: Developing the Modified Positive Achievement Change Tool for Iowa*, DEVIANT BEHAV. (forthcoming 2019).

[33] DOJ Report Chapter 3, Table 8.

[34] William Feyerherm et al., *Identification and Monitoring, in* Dept. of Just. Office of Juvenile Justice and Delinquency Prevention, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL 1-1, 1-2, 3 (4th ed. 2009).

Demographic parity remains a problem for females, though to a lesser degree than males. PATTERN predicted that 16% of Hispanic females would be recidivists, compared to 18% for White females and 25% for African-American females. Then, considering that predicted non-recidivists combine the minimum and low risk categories, African-American females benefit less often from the First Step Act's incentives and rewards. The reported Relative Rate Index with Whites versus non-Whites does not indicate a significant disparity for females. But with Hispanic females having a higher rate than White females of being eligible for early release credit, this washes out the potential disparity that an RRI computation separately for Whites versus African-Americans might show. It would also be useful to understand how Native-American and Asian-American females fare.

Overall, these sorts of racial/ethnic disparities are concerning. The risk assessment literature has been progressive as of late in crafting and testing various ways to ameliorate disparities. But to do so one would need to employ more data points than are provided in the DOJ Report. An interested party with access to the underlying datasets could look for which risk factors in PATTERN might be driving the disparities and then work on corrections that try to save predictive ability while reducing group inequities. For example, if criminal history measures account for a substantial portion of the discrepancies for African-Americans, then modifying criminal history in risk-sensitive ways may improve the tool and its equitable outcomes. Likely options could be to discount prior history with crack cocaine or marijuana arrests, both of which tend to be associated with differential policing practices in poorer areas. Excising misdemeanors from criminal history and recidivism definitions may also result in more equitably fair scores. As well, if the educational score suggests that it is a proxy for minority neighborhood disadvantage, then a fix to it might drive down disparate impact.

Notably, there are other ways to assess for test bias. The DOJ Report suggests one of them when it notes that "[t]o be racially unbiased or neutral, the tool should ensure race and ethnicity have no effect on the tool's outcomes, specifically the prediction of whether an individual will recidivate, once the tool is controlled."[35] The description and its accompanying footnote is referring to what has been nicknamed the Cleary method involving hierarchical regression models.[36] This type of test is respected, yet for some reason the DOJ Report does not actually use it. One with access to the underlying datasets could usefully employ this method to assess racial/ethnic bias further.

[35] DOJ Report, at 28.

[36] Melissa Hamilton, *The Biased Algorithm*, 56 AM. CRIM. L. REV. 1553 (2019), http://epubs.surrey.ac.uk/id/eprint/852008.

Differential Calibration

The algorithmic fairness definition of equal calibration requires that tool outcomes mean the same thing across groups. Table 6(a)[37] shows general recidivism rates for males by PATTERN risk category.

Table 6(a)

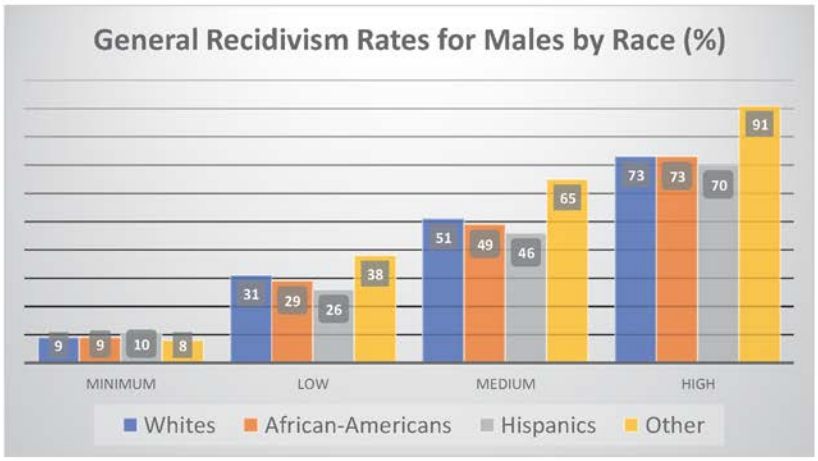
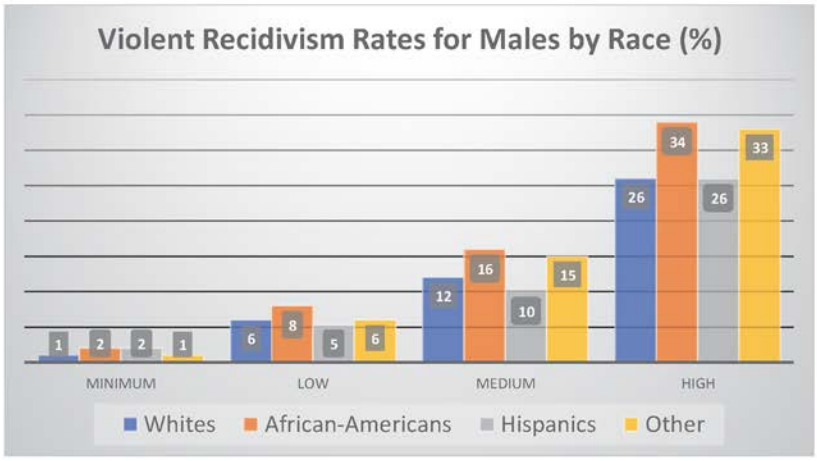


Table 6(a) indicates that risk categories do not mean the same thing across racial/ethnic lines for males. For example, a low risk outcome sees a 26% general recidivism rate for Hispanics but a 38% for Other. A medium risk outcome means a 46% chance of reoffending for Hispanics but a 65% general recidivism rate for Other. Table 6(a) also indicates that PATTERN tends to overpredict risk for African-American and Hispanic males while underpredicting for Other.

The differential calibration is worse for violent recidivism in males, as seen in Table 6(b).[38]

[37] DOJ Report Chapter 3, Table 9.
[38] DOJ Report Chapter 3, Table 10.

Table 6(b)



Again, the PATTERN risk categories do not mean the same thing across racial/ethnic groups for males for violent recidivism. The most significant difference is at the high risk category whereby 26% of Whites and Hispanics violently reoffended, compared to 34% for African-American males. Table 6(b) indicates that PATTERN underpredicts violent recidivism for African-American and Other males in the medium and high categories. We next can observe how well PATTERN is calibrated for females by race/ethnicity for general recidivism in Table 6(c).

Table 6(c)

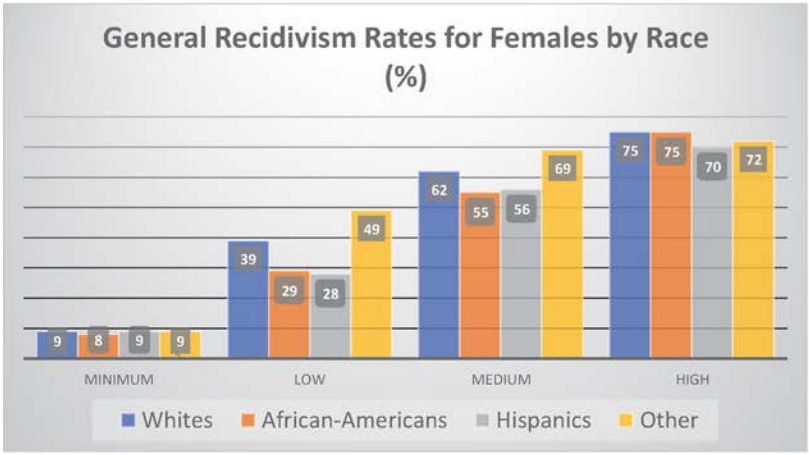
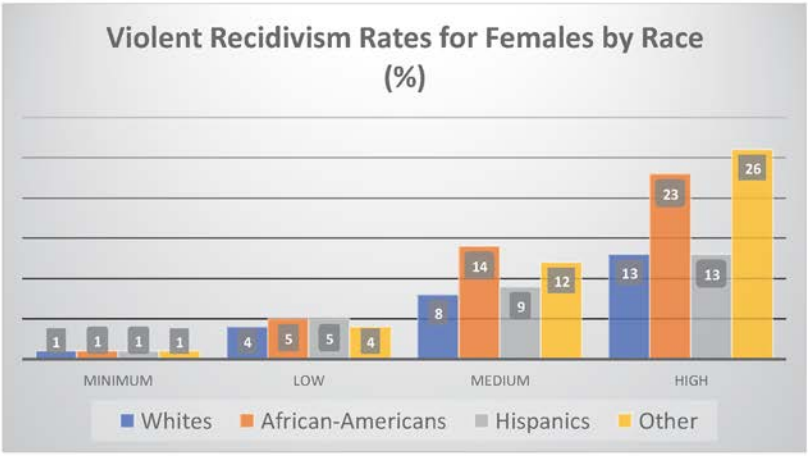


Table 6(c) indicates the most significant problem is in the low risk category, with significant variations across racial/ethnic groups for women. The situation, though, is more dire for violent recidivism in females, as indicated in Table 6(d).

Table 6(d)



For violent recidivism, PATTERN significantly varies in performance in the medium and high risk groups for women. This means that PATTERN risk categories just do not perform similarly across racial groups for women.

Improvements

The PATTERN risk tool can better achieve the goals of the First Step Act through a variety of steps.

1. It is of questionable value and equity to include all arrests. One of the developers has written that risk assessment used by a department of corrections for sentenced prisoners ought rightly to focus on reincarcerations and reconvictions on violent crimes and felonies, rather than on less serious offenses or arrests.[39] Faye Taxman, one of the Independent Review Committee members, has similarly critiqued tools when "measures of criminal history tend to treat all crimes the same without prioritizing more serious criminal behavior."[40] Misdemeanors, technical violations, and arrests are poor proxies to actual, serious offending. By definition, any proxy measures for crime will be fundamentally inaccurate.[41] Arrests, in particular, are troubling because of their relatively low evidentiary bar and the fact they may instead reflect differential and discriminatory policing practices that disproportionately target minorities. Thus, to echo suggestions by other contributors, the tool might better focus on serious and violent convictions.
2. The significant error rates in overpredicting recidivism undermines the goal of the First Step Act to incentivize all offenders to undertake rehabilitative programming and otherwise reduce their risk levels. There is an easy fix. Changing the cut-points higher between low and medium would be the single most important resolution. This would automatically increase the number of prisoners eligible to earn and apply early release credits. In reality, there is no single method for determining cut-points. One of PATTERN's developers has written about this. The method chosen for PATTERN of using fractions of the base rates is, as he has admitted, "somewhat arbitrary."[42] Using another option or simply changing these fractions may yield fewer false positives and permit more prisoners to gain the advantages of engaging with needs-based programming.

[39] Zachary Hamilton et al., *Customizing Criminal Justice Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 536, 562-64 (Faye S. Taxman ed., 2017).

[40] Faye S. Taxman & Amy Dezember, *The Value and Importance of Risk and Need Assessment (RNA) in Corrections & Sentencing: An Overview of the Handbook, in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 22, 32 (Faye S. Taxman ed., 2017).

[41] MICHAEL VEALE, THE LAW SOCIETY, ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM 18 (2019).

[42] Zachary Hamilton et al., *Customizing Criminal Justice Assessments*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 536, 561 (Faye S. Taxman ed., 2017).

3. Cut-points should be increased for another reason. Increasing cut-points can reduce the significant false positive rates and false discovery rates. The size of these error rates conflict with the goals of the First Step Act.
4. PATTERN could better represent the evidence-informed literature by incorporating additional protective factors that moderate (lessen) the salience of a risk factor or promotive factors that predict desistence (the flip side of a risk factor).[43]
5. Empirical research confirms the age-crime curve. As a result, the factor of age at assessment should have gradated negative points as age increases. Currently, the age at assessment only have positive points, all indicating increased risk with the sole exception of those over 60 years, which have zero points. Other tools more appropriate deduct points in significant increments as age increases.
6. Research indicates that the salience of criminal history as a risk factor fades over time. As a result, some mechanism should be seriously considered to reduce the points for criminal history as such events become stale over time.
7. Weights for dynamic factors should be substantially increased to more realistically allow prisoners to lower their risk scores with risk-reducing activities. The DOJ Report asserts that 99% of prisoners can reduce their risk category to low. As the current point totals significantly weight static factors, this statistic is implausible.
8. The final Risk Level Categories could be modified to allow more offenders to gain greater advantages of the First Step Act by assuming a lower risk outcome. For example, a person who scored low risk on the violent recidivism tool and medium risk on the general recidivism tool should be assigned a low risk final category rather than medium as currently applied.
9. It appears that many of the factors overlap without justification provided. This raised some questions about double and triple counting of the same events.
    a. Can the same violent offense be counted multiple times, such as in the Criminal History Score, Infraction Convictions, Instant Offense Violent, History of Violence, and/or Sex Offender?
    b. Can the same sex offense be counted multiple times, such as in the Criminal History, Infraction Convictions, Instant Offense Violent, History of Violence, and/or Sex Offender?
    c. Can a single infraction count as both any infraction and then again as a violent/serious infraction?
    d. Can a single infraction also count in the BRAVO criminal history factor and/or the sex offense (such as on a reassessment)?
    e. Young age can be counted twice for young prisoners whose index arrest/conviction (the DOJ Report is inconsistent on whether it is age at first

[43] John Monahan & Jennifer Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CRIM. PSYCHOL. 489 (2016).

arrest or age at first conviction) was their first. Should this double-counting be ameliorated?

f. Can a person with multiple violent priors receive multiple point scores in this single variable? For example, in the male general recidivism tool, if a defendant had a minor violent offense <5 years plus a serious violent offense >15 years, would the defendant be scored as 5 or 7?

10. PATTERN increases points for a history of a sex offense (this appears not to require a formal charge or conviction). But separate DOJ reports on national samples have found that sex offenders are at lower risk of general recidivism.[44] Thus, this factor may not be supported by empirical research as a valid risk factor and should be excised as a result.
11. What is the empirical basis for including the violent offense factor? This appears to be contrary to DOJ studies of national samples of offenders released whereby violent offenders at a lower risk of general recidivism compared to other types of offenders? Is this factor really operating as a policy override for other purposes?[45]
12. A stand-alone mechanism for disputing risk scores must be established. The current plan appears to be to simply apply the current prisoner grievance system. This is insufficient and inapplicable. Algorithmic risk assessment practices require their own processes to challenge.
13. Information on overrides of PATTERN outcomes is required.
14. The datasets should be public released. Statisticians could effectively mine them to determine how the tool fares across algorithmic fairness definitions. Some of those definitions were outlined earlier. Additional ones are available in the literature that can be informative. These include the ability to test group fairness (e.g., race, ethnicity, gender, age) on such measures as balance for the positive class, balance for the negative class, diagnostic odds ratios, and correlations. Further, understanding how missing data was treated would be helpful.
15. Independent reviews of the datasets could allow data scientists to suggest ways to ameliorate the racial biases that are evident. For example, an audit could reveal which risk factors correlate with race/ethnicity and thus should be removed and/or modified to improve algorithmic fairness across effected groups.

Thank-you for the opportunity to submit this written testimony to the Subcommittee.

[44] Matthew R. Durose et al., Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 (2014) (Special Report, U.S. Dept. of Just.).

[45] Mariel Alper and Matthew R. Durose, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2006-2014) (2019) (Special Report, U.S. Dept. of Just.).

Mr. CICILLINE. Thank you, Dr. Hamilton.

I now recognize Mr. Walters for five minutes.

TESTIMONY OF JOHN P. WALTERS

Mr. WALTERS. Thank you, Mr. Chair. I just wanted to express my sympathy, as well, to you, the colleagues of Congressman Cummings. When I last served in the White House Drug Policy Office, he was Chair Cummings, my authorizing chairman. He was a steadfast partner and energetic, and most of all he was a good man. I know you miss him. I miss him as well.

I am here representing as a Member of the Independent Review Committee. We didn't actually have a Chair. We worked as a group of six experts designed to give advice to the Justice Department, as specified under the act. We have a range or individuals, some of whom's qualifications are also specified in the act, but they have a broad array of backgrounds in risk and needs assessment and management of similar Federal programs and policies and in helping to run institutions of corrections at the Federal and State level, as well as broad published backgrounds in international journals and associations on these matters.

We worked with the Justice Department since the beginning of the work on the PATTERN risk assessment tool. We have also been working on the needs assessment and the programming implementation with regard to the implementation of the First Step Act. This is a massive change in the structure and purpose and mission of the Bureau of Prisons and our corrections system. It is a first step obviously designed to convey change throughout the United States criminal justice system, from one that is just holding people as a part of a criminal sentence to giving them a chance to transform their lives and reenter society as productive individuals. That requires a great deal of work, some of which is detailed within the Act itself, as you know.

We have worked on a couple of things since the release of the July 19th report. Prior to that report, we did work with the Department and the contractors designing the PATTERN system, as well as some of the initial work on the matching needs assessment and programming.

Since the release of that report, we have worked extensively to advise on the refinement of the PATTERN system. Our goal has been to reduce bias in the PATTERN instrument, both perceived and real bias in the instrument's elements and the way in which the algorithm is formulated. We have been allowed, through the Department of Justice, to work directly with the contractors, and they run over 200 hours of analysis, at our direction, to test additional sensitivity and to test for bias within the instrument.

We have made a series of recommendations to the Department of Justice about changing the PATTERN instrument, some of which would be somewhat substantial change to the structure of the instrument to remove any concern about bias while continuing to predict risk. Obviously, we all want the instrument to be valid, but we also want the instrument to capture real differences and not bias.

In addition, we provided proposals on needs assessment. We haven't talked as much about that, but that is obviously a key part

of the First Step Act and the need to match the programming in the Bureau of Prisons systems to the needs as determined by a fair assessment of the individuals coming into the Federal system.

The range of programs here is somewhat limited in the current structure, and the evaluation of those programs is even more limited, we have found. So, the structure of both identifying the proper way of assessing individuals and matching the programs is critical, and that is ongoing.

We have also provided additional advice on making this system more transparent, providing some of the information previous witnesses have asked, and also providing information on how the system is working now and what is happening to released individuals, and closer to real time, so we can see how the system is evolving.

Finally, I would like to make one point about resources, which has been touched on earlier, but I think all of us on the Committee believe is critical. The $75 million that has been authorized and will be appropriated for the implementation of the First Step Act of course amounts to about $400 per individual in the Federal prison system. The $7 billion, roughly, fiscal year 2019 appropriation, it is a small drop in the bucket. It is not enough.

I would estimate—just my personal estimate of what is going to be needed here for a fair implementation, training, staffing, building things like classrooms in prison institutions that now exist, is somewhere in the neighborhood of $300 million to begin with and then programming down the line at $500 million. I would also strongly urge that at least 10 percent of those funds always go for evaluation and research and development of programs and refinement of the process of running these programs. If you don't do this, what you are going to have is a system that simply can't meet the expectations—the high expectations that have been stated, because it is just not going to have the resources that an institution, the Bureau of Prisons, which is already understaffed and can't meet its current staffing levels.

Thank you.

[The statement of Mr. Walters follows:]

Testimony Submitted by John P. Walters, Member of the First Step Act Independent Review Committee and Chief Operating Officer of Hudson Institute to the U.S. House of Representatives, The Committee on the Judiciary, The Subcommittee on Crime, Terrorism and Homeland Security

October 17, 2019

In April 2019, the National Institute of Justice awarded Hudson Institute a contract to serve as host organization for the Independent Review Committee specified by Title I of the First Step Act of 2018. As its 501(c)(3) status requires, Hudson took no institutional position on the First Step Act at any time, and as host organization for the Independent Review Committee its role has been exactly that: to select, and host, the most qualified group of criminal justice experts—satisfying the First Step Act's criteria—to advise the Attorney General on the development of a risk and needs assessment and on the implementation of the Act. Hudson supports the efforts of IRC experts; facilitates analysis and reviews by committee members; and serves as liaison between the IRC and the Department of Justice.

The Independent Review Committee

The Independent Review Committee is composed of six experts from a range of fields and with extensive expertise in both research and operations. Dr. Faye S. Taxman is University Professor in the Criminology, Law and Society Program at George Mason University and a Director at the Center for Advancing Correctional Excellence. She is recognized for her work developing care systems that link the criminal justice system with other service delivery systems. Dr. James Byrne is Professor and Associate Chair of Criminology and Justice Studies at the University of Massachusetts, Lowell. His work focuses on the effectiveness of institutional and community-based corrections, the nexus of technology with crime and the criminal justice

response, and social ecology and criminal justice policy. Dr. Patti Butterfield is an Adjunct Professor at Southern New Hampshire University, teaching courses on Forensic Psychology, Abnormal Psychology, and Foundations of Addiction, and a former Senior Deputy Assistant Director at the Central Office at the Bureau of Prisons in the Reentry Services Division. During her time at BOP, she was responsible for overseeing the following components: psychology, residential reentry management, reentry affairs, chaplaincy, female offenders, and other special populations. George J. Terwilliger III is Partner and co-head of the white-collar practice at McGuire Woods LLP, following fifteen years in the US Department of Justice, including as Acting Attorney General. He still provides counsel for and advises government officials, Congress, and private organizations on public policy and legal issues. John E. Wetzel is Secretary of Corrections for the Commonwealth of Pennsylvania, first appointed in 2011 and overseeing the first population reduction in Pennsylvania Corrections in over four decades. He has guided the Department through restructuring Community Corrections, their mental health systems, and the implementation of security enhancements, while simultaneously reducing departmental spending. I am the sixth member of the committee and serve as Chief Operating Officer of Hudson Institute. I was the Director of National Drug Control Policy from 2001 to 2009, helping manage all aspects of federal drug policy and programs, including prevention education, treatment expansion thoughout the criminal justice system, screening in the healthcare system.

Since its formation, the IRC has offered a range of expert advice to Department of Justice as it developed and refined its new risk and needs assessment instruments; reviewed and selected programs to designate as evidence-based recidivism-reduction programs and productive activities; and offered suggestions regarding implementation oversight and improvement. The

foundational committee activity from its inception has been weekly conference calls, in which members discuss their views regarding materials and questions forwarded by DOJ. These conference sessions have resulted in detailed statistical and substantive analysis by individual IRC members that has been supplied to DOJ.

In addition, last June, the IRC solicited recommendations, concerns, and priorities for further research from nearly eighty-five expert, external organizations and individuals concerned with criminal justice, victims' rights, and law enforcement. These groups included such diverse organizations as the American Civil Liberties Union; the American Bar Association; and the National Sheriffs Association. Representatives from the IRC also attended National Institute of Justice listening sessions designed to give concerned organizations or experts the opportunity to comment on the initial draft of DOJ's new Prisoner Assessment Tool Targeting Estimated Risk and Needs, or simply "PATTERN" and other components of the Act. Finally, NIJ contractors Zachary Hamilton and Grant Duwe, PATTERN's designers have spent nearly 200 hours working on statistical tests and variations of the original model at the IRC's request. This analysis was intended to correct errors, test the reliability of the model, and remove bias.

Members of IRC have also conducted site visits. These include Grand Prairie, Texas to tour the Bureau of Prison's Designation and Sentence Computation Center, where the Bureau collects and processes inmate data. And last month, an IRC member accompanied a delegation of DOJ officials to Ottawa to hear presentations from Canadian corrections officials on program delivery and to see how those programs were developed and implemented.

Prior to the release of the National Institute of Justice's July 19, 2019 report on the Risk and Needs Assessment, IRC members participated in several direct discussions with DOJ officials, including the Deputy Attorney General and the Attorney General. These presentations

were an honest assessment of the state of PATTERN, including major concerns, areas that were necessary to improve, and recommendations about how to proceed. The IRC also recently participated in a workshop with key DOJ officials, offering final recommendations on possible refinements PATTERN before it is implemented for the first time later this year and discussing next steps regarding the implementation of needs programming.

To supplement and drive its discussions with the Department, the Committee also submitted several written analyses, each drawn from the expertise of individual IRC members and substantial discussion within the IRC.

The Committee's future work centers on three objectives. First, as the January implementation deadline approaches, we will continue to advise the Department of Justice on implementation matters, including program selection, evaluation, and quality control. Second, we will begin research and discussion about those inmates excluded from earning time credits by their offense type, as the Act requires, determining their relative risk of recidivism and weighing that alongside other considerations that led to their exclusions. And, finally, the IRC will deliver a report to the four committees specified by the act, describing current progress towards the Act's faithful implementation and indicating next steps or additional measures that will ensure its objectives are met.

Hudson Institute

Hudson Institute was founded in 1961 and is dedicated to promoting American leadership and global engagement for a secure, free, and prosperous future. Hudson is a 501(c)(3), nonpartisan, nonprofit organization and as such takes no institutional stance on specific legislation, candidacies, or issues. For nearly sixty years, the Institute has striven to challenge

conventional thinking, and to help manage strategic transitions to the future through interdisciplinary studies in defense, international relations, economics, health care, technology, culture, and law.

Thank you.

Chair NADLER. [Presiding.] Ms. James.

TESTIMONY OF ANDREA JAMES

Ms. JAMES. Thank you, Mr. Chair. I would also like to thank Madam Chair Bass and Members of the subcommittee. Thank you for this opportunity. I also would like to, for the National Council, on behalf of the National Council, express our sympathy in the loss of Congressman Cummings, who was a huge champion for us, and always had an open-door policy for our concerns. So, we will truly miss him.

Thank you again for this opportunity. Again, my name is Andrea James. I am the Executive Director of the National Council for Incarcerated and Formerly Incarcerated Women and Girls. The National Council is a Membership-based organization working to end the incarceration of women and girls. It is honor for me to share our views on implementation of the First Step Act and next steps Congress should take to transform the criminal legal system.

Regarding the First Step Act implementation, reforming the criminal legal system is one of the most important issues of our time. This country incarcerates more people than any other developed Nation in the world, with over 2 million people incarcerated, and increasing number of whom are women and girls. At the Federal level, we incarcerate approximately 177,000 people, 45 percent of whom are incarcerated for a Federal drug offense, and a disproportionate number of whom are Black and brown. This is a national crisis that Congress must address.

With the passage of the First Step Act, Congress attempted to build on several important reforms that preceded it, the Second Chance Act of 2008, and the Fair Sentencing Act of 2010, to continue to move the ball forward.

While there have been some modest but important improvements to the system as a result of the passage of the First Step Act—giving judges greater discretion to depart from mandatory minimum sentences, making the Fair Sentencing Act retroactive, reducing some mandatory minimum sentences for drug offenses, ending juvenile solitary confinement, expanding compassionate release, and increasing good-time credit to reduce sentence lengths for individuals currently incarcerated—there remain key issues with respect to its implementation and more work that needs to be done to transform the system.

As a Membership organization with Members inside and outside of prisons, we receive dozens of emails a week from women who are confused about the First Step Act, having received conflicting information, making it difficult for many incarcerated people to take advantage of what the First Step Act has to offer.

Much of the confusion has been the result of the exclusions that were included within the bill and completely bar far too many people from the act's benefits. Literally 68 categories of people may not receive earned time credits, despite their successful participation in educational programming, essentially closing the door on individuals who most need help in preparation for successful return to our communities. Also, excluded are people who are slated to be deported after their sentence is completed, denying them any chance to prepare in any way for their transition. As we look towards the

future, Congress must work to avoid unnecessary exclusions that ultimately undermine efforts to rehabilitate people.

Regarding the risk assessment tool, we are concerned that the tool will incorrectly identify women as likely to recidivate based on static measures such as the crime for which they were convicted. We therefore urge that the approach to developing the risk assessment tool be modified. The circle of people involved in developing the tool must be widened to include the expertise of qualified formerly incarcerated people. The Hudson Institute is hosting the development team and has selected academics who may have strong technical credentials, but none of whom have direct experience with the criminal legal system.

Experiences of currently incarcerated people must also shape the development of the risk assessment tool. By definition, women serving decades-long sentences will be flagged as high risk. In fact, they are the opposite. Women who were serving long sentences are integral to the day-to-day functioning of the prisons. They teach other incarcerated women and prison staff the procedures of the prison, including training for industry jobs, such as UNICOR. Long-timer women counsel new women adjusting to life in prison, provide comfort and advice to those separated from their children, and mediate interpersonal conflicts. These contributions should be captured in the risk assessment tool.

Women like those who have traveled here with me today—Virginia Douglas, Justine Moore, and Tiheba Bain, all having served decades in a Federal prison and now leading the movement to end incarceration of women and girls who could contribute significantly to the risk assessment discussion and development, in addition to the statisticians.

Finally, credit for earned time must be assessed retroactively, taking into consideration the ways many incarcerated people already have made great strides in their personal transformation, against great odds, during years of incarceration. Ultimately, we recommend that Congress ensures the Department of Justice addresses all these issues before anyone is assessed by the PATTERN tool.

Regarding next steps, directly impacted people must have a seat at the table. As experts in the field, our goal is to encourage meaningful reform, and we are entitled to ongoing, meaningful opportunity to explain why we don't believe something goes far enough and what else is possible. Such is our fight for inclusion of retroactivity.

I was incarcerated at the Federal Prison for Women in Danbury, Connecticut, during the passage of the Fair Sentencing Act and the fix of the sentencing disparity between crack and powder cocaine. I will wrap up with it was painful to see how many deserving women could not benefit from its passage because two sentencing provisions were not applied retroactively, and it is why we fought to include retroactivity, not only for FSA but also for changes to Three Strikes, Two Strikes, and 924(c) offenses in the First Step Act.

[The statement of Ms. James follows:]

Written Testimony of Andrea James,
Executive Director
The National Council for Incarcerated and
Formerly Incarcerated Women and Girls
to
United States House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security
October 17, 2019

I. Introduction

The National Council for Incarcerated & Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. Organizing began in a federal prison yard with a group of women who were tired of policy makers instituting criminal justice reform without consulting any formerly incarcerated people – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person's humanity.

While still incarcerated, these women founded "Families for Justice as Healing," which is now doing profound criminal justice reform work in the Boston area. In 2015, Andrea James received a Soros Justice Fellowship and used her 18 months of support to launch the National Council – a platform of connectivity, networking, and support of advocacy organizations led by incarcerated and formerly incarcerated women and girls across the country. In its short history, the National Council has already had a significant impact, including acting as the voice of the incarcerated women who helped draft the Dignity Act, which mandated that women in federal prison receive adequate feminine hygiene supplies and have appropriate and adequate visitation and communication with their children.[1]

The National Council is committed to abolishing incarceration for women and girls. As formerly incarcerated women, we believe a prison will never be the place to appropriately address the economic and psychological reasons women end up in prison. Prison most often causes further social and economic harm and does not effectively result in an increase in public safety. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although our long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. Through our "Reimagining Communities" project,[2] a national infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly affected women and girls, we support prison reform programs that are designed with the input of incarcerated women and work to keep people out of the legal system.

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[1] https://justiceroundtable.org/dignity-act-for-incarcerated-women/
[2] https://www.nationalcouncil.us/reimagining-communities/

II. Haphazard Implementation

a. Retroactive Provisions

i. Slow Progress

The National Council opposed the First Step Act because we felt that it did not sufficiently reduce the number of people in federal prisons who need to come home.[3] Now that the First Step Act has become law, we are committed to its implementation so that elderly and chronically ill incarcerated people can return to their homes and families where they belong We have, however, found implementing the FSA to be very slow, opaque, and frustrating.[4] According to NPR, as of April 1, 500 people had been released under the First Step Act.[5] On July 19, 2019, the Justice Department announced that 3,100 people were being released based on the recalculation of good time credits to allow for 54 days a years for good behavior rather than 47. Even if true, that is deceptive. People incarcerated in the federal system spend the last 6-12 months of their sentence in a halfway house. Taking an extra seven days off a sentence for every year served, someone would have to have served more than 25 years to have six months shaved off a sentence and thus be able to be released from prison rather than a halfway house. Furthermore, 3,100 people represents 1.7% of the total 2018 federal prison population of 179,898, hardly a watershed moment in ending mass incarceration.[6]

- Of those 3,100 at least 900 were transferred to ICE to be deported or to state custody;
- The *New York Times* profiled two "beneficiaries" of the First Step Act: one received 4.5 months off detention in a halfway house from a life sentence for selling crack

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[3] Estimates of the number of people who will be affected by the First Step Act are hard to come by and vary widely. In an Op-Ed in the Washington Post Mathew Charles, the first person released under the FSA, stated that eventually 150,000 people would benefit from the earned-time credits. An article in McClatchey put the number at 53,000. Compare Charles Matthews, *I was released under the First Step Act. Here's what Congress should do next.* Washington Post (Feb. 1, 2019) *with* Andrea Drusch, Trump's Prison Plan to Release Thousands of Inmates, McClatchey (Dec. 21, 2018), https://www.mcclatchydc.com/news/politics-government/congress/article223414935.html. The U.S. Sentencing Commission has declined to estimate the impact on the prison population for most of the provisions of the First Step Act.

[4] The National Council is not alone in this assessment. Even staunch supporters of the First Step Act are expressing alarm. *See, e.g.*, Press Release, Families Against Mandatory Minimums, *FAMM to BOP: Implement Key Prison Reforms Now* (Mar. 5, 2019), https://famm.org/famm-to-bop-implement-key-prison-reforms-now/; Douglas Berman, *Spotlighting Concerns About Organization Tasked with Helping Justice Department Develop and Implement Risk and Needs Assessment Tools Under FIRST STEP Act*, Sentencing Law and Policy (Apr. 12, 2019) (quoting Sen. Mike Lee: "I don't see a lot of good faith in implementing this law right now . . . it's become increasingly clear to me in the last few days that some Department of Justice officials at least don't like the First Step Act, and they seem not to care that Congress passed this law and that President Trump signed this into law."), https://sentencing.typepad.com/sentencing_law_and_policy/2019/04/spotlighting-concerns-about-organization-tasked-with-helping-justice-department-develop-and-implemen.html.

[5] Ayesha Rascoe, *3 Months into New Criminal Justice Law, Success for Some and Snafus for Others*, NPR Morning Edition (Apr. 1, 2019).

[6] Jacob Kang-Brown, Eital Schattner-Elmaleh, Oliver Hinds, *People in Prison in 2018*, Vera Institute of Justice (Apr. 2019), https://www.vera.org/publications/people-in-prison-in-2018.

cocaine that was reduced under the Obama Administration. The other received two weeks off of home confinement from a 22-year sentence for drug conspiracy.

The National Council worked hard to include retroactive application of the Fair Sentencing Act of 2010 into the First Step Act. In April, the Justice Department issued a press release announcing this provision "has resulted in 826 sentence reductions and 643 early releases."[7] The U.S. Sentencing Commission estimated that 2,660 eligible people were in BOP custody as of May 26, 2018, meaning 55% of those entitled to sentence reductions had received them by April 2019.[8] By August 14, 2019, that number had climbed to 63%.[9] But that means that nearly 1,000 people are owed sentenced reductions, some of whom may be over-serving their sentences, a violation of both their constitutional and human rights. It is worth noting, however, that the vast majority of motions for a reduction in sentence come from defendants. Prosecutors account for the rest. As of mid-August the BOP had not filed a single motion to reduce a sentence. Another note of concern is that only 32 of the sentence reductions have been given to women.[10]

b. Prospective Provisions

i. Earned Time Credit

The greatest impact of the FSA will be in providing earned-time credits for participating in programming – which may benefit some 100,000 incarcerated people, a rough estimate of eligible people in federal prison, although the Sentencing Commission has declined to provide a specific number.[11] There are currently approximately 180,000 people under BOP control, meaning that nearly half (45%) will not benefit from this program at all. The statute denies the chance to earn a sentence reduction to incarcerated people who fall into 68 different categories. The earned-time credits also do not apply to courses that people completed before the effective date of the statute. This is a double-penalty because incarcerated people are not allowed to repeat courses, so anyone who took the initiative to get training now has fewer options for obtaining earned-time credits. Congress should review the list of ineligible people and narrow it down to open up educational possibilities to a wider group.

I would also note that the statute says that the earned-time credit program is effective immediately, meaning that people who were enrolled in courses on December 18 should get credit for them. We have heard about women who are declining offered spots in courses

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[7] Press Release, Dep't of Justice, *Department of Justice Announces First Step Act Implementation Progress* (Apr. 8, 2019), https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress

[8] U.S. Sentencing Commission, Sentence and Prison Impact Estimate Summary
S. 756, The First Step Act of 2018 (as enacted on December 21, 2018),
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf

[9] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20190903-First-Step-Act-Retro.pdf .

[10] *Id.*

[11] U.S. Sentencing Commission, *Sentence and Prison Impact Estimate Summary*
S. 756, The First Step Act of 2018 (as enacted on December 21, 2018),
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf.

because they are afraid that they will not get credit for them. This deprives them of a chance to learn and also makes them ineligible for any programming for the next year as a penalty for turning down an opportunity. This ambiguity is especially hard for long-timers, as they cannot risk taking another course that will not give them credits because there are so few offerings still open to them.

ii. Recidivism Assessment Tool

The earned-time credit program is premised on developing a recidivism assessment tool to gauge each person's chance of recidivism and channel them into appropriate courses accordingly. The person's rating (minimum, low, medium, high) will determine what programming they are eligible for and whether they ultimately may be released early. The National Council objects to determining appropriate programming for incarcerated people in terms of assumed and projected failure – namely recidivism. The premise of this exercise should not be that people will commit crimes once they are able to return home, i.e. recidivate. Instead, we should attempt to measure how well prepared each incarcerated person is for successful reentry into society.

The use of algorithms to predict someone's behavior invites abuse, as risk assessment tools for determining pre-trial release have shown. Justice Department's first public act in implementing that program – naming the Hudson Institute as the "host" for the development of the recidivism assessment tool – further reinforces our impression that the First Step Act is neither groundbreaking nor bipartisan.[12] We urge the Department to reconsider this decision and create a community oversight board that truly represents the political spectrum and makes a place for formerly incarcerated people to join the conversation.

Even with more even-handed leadership, the National Council is skeptical that this system can be implemented in a way that fully respects the individual circumstances and background of each incarcerated person. At the very least, this risk assessment tool must be developed based on the principles listed below. This list is adapted from principles put together by the Leadership Conference for pre-trial risk assessments and to which 130 non-profit organizations, including the National Council, subscribed.[13]

1. The criminal justice reform community, especially incarcerated and formerly incarcerated people, must have significant input in designing the recidivism assessment instrument. The tool must then be "trained" and revalidated by independent data scientists who will work under meaningful community oversight. Specifically, the instrument should not be considered valid if it has any indication of racial bias.

The National Council therefore expresses concern that two of the three the social scientists in charge of developing this tool have professional backgrounds in the criminal justice system.

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[12] Press Release, Dep't of Justice, *Department of Justice Announces Progress in First Step Act Implementation* (Apr. 8, 2019), https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress

[13] Leadership Council, *The Use of Pre-trial "Risk Assessments": A Shared Statement of Civil Rights Concerns*, http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf

This group has two men and one woman, none of whom are people of color or appear to have any connection to communities who are impacted by the criminal justice system. In order for their work to be legitimate, this group must be expanded to include social scientists from a wider demographic and political spectrum.

2. Recidivism instruments must presume that incarcerated people will successfully return to their communities at the end of their sentences and be designed to presume eligibility, i.e. a minimum or low rating, for early release. Under the FSA, incarcerated people who engage in programming are automatically eligible for early release to a halfway house or home incarceration unless they maintain a medium or high recidivism rating. In that case, their release is left up to the discretion of the Warden. In accordance with basic concepts of fairness and due process, a person's release should not depend on a computer formula and the whim of a single person. Instead, anyone denied the benefits of the FSA should be entitled to a hearing and legal representation.

iii. Compassionate and Home Detention Release

The First Step Act was designed in part to give life to the statutory provision that allowed the BOP to file a motion to sentencing court to allow someone to be released for "an extraordinary and compelling" reason.[14] Over the years, the BOP neglected to use this mechanism to make it possible for the elderly, people with illnesses, and others with compelling circumstances to go home. Accordingly, the First Step Act gave incarcerated people the right to file a motion for compassionate release 1) after they had exhausted all administrative appeals or if their Warden did not respond within 30 days, whichever is earlier.[15]

The impact of this change in the law has been, and will continue to be, minimal. First, the requirements are still extremely demanding, pertaining primarily to people with terminal illnesses or debilitating medical conditions such as Alzheimers that make self-care impossible. To be considered for compassionate release, healthy people must be over 70 years old and have served 30 years or be over 65 and have served 10 years or 75% of their sentence, whichever is greater.[16]

As of July 23, 2019, **51** petitions for compassionate release had been approved, an increase from 34 during 2018.[17] This is still a miniscule number compared to the number of elderly and ill people who need to be home.

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[14] See USSG 1B1.13 and BOP Program Statement 5050.50 for information on what is considered a "extraordinary and compelling" circumstance. the grounds for compassionate release set by the US Sentencing Commission are inconsistent with the BOP's guidance, adding unnecessary confusion and ambiguity to an already complex process.

[15] 18 U.S.C. 3582(c).

[16] BOP Program Statement 5050.50 at 6.

[17] Press Release, Dep't of Justice, *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment*, (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and.

iv. Home Detention

In addition, the First Step Act allows for people with medical conditions or who are over 60 and have served 2/3 of their sentence or over 65 and have completed 50% to apply for home detention. So far 328 petitions for elderly home confinement had been approved.[18] There are 10,267 people over the age of 60 in federal prisons,[19] meaning that 3% of the elderly population has been released to home confinement under the First Step Act.

We have received dozens of messages from women in federal prisons about the impediments to applying for compassionate release or home detention. One major problem is calculating time served. No one seems to know whether good time credits can count towards time served for the purposes of qualifying for release or home detention under the Act. Although there is no reason why they shouldn't apply to the First Step Act, case managers are refusing to count time credits. One manager told an applicant "show me in the First Step Act where it says that good time credits count." We have had to advise women to send their requests for release to their family members to send back to the Warden because prison staff refuse to forward the request based on idiosyncratic determinations of how much time a woman has served.

Typical of the confusion is an email we received from a woman at Coleman FCI, who was told she had been approved for home detention and could leave on September 3, 2019. A few days before her departure, her case manager called her in to say that there had been an error in calculating her release date, meaning she would not be able to leave after all. He also could not tell her what her "correct" release date was. She told us that "This is something that has been going on here[:] giving people dates then taking them back. No one has left here for home confinement under the home confinement 2/3rd First Step Act. That is a law and the BOP does not want to comply with it."[20]

III. Moving Forward

The "bait and switch" approach to implementing the First Step Act must end.

First, Congress must make the following clear to the BOP:

- Good time credits and any other reductions in sentence apply to calculations of time served for the purpose of determining eligibility for compassionate release or home detention;
- People must be given earned-time credit for any course they were attending on December 18, 2018 or which they started after that date;
- Case Managers and other staff must not interfere with or delay applications for benefits under the First Step Act;
- Development of the Recidivism Assessment Tool must include input from incarcerated and formerly-incarcerated people to have any chance of accurately predicting chances of recidivism.

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[18] https://www.bop.gov/inmates/fsa/index.jsp (last visited Oct. 13, 2019).
[19] https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last visited Oct. 13, 2019).
[20] Email from Coleman FCI to Phyllis Hardy (Aug. 29, 2019) (on file with the National Council).

Second, Congress must amend the law to make the earned-time reward for coursework retroactive.

Finally, and most importantly, Congress must stop tinkering with the machinery of incarceration. Making the conditions of imprisonment marginally better does nothing to address the crisis of mass incarceration. Instead of steps, we must think about leaps forward.

- We must preserve families by repealing the provisions in the American Safe Families Act that allow the states to steal the children of incarcerated mothers by forcing them into closed adoptions after 15 months of separation.
- We must repeal the 1994 Crime Bill and with it the mandatory minimum sentences and other policies that have led to mass incarceration of black and brown people and our children
- We must pass a federal Primary Caretakers Bill that requires federal judges to justify in writing sentencing primary caregivers of minor children to prison, traumatizing both the parent and children.

Chair NADLER. Thank you. We will now proceed with questioning under the five-minute rule. I will recognize myself for the first questioning.

Mr. Patton, I understand you had some problems with the answers that I got—in the questions I asked the director about the crisis at the MDC in Brooklyn and their response to it. Could you elaborate?

Mr. PATTON. I will. I don't mean to blame Director Sawyer. I know she has only been in the position for two months, so she wasn't around when the crisis happened.

Chair NADLER. It is all her fault.

[Laughter.]

Mr. PATTON. I think she has been misinformed about some of the things you asked her about. First, I just had a meeting with the associate warden of the MDC two days ago, because I am trying to follow-up with them on a number of these things. I asked the very same question you did about long-sleeved and thermal attire because they are not there yet on fixing the HVAC system, as Director Sawyer acknowledged, and we are coming up on winter. The answer I got was, no, we are not going to do that.

Chair NADLER. Not going to get thermal?

Mr. PATTON. That will not become part of the standard issue. We will buy extra sets in case we have an emergency. That is not what the recommendation is, because there is an ongoing problem. It needs to be part of the standard issue.

Now, that sounds like a small thing until you sit in a 60-degree cell in paper-thin, short-sleeved scrubs. It is a real issue and that was just wrong, at least as compared to what the MDC is telling us.

She said that the people with the CPAP machines were offered to move. Now I know, Chair, you were present on one of these tours. I was personally there. I mean, that is news to me, is all I will say about that. Those people were terrified. They were terrified that their life was in danger. They were suffering. They were not given an option to move somewhere else.

So, it is important to correct the record on that, because if there is not an acknowledgement that the problem existed, I am worried about a solution being put in place to solve it moving forward.

Lastly, she said that there was a communication problem that the MDC officials forgot to communicate on some of these things. There was no forgetting to communicate. We were peppering them with questions, and we were getting demonstrably false answers back about what was going on there. That was no negligence. It was not a slip of the mind among the BOP officials there. It was intentionally misleading us about what was happening in the institution.

Chair NADLER. To your knowledge, has anyone been disciplined or admonished for intentionally misleading?

Mr. PATTON. Quite the opposite. My understanding is that the warden at the time, Warden Quay, not long after this incident was promoted, and he now oversees multiple institutions. That is my understanding from press accounts.

Chair NADLER. That is my understanding too, and I must say that he was, when I was there, completely unresponsive.

Let me ask this, section 404 is a section of the First Step Act that made the Fair Sentencing Act of 2010, which addressed the crack/powder cocaine sentencing disparity retroactive. Although the text of the First Step Act presents a straightforward application, the Department of Justice, we understand, regularly takes the position that retroactivity is not appropriate.

In your experience and for Federal defendants across the country, how is the retroactive application of the crack penalty reforms of section 404 being applied? Are they being applied?

Mr. PATTON. At the end of the day, the vast majority of judges are doing the right thing, but it is not because the Department of Justice is making it easy. In fact, they are taking very strained and aggressive litigation positions that have been highly criticized by judges.

So, for instance, one example on the retroactive application of the Fair Sentencing Act, the crack quantities, they are saying our clients are not eligible for relief because we could have charged a higher quantity back then. So, the judge should take into account what we could have proven, or what we could have done.

Chair NADLER. In the absence of a new trial, how can they do that?

Mr. PATTON. Exactly. It is unconstitutional, it is not fair, and perhaps, most significantly, it is just contrary to the language of the law and the statute, and what Congress intended.

There are two separate aspects to the retroactive application of the Fair Sentencing Act. There is eligibility and then there is the discretion of the judge about whether to reduce the sentence. The law doesn't require judges to reduce a sentence, and for the Department of Justice to say people are—

Chair NADLER. The law does not require it.

Mr. PATTON. The law does not require a reduced sentence. It imposes upon the judge a duty to decide whether somebody is eligible, and then if they are eligible the judge takes into account all of these usual sentencing factors and decides whether or not to reduce the sentence. For the Department of Justice to make really strained arguments on the eligibility side is disappointing. It means that even though thousands of judges are going—not thousands of judges, but in thousands of cases that are going our way on these arguments, a handful are not, and they are being selective about how they then appeal those, because they can be selective about what they appeal and what they don't. So, they are being very aggressive about trying to create bad law, from our perspective.

Chair NADLER. Do you suggest the Department is trying to sabotage the retroactivity feature of section 404?

Mr. PATTON. They are doing their best, in my opinion.

Chair NADLER. Thank you. I have one further question. You mentioned racial and ethnic disparity and disparate treatment in your testimony. How is PATTERN risk assessment tool still unfair with regard to race and ethnicity? Can you give us some specific examples?

I am sorry. That is for Ms. Hamilton.

Mr. PATTON. Yeah.

Chair NADLER. Dr. Hamilton.

Mr. PATTON. I'm glad it is for Ms. Hamilton.

Chair NADLER. Dr. Hamilton, yes.

Ms. HAMILTON. Yes. So, I think I have some slides that can go up. First let us do, for example, Slide 4B.

It is hard to see but what Slide 4B is doing is giving you an indication for males. These are the percentages based on race of those individuals who fall in the minimum and low category and therefore gain the best benefits of PATTERN. So, you can see significant differences, based on race, of this eligibility to earn early release and to be incentivized to go through a lot of programs.

Then my next one, if we can go to 2B, please.

So, this one is the idea, also, this is for females, 2B. Sorry, I know we are skipping around.

Well, the next one will be about—I had talked about differences in calibration. I wanted to show you what it meant. For females this is going to be on the violent recidivism rate, and what you will notice on the bottom then is, on the left-hand side is those who were assessed females at minimum risk very low, medium, and then on the right-hand side is high. What you are seeing there in the bars are the recidivism rates of individuals who were categorized within those four risk categories.

Notice, then, in each of those— and I am sorry that it is very small, but what you are seeing is racial disparity. So, in any of the four groups where you are seeing differences in height, that is by race, meaning that, for example, a medium-risk outcome doesn't mean the same based on risk, or high, it just doesn't mean high risk means something different based on racial groups, for females, at least, in violent recidivism.

I do want to say I am very happy to hear from Mr. Walters that they are correcting for, I would assume, something like this.

Chair NADLER. Thank you very much. My time has expired.

The gentlelady from Arizona?

Ms. LESKO. Thank you, Mr. Chair, and thank you, all of you, for being here, first of all.

My first question is for Ms. James, and I applaud your effort to reduce incarceration of women and children. A couple of times during your testimony you said your goal was to end, totally, incarceration for women and children, and I think in your written testimony you said you are committed to abolishing incarceration for women and girls.

How are you going to do that? Aren't there some women that deserve to be in prison?

Ms. JAMES. Well, I think that it is a bold mission that we have taken on, but we also have been incarcerated women. We have all lived in prisons. We know for sure, after that experience, that the environment, as prisons currently exist in this country, will never help a woman to truly heal and advance her life.

So we know, because we have been, for some years now, working on looking at what else is possible for women, what else is possible for girls, mostly things that are created within the communities that the women and girls come from, that could immediately significantly reduce the incarceration numbers of women and girls, and then help us to advance ideas about women who may be caus-

ing harm to other people, that will need some other source of resource other than just community-led programming.

Ms. LESKO. Thank you.

Ms. JAMES. Certainly, a prison is not the place that will help us to do that.

Ms. LESKO. Thank you. I was just curious, because I was like, there are some people, that can be released into society and it is good, but other people I am not so sure about. There are some people that need to be in prison, is what I am saying.

Ms. JAMES. May I just mention something?

Ms. LESKO. Ma'am, if you don't mind, I have other questions and I only have five minutes, so thank you.

Mr. Walters, I guess, there have been a few criticisms and concerns about the Review Committee and the tool and the assessment and that type of thing. Would you like to address anything that has been said?

Mr. WALTERS. Well, I think there were some initial concerns about the Committee and the background of the people, but I included the backgrounds in my written testimony, and I won't take your time to read the backgrounds of the individuals. They have a diverse group of points of view, but they are highly professional in what they have done. The Justice Department has listened to us. We have sat with the attorney general, the deputy attorney general, as well as Ms. Bacon and some BOP officials. We have gone through a lot of these items, I think in a way that is intended by the law. I mean, our job is to advise, and our job is to advise, as under the law of the attorney general, and we have tried to address some of these issues about the structure of the instrument, but also the task that is involved here—the compression of time for implementation, the need to look at these programs.

As I mentioned earlier, one factor here that has to be recognized is the Bureau of Prisons has not evaluated its programs. I mean, to bring some of these programs in, they are going to try to bring in programs that have links to programs that are evaluated or are in areas that we think will make a difference. They are going to have to go back and look at how to certify and make them effective. Otherwise, you are going to have people sitting in programs that really don't do a good job in helping them with the needs they have.

The whole needs assessment system has limits, and we have suggested some ways of using some unconventional instruments to look at needs and to measure whether programs are meeting those needs, using things like functional improvement in people's behavior, so we are not just waiting until we look at what happens after they have been released for three years, after they have already been in the system.

So, some of those things are more radical changes. They will, as I said, cost more money to train and implement these things in the Bureau of Prisons. If you want to meet the goals of the act, which I think everybody here wants to do, if you want to meet the goals of the act, our job is to kind of give our best opinions, and we have a range of them from different backgrounds, on what that takes. I have nothing negative to say about the Justice Department's will-

ingness to listen to us. They have a tough job in implementing it. They implement it; we don't.

Ms. LESKO. Thank you, Mr. Walters. I do have one more question, and this one is for Mr. Patton.

Mr. Patton, I have some information that the Federal Prison Industries has struggled over the past number of years, and it was kind of surprising to me that there was a reduction—well, let me read what it says. Since 2009, Federal Prison Industries sales have dropped 47 percent and we have experienced financial losses totaling $182 million. During this time the FPI, or Federal Prison Industries, has closed or mothballed about 40 factories. This reflects a reduction of more than two-thirds in the percentage of eligible inmates working in the program, from 25 percent in 2000 to less than 8 percent in 2016.

This was really surprising to me. I am from Arizona, and we have a fairly successful program, the Arizona Correctional Industries. At least in Arizona, I have heard from industries—everybody I talk to said they are in great need of workers, right? So, in Arizona we even have people working as mechanics on trucks and big semi-trucks. So, it is a good workforce. They come, they learn a skill, and then they are able to use that skill when they are released.

So, do you have any idea why this is happening? I think it is part of this program that we are supposed to be getting more people to work. I don't understand what is happening here.

Mr. PATTON. I wish I had an answer for you. I think that is probably a good question for Director Sawyer. I agree with you. That is one of the programs that has really proven to reduce recidivism, and there is just not enough of it. There are other programs, similarly, whether it is drug treatment or mental health counseling, that we know would reduce recidivism, improve people's lives, and there is just not enough of it. It is why I mentioned in my opening statement that I have real concerns that the programming is there to really make the First Step Act a success.

Ms. LESKO. Well, thank you. Yeah, I agree with you. In Arizona I was quite impressed with what they all do. You have a whole call center where people—this is in a women's prison—where people don't realize when they are getting answers on something that it is from a woman prisoner inside the prison. Obviously they are very dedicated and show up to work all the time.

Anyway, thank you all for your testimony. I appreciate it.

Chair NADLER. The gentlelady yields back.

That concludes our hearing today. I want to thank our witnesses. I want to thank our Members for attending. I want to thank our witnesses. With that the hearing will stand adjourned.

[Whereupon, at 5:25 p.m. the Subcommittee was adjourned.]

APPENDIX

REUTERS

POLITICS
JULY 23, 2019 / 6:07 AM / 3 MONTHS AGO

As new U.S. law frees inmates, prosecutors seek to lock some back up

Andy Sullivan

BUFFALO, N.Y. (Reuters) - Monae Davis walked out of prison on March 7, thanks to a new law that eased some of the harshest aspects of the United States' war on drugs.

Now the U.S. Justice Department is trying to lock him back up.

As Davis, 44, looks for work and re-connects with his family, U.S. prosecutors are working to undo a federal judge's decision that shaved six years off his 20-year prison sentence under the First Step Act, a sweeping criminal-justice reform signed into law by President Donald Trump last December.

"They're prosecutors – it's their job to make it hard on people," he said. "Do I think it is right? No, it's not fair."

Even as thousands of prison inmates have been released by judges under the new law, federal prosecutors have fought scores of petitions for reduced sentences and are threatening to put more than a dozen inmates already released back behind bars, Reuters found in an analysis of these cases.

The reason: the Justice Department says the amount of drugs they handled was too large to qualify for a reduced sentence.

Davis, for example, reached a deal in 2009 with U.S. attorneys in western New York to plead guilty to selling 50 grams or more of crack, resulting in his 20-year sentence. Under First Step guidelines, that carries a minimum sentence of five years, less than half the time he has already served.

But prosecutors say Davis should not get a break, because in his plea deal he admitted to handling between 1.5 kilograms and 4.5 kilograms, which even under current guidelines is too high to qualify for a sentence reduction.

In a statement, the Justice Department said it is trying to ensure that prisoners seeking relief under the First Step Act aren't treated more leniently than defendants now facing prosecution.

The department said prosecutors now have a greater incentive than previously to bring charges that more closely reflect the total amount of drugs they believe to be involved.

"This is a fairness issue," the department said.

Monae Davis poses for a portrait after an interview at a halfway house in Buffalo, New York, U.S., July 16, 2019. Picture taken July 16, 2019. REUTERS/Lindsay DeDario

A TOUTED ACHIEVEMENT

Passed by overwhelming majorities in Congress, the First Step Act here stands out as a rare bipartisan achievement in an era of sharp political divisions. Trump has invited ex-offenders to the White House and his State of the Union speech.

The law allows inmates who are serving time for selling crack cocaine to ask a judge to reduce their prison sentences. It's a belated recognition, supporters say, that tough-on-crime policies that required lengthy prison terms for crack dealers were too punitive and fell most heavily on African-Americans.

More than 1,100 inmates have been released so far under this provision in the new law, according to the Justice Department. (Another 3,100 here are being released under a separate provision that awards time off for good conduct.)

In most of the 1,100 sentence-reduction cases, U.S. prosecutors did not oppose the inmate's release. But in at least 81 cases, Reuters found, Justice Department lawyers have tried - largely unsuccessfully so far - to keep offenders behind bars. They argue that judges should base their decision on the total amount of drugs that were found to be involved during the investigation, rather than the often smaller or more vague amount laid out in the law they violated years ago.

The difference between the two amounts in these cases is often significant – and, depending on whether a judge agrees with prosecutors' objections, can mean years of continued incarceration rather than immediate release.

Regional prosecutors' offices, though they often enjoy great autonomy, have made it clear that they are operating on instructions from Washington.

One prosecutor in western Virginia in April objected to nine sentence reductions she had previously not opposed, citing Justice Department guidelines.

The federal government has lost 73 of 81 cases in which the issue has arisen so far, according to the Reuters analysis.

Prosecutors have appealed at least three of those decisions and indicated they intend to appeal 12 more.

If they succeed, men like Davis would return to prison.

First Step Act advocates say the Justice Department is undercutting the intent of the law.

"Many of these people have served in prison for five, 10, 15, 20 years and more. It's time for them to be able to get on with their lives, and the notion the Department of Justice is just going to keep nagging at them and appealing these cases is not what we ever had in mind," Democratic Senator Dick Durbin, one of the law's authors, told Reuters.

Florida resident Gregory Allen, freed in March, appeared with Trump at a ceremony celebrating the new law in April. Federal prosecutors in Tampa, meanwhile, had filed

paperwork to appeal that decision and force him back to prison. They dropped the appeal three weeks later, without explanation.

Legal experts say they are aware of few other cases in which the federal government has tried to re-incarcerate someone who has been freed due to a sentence reduction.

"It's particularly cruel," said Mary Price, an attorney with Families Against Mandatory Minimums, a nonpartisan group. "The whole point of the First Step Act was to give some relief to people who were sentenced to unduly long sentences."

Slideshow (7 Images)

A TURBULENT LIFE

According to court documents and his own account, Davis has led a turbulent life. The son of a prostitute who entered the witness protection program when testifying in a criminal case, Davis was given a new name and moved to New Orleans when he was seven years old.

By the time he was fifteen, back in Buffalo, both parents and a younger brother were dead and he was selling drugs. He dropped out of high school.

He killed a woman accidentally when he was nineteen, he said, and records show he eventually pleaded guilty to state manslaughter charges.

By the time he was 30, federal agents say, Davis oversaw a network that sold crack and cocaine across western New York and Pennsylvania.

"Your life has been a disaster, and maybe not all of it your fault," U.S. Judge William Skretny told him in 2009 as he sentenced him.

In March, the same judge ruled that Davis should be freed under the First Step Act.

"I fell off the chair," Davis recalled. "I couldn't believe it."

Prosecutors told the court they intend to appeal. The U.S. Attorney for the Western District of New York, James P. Kennedy Jr., declined to comment on Davis's case, but said in a prepared statement that asking for appellate review "is consistent with our mission of seeing to it that justice is done in each case."

Meanwhile, Davis is learning to use a smartphone and planning to start welding classes in September. Eventually, he says, he aims to run a cleaning service or auto shop, and set aside money for his six grandchildren so they can have a better life than he did.

"I know God has a plan for me," he said. "I know I'm not finished yet."

Editing by Kevin Drawbaugh and Julie Marquis

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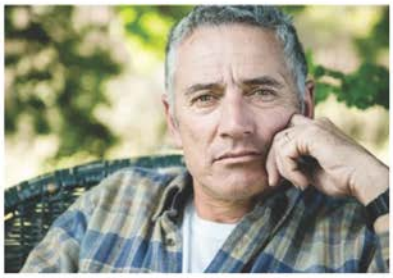

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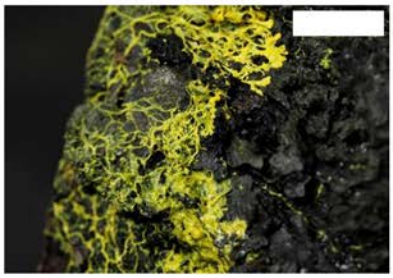

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Congress of the United States

Washington, DC 20515

February 6, 2019

Michael E. Horowitz
Inspector General of the United States Department of Justice
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue, NW
Suite 4706
Washington, D.C. 20530-0001

Dear Inspector General Horowitz:

We are writing to express concerns over recent events at the Bureau of Prisons' (BOP) Metropolitan Detention Center (MDC) in Brooklyn, NY. This past weekend, it was reported that over 1,600 detainees and employees at the correctional facility remained in a building that had serious heating and electrical issues for nearly a week during polar vortex conditions.[1] The grave nature of these circumstances were muddled until press coverage revealed the extent of the MDC's problems.

We believe there are ample grounds for your office to review the conditions at Brooklyn MDC. It is still unclear why the facility had prolonged issues with heating and electricity. It is understood that the facility kept detainees on lockdown without appropriate access to medical services. Further, attorneys and paralegal staff reported that detainees lacked access to extra blankets and could not purchase extra sweatshirts at the commissary during the height of this crisis. All the while, it is alleged that management at MDC did not activate and follow their emergency plan.

The lackluster response from the facility's leadership cannot be categorized as anything less than inappropriate given the circumstances. Instead of offering proactive solutions and executing its emergency plan, MDC Brooklyn failed in its duties until public pressure and demands for answers reached a tipping point. Leadership at BOP facilities must be consistent with our values, and ensure that detainees have access to humane shelter conditions. The arguably abusive practices arising out of this incident, including the fact that detainees were kept on lockdown in near-freezing conditions, is unacceptable.

[1] Herreria, C. Protesters rally into the night for Brooklyn inmates in freezing jail cells. Huffington Post. https://www.huffingtonpost.com/entry/protests-brooklyn-jail-freezing-temperatures_us_5c5648b2e4b00187b5517ff8

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Given the above, we request:

- the Evaluation and Inspections Division review the Management practices at this facility—such review should also examine whether the MDC fully followed its emergency plans. Such inquiry, in addition, examine the chain of command at the facility, including the respective decision-making authority that is in cases when the warden is not physically present at the facility;
- a review of medical care given to detainees during this period, including the lack of electricity for CPAP machines and the exacerbation of conditions such as asthma by the cold conditions; and
- a review of the extended denial of access to counsel for detainees by MDC, leaving detainees unable to address their cases or assert their rights about these conditions during this time period;
- an audit of whether contractors at MDC fulfilled their duties related to repairing or replacing heating, ventilation, and air conditioning (HVAC), electrical, or similar infrastructure on or about the week of January 28th, 2019. Such audit should also examine whether contractor malfeasance was a contributing factor leading to the loss of heat and electricity on or about the week of January 28th, 2019.

As Members of Congress, it is our responsibility to ensure that detainees are treated fairly and afforded humane living conditions while in federal custody. **Given the severity of these circumstances, we request a formal response from your office no later than ten (10) calendar days from the date of this correspondence.**

Sincerely,

Nydia M. Velázquez
Member of Congress

Jerrold Nadler
Member of Congress

Kamala Harris
United States Senator

Kirsten Gillibrand
United States Senator

Elizabeth Warren
United States Senator

Carolyn B. Maloney
Member of Congress

Adriano Espaillat
Member of Congress

José E. Serrano
Member of Congress

Nita M. Lowey
Member of Congress

Gregory W. Meeks
Member of Congress

Hakeem Jeffries
Member of Congress

Sean Patrick Maloney
Member of Congress

Eliot L. Engel
Member of Congress

Ayanna Pressley
Member of Congress

Grace Meng
Member of Congress

Thomas R. Suozzi
Member of Congress

Max Rose
Member of Congress

Eleanor Holmes Norton
Member of Congress

Alexandria Ocasio-Cortez
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Yvette D. Clarke
Member of Congress

Tony Cárdenas
Member of Congress

Mark Pocan
Member of Congress

Brenda Lawrence
Member of Congress

John Lewis
Member of Congress

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Member of Congress

Raúl Grijalva
Member of Congress

Bobby Scott
Member of Congress

Albio Sires
Member of Congress

Kathleen M. Rice
Member of Congress

Congress of the United States

Washington, DC 20515

February 6, 2019

Hugh Hurwitz
Acting Director
Bureau of Prisons
320 1st Street, NW
Washington, DC 20534

Dear Acting Director Hurwitz:

We are writing to express serious concerns about the treatment of detainees by the Bureau of Prisons' Metropolitan Detention Center (MDC) in Brooklyn, NY. As you are aware, this facility was the center of a significant number of protests after it was reported that over 1,600 detainees and employees remained in a building that had heating and electrical issues for nearly a week.[1] Reports suggest that such issues are mutually exclusive: heating issues began at the facility when boilers (and associated coils) began to freeze,[2][3] and an electrical panel caught fire, which in turn melted a back-up generator switch. The fire prevented the facility from switching to emergency power.

As a result, detainees were kept on lockdown, in near-freezing conditions, with limited or no access to their lawyers or loved ones.[4] Furthermore, it is understood that the facility kept detainees on lockdown without appropriate access to medical services. Attorneys and paralegal staff reported that detainees lacked access to extra blankets and could not purchase extra sweatshirts at the commissary during the height of this crisis. **Expecting detainees to purchase items at a commissary due to incidents that are entirely under the BOP's responsibility is unacceptable.** All the while, the Bureau failed to provide adequate and timely remedies to the heat and electrical issues at the facility.

Such conditions, coupled with a dismally slow response time during a polar vortex[5], draws serious questions to the response mechanisms currently employed by the BOP and warrant further discussion over its current shortcomings. Alarmingly, it is our understanding management at MDC failed to activate and follow their emergency plan.

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[1] Herrerla, C. Protesters rally into the night for Brooklyn inmates in freezing jail cells. Huffington Post. https://www.huffingtonpost.com/entry/protests-brooklyn-jail-freezing-temperatures_us_5c5648b2e4b00187b5517ff8

[2] Correal, A. No heat for days at a jail in Brooklyn where hundreds of inmates are sick and 'frantic' The New York Times. https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html?module=inline

[3] Correal, A. Newman, A. and Goldbaum, C. Protesters try to storm federal jail in Brooklyn with little heat or electricity. The New York Times. https://www.nytimes.com/2019/02/02/nyregion/brooklyn-federal-jail-heat.html

[4] Id.

[5] Phifer, D. Brooklyn jail has power restored after inmates go days without lights and heat amid polar vortex. Newsweek. https://www.newsweek.com/brooklyn-prison-has-power-restored-after-inmates-go-days-without-lights-and-1316370

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The Bureau is responsible for providing for the humane detention of these detainees—not subjecting them to third-world conditions. Therefore, we demand you take the incident at MDC Brooklyn seriously and immediately initiate an investigation. As you undertake this investigation, we request you provide us with answers to the following questions regarding current concerns at MDC:

1. Prior to this heating and electrical fire incident, when was the last inspection of MDC Brooklyn's electrical and air conditioning infrastructure?

    a. Were there any issues with facility infrastructure in the last five calendar years that caused the heat, air conditioning, water, or electricity to be offline for more than three consecutive days? If yes, please provide details of each instance.

    b. A concern highlighted in media reporting is that the coils transporting heat though the building froze. What is your plan to insulate or rehabilitate the facility's infrastructure and units to prevent such issues in the future?

2. It is understood that the contractors tasked to fix the electrical panel issues may have had to order special parts in order to do so. Why are such parts not kept at the facility in case of extenuating and emergency circumstances?

    a. Are such considerations part of the facility's contingency plan?

        i. Is MDC Brooklyn's current contingency plan inadequate based on this incident?

3. Why did MDC Brooklyn staff not attend to the medical needs of the detainees, particularly those with conditions such as asthma that were exacerbated by the conditions and individuals who were placed at risk due to lack of electricity for CPAP breathing machines? What plans does BOP have to take care of such needs at its facilities in the event of the onset of such conditions?

4. Why were detainees denied the ability to meet with counsel for extended periods, and how will you prevent this from occurring in the future?

5. What review and accountability mechanisms will your agencies employ to investigate, reprimand or restructure the current leadership of MDC Brooklyn?

    a. Should your agencies decide to restructure or change leadership at MDC Brooklyn, how will you inform the public of such decision?

    b. Would you consider appointing an emergency monitor, investigator or other appropriate staff from BOP to oversee necessary reforms of the culture and operating practices at MDC Brooklyn?

6. Based on this weekend's events, it is clear that the BOP's lack of responsive action during this incident has seriously undermined the public's trust in this facility. What is your plan to re-establish the community's trust?

7. How will your agencies use this incident to prevent similar occurrences at other facilities operated by the BOP?

As Members of Congress, it is our responsibility to ensure that all Americans, including detainees, are provided the full rights afforded by our laws. Any transgression that limits such right, including limited access to basic shelter needs, must be fully investigated and remedied.

Given the severity of these circumstances, we request a formal response from your agencies on MDC's issues no later than ten (10) calendar days from the date of this correspondence. Your responses will be critical for Congress' role in ensuring that BOP's facilities will be able to handle harsh weather conditions without compromising the health and safety of those in federal custody.

Sincerely,

Nydia M. Velázquez
Member of Congress

Jerrold Nadler
Member of Congress

Kamala Harris
United States Senator

Kirsten Gillibrand
United States Senator

Elizabeth Warren
United States Senator

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Bobby Scott
Member of Congress

Albio Sires
Member of Congress

Kathleen M. Rice
Member of Congress

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515–6216
One Hundred Sixteenth Congress

April 8, 2019

The Honorable William Barr
United States Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Mr. Hugh J. Hurwitz
Acting Director
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 20534

Dear Attorney General Barr and Acting Director Hurwitz:

As you know, the First Step Act was signed into law on December 21, 2018, after overwhelming bipartisan support in both the House of Representatives and the Senate. We look forward to partnering with you in the swift and effective implementation of the First Step Act's reforms.

We appreciate the Administration's statements in support of this new law. Specifically, the President praised the First Step Act because it "will promote prisoner participation in vocational training, educational coursework, or faith-based programs, and in turn help them successfully reenter society." In Attorney General Barr's January 15, 2019 testimony before the Senate Judiciary Committee, he stated: "The recently passed First Step Act, which I intend to diligently implement if confirmed, recognizes the progress we have made over the past three decades." Attorney General Barr again stated that he is "committed to implementing the First Step Act" in a speech before the National Association of Attorneys General on March 4, 2019.

We are grateful for your commitment to implementation of the First Step Act. However, we are concerned that at least one of the law's deadlines has lapsed without compliance, and we have not seen significant steps taken toward implementation. As we initiate oversight of the implementation of this law, we ask that you provide answers to the following questions.

Good Conduct Time

1. Since 1988, BOP has awarded only a 47-days-per-year reduction of the sentence imposed, instead of the 54 days per year mandated by the good conduct time statute, 18 U.S.C. § 3624(b) (also known as "good time credit"). The First Step Act clarifies Congress' original intent in drafting section 3624(b) - that prisoners receive 54 days of good conduct time per year, not 47 days.

   We are aware of arguments that under language in the First Step Act, BOP cannot be compelled to immediately implement these provisions until after creation of the risk and needs assessment system. We disagree with this position because it is well within BOP's

discretion to revise BOP's calculation policy immediately, particularly given your commitment to "diligently" implement the First Step Act. BOP is free under the law to, and should, immediately begin to recalculate good conduct time credit at 54 days per year in compliance with Congressional intent, as was made clear in the Congressional record during consideration of the First Step Act:

- Sen. Cornyn on December 17, 2018: "All this does is clarifies Congress's original intent that 54 days of good time credit be available rather than the 47 days that the Bureau of Prisons had interpreted under previous law that was more ambiguous. So that is not a change to what Congress intended but merely a clarification of preexisting congressional intent."

- Sen. Cardin on December 5, 2018: "The bill makes a good time credit fix and revises the good-time credit law to accurately reflect congressional intent by allowing prisoners to earn 54 days of credit per year, rather than 47 days."

- Rep. Scott on May 22, 2018: "Turning to the bill we are debating today, I recognize that the FIRST STEP Act includes a fix to the calculation of good time credit, which I have sought for many years. Calculating good time credit as Congress had originally intended is a serious improvement made by this bill."

- Rep. Goodlatte on May 22, 2018: "...Democrats asked for a fix to the way the Bureau of Prisons calculates good time credit. We made changes to clarify congressional intent on that section."

- Rep. Richmond on May 22, 2018: "We also fix the "good time" problem that has happened. For every 7 days that you increase good time, you save $50 million a year. Not only did we fix it this year, but we fixed the problem BOP interpreted in the law, contrary to congressional intent, in the first place."

a. **Has BOP begun to recalculate good conduct time for each prisoner after the law's enactment in December of last year? If so, please describe how many inmates have had their sentences recalculated, and how many inmates have been released, to date. If not, please provide the date by which BOP will begin to recalculate prisoner release dates, and the date by which BOP will begin to release prisoners with recalculated sentences.**

b. If BOP will not begin to recalculate good conduct time for each prisoner immediately, BOP may still begin the process of recalculation to ensure that when the risk and needs system is complete, BOP is able to move eligible individuals expeditiously. **Has BOP developed a plan to begin calculating new release dates for eligible individuals? Please describe this plan and when you expect that BOP will begin its implementation.**

Risk and Needs Assessment System

2. The First Step Act requires that the Independent Review Committee (IRC) be established not later than 30 days after enactment, or by January 20, 2019, and requires the National Institute of Justice (NIJ) to first select a nonpartisan and nonprofit organization with expertise in the study and development of risk and needs assessment tools to host and appoint the IRC. NIJ has not yet selected the organization charged with appointing the IRC.

   a. **What steps has NIJ taken toward selection of a nonprofit organization that will create the IRC?**

   b. **What nonprofit organizations has NIJ considered to create the IRC? How will you make this decision?**

   c. **By what date will this nonprofit organization be selected by NIJ?**

   d. Under the First Step Act, the organization selected by NIJ must appoint not fewer than 6 members to the IRC. The IRC is intended to be, by design, "independent" from DOJ. **Will you commit to allow the task of appointing the members of the IRC to be executed only by this selected nonprofit organization, not by the Department of Justice (DOJ) or NIJ?**

3. The First Step Act requires the Attorney General, in consultation with the IRC, to conduct a review of the existing risk assessment systems in effect on the date of enactment of the bill, and to develop recommendations regarding evidence-based recidivism reduction programs and productive activities in accordance with the bill.

   a. **Understanding that any review and recommendation is not to be undertaken separately from the IRC, has BOP begun to prepare for these reviews and recommendations?**

   b. **If so, does BOP have current views on which existing recidivism reduction programs and productive activities need to be revised or changed, and what types of programs are currently lacking?**

   c. **Does BOP have a current view on how to ensure recommended programs are those that have been shown by empirical evidence to reduce recidivism and are designed to help prisoners succeed in their communities upon release from prison?**

   d. **What process does BOP intend to follow in order to follow this mandate?**

4. The First Step Act requires the Attorney General, not later than 210 days after the date of enactment, and in consultation with the IRC, to develop and release publicly on the Department of Justice website a risk and needs assessment system.

   a. **What steps will you take in order to ensure the risk and needs assessment system is developed and released timely in compliance with the law?**

b. **Will you commit to ensure, as required, that the risk and needs assessment system bases the assessment of each prisoner's risk of recidivism on indicators of progress and of regression that are dynamic and that can reasonably be expected to change while in prison? How will you ensure this?**

c. **Will BOP commit to not use any currently existing tools (whether characterized as "risk and needs assessment tools" or not), because they (1) have not been developed in consultation with the IRC; (2) do not use objective and statistically validated methods to determine which recidivism reduction programs will best minimize the risk that the prisoner will recidivate upon release from prison; and (3) do not base the assessment of each prisoner's risk of recidivism on indicators of progress and of regression that are dynamic and that can reasonably be expected to change while in prison, as required by the First Step Act?**

5. After completion and release of the risk and needs assessment system, the First Step Act requires the Attorney General to implement and complete the initial intake risk and needs assessment for each prisoner and begin to implement programs and activities as required under the bill not later than 180 days after release. Within 2 years after the initial risk assessment of each prisoner, such evidence-based recidivism reduction programs and productive activities must be provided for all prisoners.

   a. **Will you commit to ensuring that the risk and needs assessments are conducted timely, and that programs and activities are provided for all prisoners? What steps will you take in order to do so?**

6. The First Step Act requires the Attorney General to annually (1) conduct audits of the Bureau of Prisons (BOP) regarding the use of the risk and needs assessment system; (2) review, validate, and release the System publicly on the Department of Justice website; and (3) make any revisions or updates to the System. It also requires certain data be collected.

   a. **What policies will you implement to ensure such annual requirements are completed?**

   b. **What agencies, employees, and/or divisions comply with these annual requirements?**

   c. **What factors will you focus on to determine what revisions and updates may be needed annually to the risk and needs assessment system? Will you evaluate and consider any disparate racial impact?**

   d. **Will such audits, reviews and revisions be focused on ensuring that the risk and needs assessment system bases the assessment of each prisoner's risk of recidivism on indicators of progress and of regression that are dynamic and that can reasonably be expected to change while in prison?**

   e. **Will you commit to ensure that such requirements are completed timely each year?**

7. Section 3632(g), created by the First Step Act requires "annual audits of the Bureau of Prisons regarding the use of the System."

   a. **Will you commit to ensure that these audits analyze any racial disparities that may result from the use of the risk and needs assessment system?**

   b. **Will you commit to ensure that these audits ensure that the System bases the assessment of each prisoner's risk of recidivism on indicators of progress and of regression that are dynamic and that can reasonably be expected to change while in prison?**

   c. **Please provide the standards, criteria and guidelines you will utilize for these annual BOP audits.**

8. Under the First Step Act, beginning 2 years after the date of enactment, and annually thereafter for a period of 5 years, the Attorney General is required to submit a report to Congress on specified data on implementation.

   a. **Will you commit to ensure that such reports to Congress are completed and submitted timely each year?**

   b. **What steps will you take to ensure the reports rely on evidence-based practices in the collection of, and reporting of, data?**

9. The First Step Act requires that the Attorney General, in consultation with the Office of Probation and Pretrial Services, implement policies regarding BOP's determination to release eligible prisoners into home confinement, residential reentry centers or to supervised release, as well as policies related to consequences for violation of conditions of release.

   a. **Has the Attorney General consulted with Probation and Pretrial Services yet as to the development of these policies? If not, when will such consultation occur?**

   b. **What guidance will you consider in the creation of such policies?**

   c. **Will you commit to ensuring the least restrictive type of release for each eligible prisoner based on eligibility under the law?**

10. The First Step Act requires the Director of BOP to ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners.

    a. **Will you commit to ensuring sufficient prerelease custody capacity to accommodate all eligible prisoners?**

    b. **If additional funding is required in order to ensure such capacity, will you commit to request sufficient funding in Department of Justice Budget requests?**

c. **Will you commit to maximizing the use of release into supervised release where authorized under the law?**

11. The First Step Act requires the Attorney General to carry out certain duties in consultation with BOP; the Administrative Office of the United States Courts; the Office of Probation and Pretrial Services; the National Institute of Justice; the National Institute of Corrections; and the IRC established under the Act. **How do you intend to facilitate information-sharing and collaboration between these agencies and committees?**

12. The First Step Act mandates that BOP institute initial and continual training for employees on implementation of the risk and needs assessment system, and that such officers and employees demonstrate competence in administering the System, including interrater reliability, on a biannual basis. **What methods or sources will be used to establish this training? How frequently will continuing training be required?**

13. The First Step Act renders prisoners ineligible to receive earned time credits if they are serving a sentence for a conviction under specified provisions of law ("exclusions list"). The Act requires the IRC to review this exclusions list, to issue a report within 2 years on the effects of this exclusions list, and to make recommendations regarding modifications of the list.

    a. **Do you agree that if, after application of the exclusions list, a significant percentage of the prison population is excluded from receiving earned time credits, the exclusions list must be modified?**

    b. **Do you agree that if the criminal histories of persons excluded from earned time credits are determined to be lower-level or non-violent, the exclusions list must be modified?**

    c. **Do you agree that if these exclusions result in racially disparate outcomes, the exclusions list must be modified?**

    d. **Do you agree that if the exclusions list results in a significant percentage of the prison population not participating in recidivism reduction programming or productive activities, the exclusions list must be modified?**

Prisoner Reentry Initiative and Compassionate Release

14. The First Step Act reauthorized and expanded the Prisoner Reentry Initiative under the Second Chance Act.

    a. **Has BOP revised its program statement on this initiative to comport with changes mandated in the First Step Act?**
    b. **What is the status of reinstituting this program?**

    c. **Please provide data on applications received and pending, and applications granted or denied under this program, to date.**

15. The First Step Act increases the use and transparency of compassionate release under 18 U.S.C. § 3582.

    a. **Has BOP's program statement on compassionate release been revised to include new requirements mandated under the First Step Act? When will these requirements begin to be implemented?**

    b. In a letter dated January 16, 2018, the BOP revealed that the agency has granted only 306 petitions, while denying more than 2,400 over the past four years - approving just over 12% of applicants. **Do you agree that this approval percentage should increase?**

    c. The First Step Act requires BOP to issue a report on compassionate release requests received, denied, and granted within one year of enactment. **Will you commit to detailed and thorough responses regarding this data? Will you seek to increase the use of compassionate release such that this report reflects an increase in granted petitions?**

    d. Prisoners have previously waited an average of 4.7 to 6.5 months for a response to a petition for compassionate release, and since 2014, 81 prisoners died while waiting for review. **Has BOP begun to implement the First Step Act's expedited process for reviewing inmate compassionate release requests? Has BOP drafted an implementation policy to ensure compliance with these provisions? If not, when will such policy begin to be implemented?**

16. The reauthorizing and expansion of the Prisoner Reentry Initiative and the reform of the compassionate release process will require BOP staff for implementation.

    a. **How many BOP employees are assigned to assist with each of both the Prisoner Reentry Initiative and the reformed compassionate release process?**

    b. **Does BOP intend to create full time positions to implement and staff these programs?**
    c. **How many full time employees will be assigned these tasks, and when will their assignments begin?**

Appropriations and Staffing

17. The First Step Act authorizes $75,000,000 for each of fiscal years 2019 through 2023 to carry out the Act's provisions.

    a. **In the FY19 Consolidated Appropriations Act, the Federal Prison System received a significant funding increase. Has or will BOP use any of this funding increase to implement policies authorized in the First Step Act?**

    b. **Will you agree to seek full funding of the First Step Act, at minimum at the amount of $75 million per year?**

c. **If additional funding beyond the $75,000,000 authorized in the First Step Act is required, will you commit to evaluate the full cost required to implement all provisions under the Act effectively, and to request sufficient funding in DOJ Budget requests?**

d. **Will you commit to hire sufficient staff to ensure the effective implementation of the Act, such that waitlists for work programs, drug treatment programs, and other recidivism reduction programs are eliminated?**

e. **Will you commit to ensure the safety of all correctional employees and inmates by ending the use of augmentation?**

18. BOP has reportedly been understaffed for years, and has relied on "augmentation" to fill correctional officer positions. First Step Act implementation may require increased BOP staffing, including to ensure the monitoring of increased phone and visitation privileges, and to provide notice and assistance for compassionate release petitions, among many other tasks. **Please describe BOP's plan to ensure sufficient staff and correctional officer capacity at BOP facilities in order to comply with all First Step Act mandates.**

Other Prison Policy Reforms

19. Many provisions within the First Step Act require changes to BOP policy. These include (1) restrictions on use of restraints on prisoners during the period of pregnancy, labor and postpartum recovery; (2) free access to tampons and sanitary napkins for inmates; (3) placement of prisoners close to home; (4) placement of inmates in home confinement for the maximum amount of time permitted under current law; (5) increased phone and visitation privileges; (6) provision of identification for returning inmates; (7) provision of de-escalation training for correctional officers and employees; and (8) the establishment of pilot programs for youth mentorship and service to animals.

a. **Which of these prison reforms have already been implemented by BOP? Which have not, and why not? Will you direct BOP to implement these policies immediately?**

b. **The new law requires notice to pregnant prisoners on the newly updated restrictions on the use of restraints during pregnancy, labor and postpartum. Has this notice to pregnant prisoners been issued? If so, please share a copy of the notice with the House Judiciary Committee.**

c. **Are there any BOP facilities where placement of prisoners close to home in compliance with the First Step Act is not feasible? If so, please provide information on which facilities, the reasons compliance is not feasible, and how many inmates are affected.**

d. **Will BOP ensure that assistance with obtaining identification is provided for all inmates upon release, including non-citizens?**

Medication-Assisted Treatment

20. The First Step Act requires BOP to submit a report to Congress within 90 days on expanding medication-assisted treatment within federal prisons, as well as taking steps to implement that plan. Given the current overdose crisis, this expansion must be a priority.

    a. **What has BOP done to prepare this report?**

    b. **When will BOP implement medication-assisted treatment in all its facilities?**

    c. **What is BOP doing to make sure all forms of medication-assisted treatment are available to those who need it?**

Faith-Based Programming

21. The First Step Act permits nonprofit and other private organizations, including faith-based organizations, to deliver recidivism reduction programming. It also requires the Director of BOP to ensure that non-faith-based programs that qualify for earned time credit are offered at each BOP facility in addition to any such faith-based programs.

    a. **Has BOP complied with this mandate? Please provide the data concerning the current availability of faith-based and non-faith-based programs at each BOP facility.**

Juvenile Solitary Confinement

22. The First Step Act significantly limits the use of juvenile solitary confinement.

    a. **How many covered juveniles or juveniles in covered facilities, on average, are placed in solitary confinement annually?**

    b. **Has the Department of Justice notified and trained its contractors about the new policy regarding solitary confinement of juveniles and offered resources and responses to discipline to end the use of solitary confinement?**

    c. **How will DOJ monitor contract facilities' compliance with prohibitions against juvenile solitary confinement, both prior to any disposition and after?**

Dyslexia/Learning Disabilities

23. The First Step Act requires screening for dyslexia at intake and during each periodic risk and needs assessment, the appropriate use of audio technology for program course materials, and a review of statistics on the prevalence of, and programs intended to mitigate the effects of dyslexia, and the incorporation of findings into program development at BOP.

a. **Has BOP begun the required review of statistics regarding dyslexia? When will BOP begin to comply with these requirements? How will BOP ensure such screening, review and implementation is evidence-based?**

24. The First Step Act also permits the Attorney General to incorporate programs designed to treat other learning disabilities.

    a. **Has BOP incorporated any screening or treatment programs for learning disabilities other than dyslexia? If so, please describe such programs. If not, please describe whether BOP intends to introduce such programs, what learning disabilities they would seek to address, and when they would be introduced.**

BOP IHP Hearings

25. The First Step Act permits certain noncitizen inmates who seek to apply time credits the option of utilizing expedited removal proceedings under BOP's Institutional Hearing Program (IHP). Through the IHP, DOJ's Executive Office for Immigration Review (EOIR) provides in-person and video teleconference immigration proceedings to determine whether such inmates are removable from the United States and, if removable, whether they are statutorily eligible for any form of protection or relief from removal.

    a. **How many BOP facilities currently participate in the IHP? Are there plans to expand the number of facilities that participate in IHP and, if so, by how many? What number of IHP-participating facilities does BOP estimate are necessary to sufficiently address BOP needs as required under the First Step Act?**

    b. **Are there inmate waitlists for participation in IHP? If so, how many inmates are currently waiting for their matter to be heard through IHP?**

    c. **How are IHP dates scheduled for inmates who may ultimately be amenable to removal? For example, are matters for an inmate with the "earliest release date" given priority?**

26. We have heard concerns that the IHP program does not afford sufficient due process rights. For example, experts report that it is difficult to consult with an immigration attorney while in BOP custody. Please provide the following data on the IHP program:

    a. **How many BOP inmates have been processed through the IHP since its creation? Please break this number down by calendar or fiscal year.**

    b. **What percentage of IHP proceedings are conducted in person and what percentage are conducted through video teleconference (VTC)? For hearings conducted through VTC, in what percentage of cases are there reports or complaints about the VTC equipment not working or being unreliable?**

    c. **On average, how quickly is a removal matter processed through the IHP? What are the primary factors that affect processing times?**

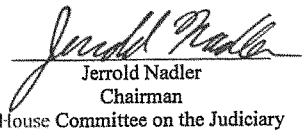
d. **What percentage (and how many) of the BOP inmates processed through the IHP had attorney representation in removal proceedings and what percentage (and how many) did not have an attorney?**

e. **Of those who were represented, what percentage (and how many) were successful in claiming protection or relief from removal, and what percentage (and how many) were unsuccessful?**

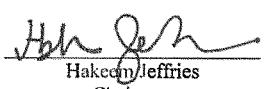
f. **Of those who were unrepresented, what percentage (and how many) were successful in claiming protection or relief from removal, and what percentage (and how many) were unsuccessful?**

Although we understand that DOJ has offered to brief our staff concerning these and related issues, we still request a written and comprehensive response to these questions no later than April 22, 2019.

Sincerely,



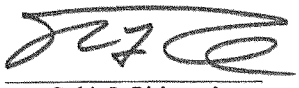
Jerrold Nadler
Chairman
House Committee on the Judiciary



Hakeem Jeffries
Chairman
House Democratic Caucus

Karen Bass
Chairwoman
Subcommittee on Crime, Terrorism, and Homeland Security

Sheila Jackson Lee
Member
Subcommittee on Crime, Terrorism, and Homeland Security



Cedric L. Richmond
Member
Subcommittee on Crime, Terrorism, and Homeland Security

Congress of the United States
Washington, DC 20515

March 19, 2019

Mr. Hugh J. Hurwitz
Acting Director
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 20534

Dear Acting Director Hurwitz

After years of hard work on a bipartisan basis, the First Step Act ("FSA") was signed into law with the clear intent of Congress that certain provisions would take effect immediately. The increase in good time credits from 47 days to 54 days per year is one of the significant changes that should have resulted in the release of many federal prisoners that have yet to be released. It appears that the Federal Bureau of Prisons ("BOP") has yet to release anyone under this provision.

Increasing good time credits is one of the key aspects of the FSA. It is concerning that this section of law is not being implemented immediately. While it may be true that there is statutory language that arguably establishes that this section of law will not take effect until the Attorney General completes and releases the risk and needs assessment system, this was not the intent of Congress. The intent of Congress was to correct BOP's misinterpretation of its existing process of calculating good time credits.

The risk and needs assessment system has no bearing on the calculation of good time credits, and BOP currently has all of the authority it needs to comply with the clear intent of Congress. Thousands of families are anticipating the return of their family members, and this uncertainty jeopardizes reentry planning. The situation BOP has created is untenable and must be corrected.

Currently, we are requesting the following information in contemplation of additional action, including a hearing, before the House Judiciary Committee:

1. When will BOP recalculate good time credits;
2. How does BOP interpret Section 102(b)(2) of the Act, specifically whether it plans to recalculate good time credits in 210 days or when the attorney general completes and release the risk and needs assessment, even if that date comes more than 210 days after the law's enactment;
3. What steps is BOP taking to ensure that recalculation of good time credits is done expeditiously so that not one person serves one day more in prison than the FSA anticipates?

Thank you in advance for your timely response.

PRINTED ON RECYCLED PAPER

Sincerely,

Cedric L. Richmond

Jerrold Nadler

Zoe Lofgren

Steve Cohen

Hakeem Jeffries

Pramila Jayapal

Henry C. "Hank" Johnson, Jr.

QUESTIONS AND ANSWERS FOR THE RECORD

Oversight Hearing on the Federal Bureau of Prisons and Implementation of the First Step Act

Questions for the Record from Committee Chairman Jerrold Nadler

Questions for The Honorable Kathleen Hawk Sawyer, Ph.D., Director of the Federal Bureau of Prisons

1. The Committee remains deeply concerned regarding the lack of information from the Federal Bureau of Prisons (BOP), as repeatedly requested by Congresswoman Eleanor Holmes Norton, regarding which federal laws, rules and regulations apply to inmates in BOP custody for violating federal law but not to inmates in BOP custody for violating District of Columbia law. This information is especially important given the recently enacted First Step Act, which made several important reforms to the prison system, including, for example, modifications to compassionate release and good conduct time. When Congress passed the First Step Act, it intended to apply its provisions to those in BOP custody for violating District of Columbia law. As the provisions of the Act are beginning to be enforced for the first time, it is critically important that these inmates are fully aware of which programs and reforms are available to them. It is also important that Congress be informed of BOP's application of other programs to these inmates. Please, therefore, provide a list of all federal laws, rules, regulations, programs and policies that apply to inmates in BOP custody for violating federal law that do not apply to individuals in BOP custody for violating District of Columbia law.

2. During your testimony before the Committee, Congressman Hakeem Jeffries asked you whether "*According to the United States Sentencing Commission, almost 1/3 of federal offenders are reconvicted in 8 years after entering the community, is that correct?*" You testified in response to this specific question from Mr. Jeffries by answering, "*It is almost 40 percent in the federal system.*"

    a. What specific study or data report, whether published or unpublished, is the source of, or supports your answer of an "*almost 40 percent*" reconviction rate?

    b. Was your answer—*it is almost 40 percent in the federal system*—informed by the U.S. Sentencing Commission's ongoing series of research publications that examines 25,431 U.S. citizen federal offenders who were released from federal prison after serving a term of imprisonment or placed on a term of probation in calendar year 2005 and studied over an eight-year follow up period?

    c. Have you reviewed the U.S. Sentencing Commission's report entitled *Recidivism Among Federal Offenders: A Comprehensive Overview*, which was published in March 2016? Were you aware that the Sentencing Commission found that almost one-third (31.7%) of the offenders were reconvicted after an 8-year follow-up period?

Questions for Ms. Antoinette Bacon, Associate Deputy Attorney General, U.S. Department of Justice

The Committee is concerned about the process by which the National Institute of Justice (NIJ) developed the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN), which was released by NIJ in July, 2019. Please answer the following questions:

1. What gender experts did NIJ consult in developing PATTERN?

2. Who did NIJ contract with to develop the risk tool, and what is their experience with gender responsive approaches? What are their qualifications?

3. Are the Bureau of Prisons' gender responsive programs factored into the risk tool so women lower their risk when they take those courses?

4. Who is overseeing work on the risk and needs assessment system? Does the person have any correctional or assessment experience? How was this person selected – based on what qualifications? Was anyone else considered? Who?

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

December 17, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Section 301 of the First Step Act of 2018 requires the Director of the Bureau of Prisons to submit to Congress an annual report that certifies compliance with the section and to include information describing the facts and circumstances surrounding the use of restraints, specifying the reasoning, details, and resulting physical effects of any such restraints. A copy of the report is enclosed.

Sincerely,

Kathleen Hawk Sawyer

Kathleen Hawk Sawyer
Director

Enclosure

First Step Act Restraints on Pregnant Prisoners
Report to Congress

Status Report: Covering data from December 2018 to December 2019.

Legislative Summary: On December 21, 2018, the President signed the First Step Act of 2018 (FSA) into law (P.L. 115-391). Title III Section 301 of the FSA, codified at Title 18 USC § 4322, requires the Director of the Bureau of Prisons (Bureau) to submit a report that certifies compliance with the section and to include information describing the facts and circumstances surrounding the use of restraints, specifying the reasoning, details, and resulting physical effects of any such restraints.

Compliance: This report certifies that the Bureau's policies regarding the use of restraints on pregnant prisoners comply with the provisions of the FSA.

Restraint Use: There was one circumstance of restraint use on a pregnant female during the reporting period.

Date Placed in Restraints: May 31, 2019
Type of Restraints: Hard Hand Restraints Placed Behind the Back
Time in Restraints: Approximately Two Minutes
Physical Effects: No Physical Effects to Inmate or Fetus

Details: The inmate was a forensic study case pursuant to a Title 18 USC § 4241(b) competency evaluation at Federal Medical Center (FMC) Carswell, Texas. To clearly and visually identify pregnant and postpartum inmates, the institution used a color wristband system. The inmate had removed her wristband however, and was not identified by staff as being pregnant.

The inmate was discovered out-of-bounds and refused numerous orders to return to her assigned area. She vocalized nonsensical statements and demanded to be released from custody. She was subsequently placed in standard hard hand restraints behind her back, in accordance with standard security practices for all non-pregnant inmates. A Lieutenant then identified the inmate as being pregnant and the restraints were removed within approximately two minutes of placement.

Resulting Physical Effects: The inmate was medically assessed and found to have no injuries. The inmate was then returned to her assigned housing unit.

Response: The Bureau's Women and Special Programs Branch reviewed the circumstances involving this incident and discussed the report with staff at FMC Carswell. The institution was counseled that the wristband system alone was an inadequate means of identifying pregnant and postpartum females. Instead, the institution was reminded that it is the staff's responsibility to check the inmate's pregnancy status prior to the potential application of restraints. The Women and Special Programs Branch will continue to oversee the Bureau's policies and training in this area and provide guidance to field sites.

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

November 1, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Section 504(g)(4) of the First Step Act of 2018, titled "Reporting Requirements," requires the Director of the Bureau of Prisons to submit to Congress an annual report detailing the number of recidivism reduction partnerships under this section that were in effect, the number of volunteers that provided recidivism reduction programming, and the number of recidivism reduction programming hours provided. A copy of the report is enclosed.

Sincerely,

Kathleen Hawk Sawyer

Kathleen Hawk Sawyer
Director

Enclosure

First Step Act Partnership
Report to Congress

Status Report: Covering data from December 2018 to September 2019.

Legislative Summary: On December 21, 2018, the President signed the First Step Act of 2018 (FSA) into law (P.L. 115-391). Title I Section 102 of the FSA requires the Attorney General to develop policies for the Warden of each Bureau of Prisons (Bureau) facility to enter into partnerships subject to the availability of appropriations with any of the following: non-profit organizations, private organizations and entities, community-based organizations, institutions of higher education, and industry-sponsored organizations. The goal of these partnerships as articulated in the FSA is to expand evidence-based recidivism programs and productive activities.

Partnerships: The Bureau has a long history of working with external organizations to recruit community volunteers to assist with inmate services in our 122 institutions nationwide. This has included such areas as faith-based, academic, vocational, wellness, mental health, and interpersonal skills. Community volunteers play important roles in providing valuable mentorship, support, and educational opportunities that assist inmates in their personal growth and in returning to their communities as law-abiding citizens.

Consistent with the goal to support and expand the volunteer activities at all institutions, on June 25, 2019, the Bureau provided guidance to all Wardens, informing them about the importance and use of partnerships under the FSA. Specifically, the Bureau's Assistant Directors for the Office of General Counsel and Reentry Services Division issued guidance on collaboration with outside organizations pursuant to the FSA[1]. This memorandum provided information on the FSA's statutory requirements, the Bureau process for establishing partnerships, equitable treatment of similar organizations, and tracking of partnerships.

On September 19, 2019, the Bureau had voluntary partnerships in place at all 122 institutions[2]. At that time, 5,939 individuals had volunteered their time and expertise at various institutions, for a total of 110,489 volunteer hours during the relevant reporting period.

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[1] Memorandum for All Chief Executive Officers (attached). June 25, 2019.

[2] Attachment Table with volunteer data for each institution.

The following table provides data on the number of volunteers and hours by category:

Type of Partnership	Number of Volunteers	Number of Volunteer Hours	Average Number of Hours/Volunteer
Art	10	554	55.4
Community-Based	492	4,835	9.8
Faith-Based	3,654	65,469	17.9
Higher Education	516	17,218	33.4
Non-Profit	399	9,885	24.8
Private	249	2,357	9.5
Visitation Volunteer	356	6,704	18.8
Vocational Training	41	1,393	33.9
Workforce Development	222	2,074	9.3

Going Forward: The Bureau continues to work closely with volunteer organizations in the local communities of our 122 federal prisons nationwide to ensure robust partnerships that benefit the inmate population. It is important to note that these partnerships vary in their offerings and scope, and the Bureau is working to develop a method to assess any reduction in recidivism associated with each organization's program. However, as a complement to the broader programs and services offered to inmates within the Bureau, we know these collaborations are an important component of effective reentry, and we will continue our work to expand these offerings.

The following table provides data on the number of volunteers and hours by institution:

BOP Institution	State	Region	Volunteers	Hours	Average Hours Per Volunteer
Alderson FPC	WV	MXR	29	318	11.0
Aliceville FCI	AL	SER	89	1,031	11.6
Allenwood Low FCI	PA	NER	9	49	5.4
Allenwood Medium FCI	PA	NER	14	16	1.1
Allenwood USP	PA	NER	20	125	6.3
Ashland FCI	KY	MXR	43	219	5.1
Atlanta USP	GA	SER	34	444	13.1
Atwater USP	CA	WXR	42	223	5.3
Bastrop FCI	TX	SCR	33	243	7.4
Beaumont Low FCI	TX	SCR	43	692	16.1
Beaumont Medium FCI	TX	SCR	20	364	18.2
Beaumont USP	TX	SCR	6	124	20.7
Beckley FCI	WV	MXR	35	641	18.3
Bennettsville FCI	SC	SER	20	1,186	59.3
Berlin FCI	NH	NER	71	1,021	14.4
Big Sandy USP	KY	MXR	16	875	54.7
Big Spring FCI	TX	SCR	16	300	18.8
Brooklyn MDC	NY	NER	99	1,709	17.3
Bryan FPC	TX	SCR	114	1,062	9.3
Butner FMC	NC	MXR	33	543	16.5
Butner Low FCI	NC	MXR	23	416	18.1
Butner Medium I FCI	NC	MXR	34	389	11.4
Butner Medium II FCI	NC	MXR	60	466	7.8
Canaan USP	PA	NER	16	210	13.1
Carswell FMC	TX	SCR	141	8,355	59.3
Chicago MCC	IL	NCR	45	1,446	32.1
Coleman I USP	FL	SER	6	73	12.2
Coleman II USP	FL	SER	12	202	16.8
Coleman Low FCI	FL	SER	19	421	22.2
Coleman Medium FCI	FL	SER	47	1,704	36.3
Cumberland FCI	MD	MXR	53	441	8.3
Danbury FCI	CT	NER	139	1,299	9.3
Devens FMC	MA	NER	48	964	20.1
Dublin FCI	CA	WXR	136	2,895	21.3
Duluth FPC	MN	NCR	32	329	10.3
Edgefield FCI	SC	SER	43	409	9.5

El Reno FCI	OK	SCR	35	1,008	28.8
Elkton FCI	OH	NER	109	865	7.9
Englewood FCI	CO	NCR	41	2,050	50.0
Estill FCI	SC	SER	21	50	2.4
Fairton FCI	NJ	NER	137	1,617	11.8
Florence ADMAX USP	CO	NCR	16	317	19.8
Florence FCI	CO	NCR	35	628	17.9
Florence High USP	CO	NCR	46	395	8.6
Forrest City Low FCI	TN	SCR	11	192	17.5
Forrest City Medium FCI	TN	SCR	14	157	11.2
Fort Dix FCI	NJ	NER	153	1,459	9.5
Fort Worth FMC	TX	SCR	97	1,690	17.4
Gilmer FCI	WV	MXR	39	1,991	51.1
Greenville FCI	IL	NCR	28	8,265	295.2
Guaynabo MDC	PR	SER	4	116	29.0
Hazelton FCI	WV	MXR	67	644	9.6
Hazelton USP	WV	MXR	48	483	10.1
Herlong FCI	CA	WXR	29	311	10.7
Honolulu FDC	HI	WXR	75	896	11.9
Houston FDC	TX	SCR	9	20	2.2
Jesup FCI	GA	SER	47	768	16.3
La Tuna FCI	TX	SCR	39	791	20.3
Leavenworth USP	KS	NCR	45	1,858	41.3
Lee USP	VA	MXR	21	1,275	60.7
Lewisburg USP	PA	NER	35	240	6.9
Lexington FMC	KY	NER	75	989	13.2
Lompoc FCI	CA	WXR	49	713	14.6
Lompoc USP	CA	WXR	62	1,018	16.4
Loretto FCI	PA	NER	77	771	10.0
Los Angeles MDC	CA	WXR	53	539	10.2
Manchester FCI	KY	MXR	38	703	18.5
Marianna FCI	FL	SER	4	5	1.3
Marion USP	IL	NCR	63	1,214	19.3
McCreary USP	KY	MXR	45	506	11.2
McDowell FCI	WV	MXR	3	37	12.3
McKean FCI	PA	NER	32	619	19.3
Memphis FCI	TN	MXR	48	444	9.3
Mendota FCI	CA	WXR	52	262	5.0
Miami FCI	FL	SER	57	174	3.1
Miami FDC	FL	SER	20	372	18.6
Milan FCI	MI	NCR	113	526	4.7

Montgomery FPC	AL	SER	24	730	30.4
Morgantown FCI	WV	MXR	70	835	11.9
New York MCC	NY	NER	45	399	8.9
Oakdale I FCI	LA	SCR	37	377	10.2
Oakdale II FCI	LA	SCR	21	346	16.5
Oklahoma City FTC	OK	SCR	13	323	24.8
Otisville FCI	NY	NER	142	1,547	10.9
Oxford FCI	WI	NCR	9	263	29.2
Pekin FCI	IL	NCR	98	1,742	17.8
Pensacola FPC	FL	SER	26	1,034	39.8
Petersburg Low FCI	VA	MXR	30	452	15.1
Petersburg Medium FCI	VA	MXR	18	866	48.1
Philadelphia FDC	PA	NER	82	1,072	13.1
Phoenix FCI	AZ	WXR	70	993	14.2
Pollock FCI	LA	SCR	53	583	11.0
Pollock USP	LA	SCR	45	346	7.7
Ray Brook FCI	NY	NER	38	2,197	57.8
Rochester FMC	MN	NCR	92	856	9.3
Safford FCI	AZ	WXR	64	389	6.1
San Diego MCC	CA	WXR	23	270	11.7
Sandstone FCI	MN	NCR	106	697	6.6
Schuykill FCI	PA	NER	15	217	14.5
SeaTac FDC	WA	WXR	18	576	32.0
Seagoville FCI	TX	SCR	71	1,871	26.4
Sheridan FCI	OR	WXR	62	1,004	16.2
Springfield MCFP	MO	NCR	49	481	9.8
Talladega FCI	AL	SER	23	364	15.8
Tallahassee FCI	FL	SER	69	1,246	18.1
Terminal Island FCI	CA	WXR	53	1,219	23.0
Terre Haute FCI	IN	NCR	57	694	12.2
Terre Haute USP	IN	NCR	68	953	14.0
Texarkana FCI	TX	SCR	38	7,017	184.7
Thomson AUSP	IL	NCR	22	348	15.8
Three Rivers FCI	TX	SCR	18	914	50.8
Tucson FCI	AZ	WXR	27	261	9.7
Tucson USP	AZ	WXR	49	691	14.1
Victorville Medium I FCI	CA	WXR	127	1,586	12.5
Victorville Medium II FCI	CA	WXR	167	1,600	9.6
Victorville USP	CA	WXR	122	1,422	11.7
Waseca FCI	MN	NCR	45	781	17.4
Williamsburg FCI	SC	SER	34	2,150	63.2

Yankton FPC	SD	NCR	24	197	8.2
Yazoo City Low FCI	MS	SER	39	378	9.7
Yazoo City Medium FCI	MS	SER	3	16	5.3
Yazoo City USP	MS	SER	1	4	4.0
			5,939	**110,489**	**18.6**

U.S. Department of Justice

Federal Bureau of Prisons

Office of the General Counsel

Washington, DC 20534

June 25, 2019

MEMORANDUM FOR ALL CHIEF EXECUTIVE OFFICERS

FROM: Ken Hyle
Assistant Director/General Counsel
Office of General Counsel

James Wills
Acting Assistant Director
Reentry Services

SUBJECT: Guidance for Collaboration with Outside Organizations Pursuant to the First Step Act

Introduction

Evidence based recidivism reduction programming and productive activities are an integral part of the mission of the Bureau of Prisons ("Bureau"). Under Section 102 of the First Step Act (FSA), the Bureau is empowered to enter into new partnerships with nonprofits, private organizations, institutions of higher education, private vocational training entities, and industry-sponsored organizations to expand its evidence-based recidivism reduction programs and productive activities.

This memorandum provides advice to supervisors to assist in establishing these new partnerships. A template for a memorandum of understanding (MOU) with outside organizations is attached for your use.

Statutory Requirements

Title 18 USC 3621 (h)(5), as amended by the FSA, directs the Bureau to expand evidence-based recidivism reduction programs and productive activities, and develop policies for Wardens to enter into partnerships, subject to the availability of appropriations, with any of the following:

- Nonprofit and other private organizations, including faith-based, art, and community-based organizations that will deliver recidivism reduction programming on a paid or volunteer basis.

- Institutions of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001) that will deliver instruction on a paid or volunteer basis.

- Private entities that will:

  deliver vocational training and certifications;

  provide equipment to facilitate vocational training or employment opportunities for prisoners;

  employ prisoners; or

  assist prisoners in prerelease custody or supervised release in finding employment.

- Industry-sponsored organizations that will deliver workforce development and training, on a paid or volunteer basis.

In addition, Section 106 of the FSA directs, "In considering any program, treatment, regimen, group, company, charity, person or entity of any kind under any provision of this Act or the amendments made by this Act, the fact that it may be or is faith-based may not be a basis for any discrimination against it in any manner or for any purpose."

Process to Establish Partnerships

Program materials, to include any documentation concerning the evidence-based practices and research outcomes, should be provided by the outside organizations for evaluation. The Regional Reentry Affairs Coordinators will submit the packet to the Reentry Services Division. The BOP is in the midst of identifying outside research partners who will assist BOP in

evaluating external programs. If the initial review supports that the program is evidence-based, the Reentry Services Division will evaluate the program for a pilot or final approval.

Voluntary Service

All organizations and individuals providing services at no cost to the Bureau should complete a Gratuitous Services Acknowledgment (GSA). Attached are examples of some GSAs for your use. A GSA should be signed by an official representative of the organization, and by individuals providing services.

Any proposed substantive modifications to the GSA should be reviewed by the appropriate Regional Counsel's Office. If the Regional Counsel's Office agrees with the modifications, the modified GSA shall be forwarded to the Bureau's Commercial Law Branch for review prior to use.

Donation of Goods

If an outside organization wants to donate items or goods, Program Statement 1350.02, Acceptance of Donations, must be followed.

Avoiding Endorsements and Other Ethics Issues

When interacting with outside groups, it is important to avoid a specific or implied endorsement of one organization over another. The Bureau should engage with similar organizations in an equitable manner.

Outside groups cannot use Bureau affiliations to solicit others or in advertising. In addition, an outside organization cannot solicit inmates for business services available after they are released from custody.

Contracting Issues

Agreements entered under the First Step Act are subject to all the requirements for agreements outlined in the Bureau of Prisons Acquisition Policy, P.S. 4100.06.

Outside groups that currently have a contract for goods and services with the Bureau cannot provide gratuitous services, as they are a "prohibited source."

No Participation Guarantees

As these programs are voluntary for inmates, the Bureau cannot guarantee to the outside organization a specific number or percentage of inmates that will participate in the program. Also, the Bureau cannot guarantee continued inmate interest over time.

Tracking of Participation

Under the FSA, the BOP is required to annually report on the

(i) the number of recidivism reduction partnerships that were in effect during the year;

(ii) the number of volunteers that provided recidivism reduction programming; and

(iii) the number of recidivism reduction programming hours provided;

Therefore, it is very important the implementation of any partnership requires appropriate tracking and monitoring of the above statistics. The Regional Reentry Affairs Coordinator will track this data, and provide it to the Reentry Services Division upon request.

Conclusions and Further Assistance

This guidance memorandum provides a broad framework for collaborating with outside organizations. Other legal and ethical considerations may arise in specific cases. Please contact the Office of General Counsel (e.g. the Ethics Office, the appropriate Consolidated Legal Center, the Regional Counsel's Office, or the Commercial Law Branch) for questions and assistance when entering into these First Step Act partnerships.

The local Union should be notified in the event any local institutional policies, practices or procedures are developed. See e.g. Master Agreement, Art. 3, section d(5) and Art 4, sections (a),(b) and (c).

Attachments:

Template MOU
GSA - Individual
GSA - Entity

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