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"

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Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to testify. At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all federal defendants because they are too poor to afford counsel. An overwhelming majority of people incarcerated in Bureau of Prisons (BOP) are our clients, and we are grateful for this opportunity to discuss the BOP and the First Step Act (FSA).

The BOP has a long history of acting in ways that result in lengthier and less productive terms of incarceration despite the obvious will of Congress. For decades the BOP took an unreasonably restrictive view of good time, resulting in thousands of years of additional overall prison time. For decades it refused to exercise the authority given to it by Congress to release incarcerated people who were terminally ill, infirm, or otherwise suffered from extraordinary circumstances. For decades it has not made nearly full use of its statutory authority to release people to Residential Reentry Centers (RRCs). And for decades it has not provided enough vocational, educational, mental health, and substance abuse programming despite abundant need and lengthy waitlists.

The FSA will solve some of these problems, most notably clarifying the good time credits and offering an avenue to the courts for compassionate release. But the FSA also provides the BOP with significant added responsibility and authority. As a result of the Act, the BOP will now establish and implement a risk and needs assessment system that will directly determine how long tens of thousands of people serve in prison. If not done wisely, there are countless ways the system will result in unfair, biased, and overly punitive outcomes. With history as a guide, this committee should be very concerned about whether the BOP will rise to the challenge of these new responsibilities. Oversight has never been more important.

Although the focus of my remarks will be on national BOP and FSA issues, I will start with a discussion of two BOP facilities in my home district in New York City, the Metropolitan Detention Center (MDC) in Brooklyn, which is the largest federal pretrial detention center in the country, and its counterpart in downtown Manhattan, the Metropolitan Correctional Center (MCC). Repeated problems at the facilities and well-publicized events of the past

year are part of a larger story about why strong oversight of the BOP is so desperately needed.

Fire at the MDC

Under the best of circumstances, the MDC is a miserable place to be incarcerated. The federal jail located in Sunset Park, Brooklyn houses over 1,600 people, most of whom are pretrial detainees awaiting trial in the Southern and Eastern Districts of New York. The Federal Defenders of New York represents roughly half of them. Most of the rest are represented by appointed counsel from the Criminal Justice Act Panel. The vast majority of those incarcerated at MDC are poor people of color. On a regular basis we witness inexcusable treatment of our clients: poor medical treatment and psychiatric care, arbitrary placement in solitary confinement, unnecessary impediments to legal visiting, and even rape by corrections officers (which have resulted in several indictments). The space itself is cramped with little opportunity for any exposure to the outdoors.

Even with those conditions as a baseline, during the week from January 27 to February 3, 2019, the MDC reached a new low. On Sunday, January 27, there was a fire at the MDC that knocked out the electrical panel controlling a sizable part of the institution, including cell and common area lighting, much of the kitchen equipment, and most of the inmate phones and computers, among other things. Despite the severity of the situation, the only thing MDC officials told us (or anyone else) was that attorney and family visitation was being suspended that day. The next morning, we were once again told that visitation was suspended with no explanation. We peppered prison officials with questions. We were told all was okay – just a problem with lighting in the visitation area. Then the calls from our clients started. The only phones working were the direct lines to the Federal Defenders' office. "There's no heat in here." "We're being locked down in the dark." "I'm not getting my medication." Temperatures outside were hovering in the single digits during one of the coldest stretches in New York City's history. Most of our clients lack money for the commissary and are relegated to wearing short-sleeved scrub-like uniforms. They are cold when the heat is functioning properly and set to 68 degrees. When it's 40 or 50 degrees inside, as we were hearing, merely cold becomes torture. We immediately contacted MDC officials, and they denied any problem with the heat or medical care. As the reports from our clients continued, we began filing emergency motions before the trial judges in their cases, asking for release or removal to safer conditions. We asked the MDC for a tour of the facility but were denied. As we sought relief in court, federal prosecutors reported to the judges that MDC officials were telling them that all was fine; our concerns were overblown, and our clients were lying.

On Thursday, January 31, the New York Times reported on the conditions. In a statement to the Times, prison officials minimized the problems and stated that "the electrical failure was related to Con Edison, which it said had been 'dealing with numerous power emergencies in the community.'" That, of course, was a lie, and Con Edison quickly refuted it. The Times story included not just our lawyers' and clients' accounts but those of the

correctional officers who work there. According to the officers, temperatures were "freezing," and people in cells "just stay huddled up in the bed." "We didn't have heat in the building, we didn't have light." With the press attention and the corroboration of the officers, our complaints began to be taken seriously.

On Friday, February 1, the Chief Judge of the Eastern District of New York, Dora Irizarry, ordered that we be given access, and the head of our Eastern District office, Deirdre von Dornum, entered the facility – now five days after the fire and loss of power. What she found was horrifying. It was after sunset, and the small cells containing two people each, were pitch black. The only lighting was emergency lighting coming from the common areas. Our clients had been locked down in those cells for the past 24 hours and for various long stretches throughout the week. Some cells had heat; others were frigid. People needing new medication couldn't get it. People who require Continuous Positive Airway Pressure machines (CPAPs) couldn't use them because of the lack of power. Their lives were in danger, and they were terrified. One man with an open wound showed Ms. von Dornum (and later a federal judge who also toured the facility) his puss-covered bandages that hadn't been changed in two weeks. Another, who suffered from ulcerative colitis, showed her his bloody bedding that had not been changed because of the lack of laundry services. Everyone was scared and cut off from the world: no family visits, attorney visits, or phone calls other than use of the direct line to the Federal Defenders during the rare moments they were let out of their cells.

I toured the facility the following day with various local and federal officials, including Chairman Jerrold Nadler and Representative Nydia Velazquez. Chairman Nadler asked the Warden, Herman Quay, why there wasn't a better plan for a power outage of this sort and why there wasn't more of a sense of urgency to fix it – and, in particular, why the electricians were not working that day, much less around the clock. The warden had no answers. Representative Velazquez expressed her anger that the previous day when she had come for a tour, MDC officials only showed her the common areas, not the cells, by falsely telling her the inmates were locked down for a "count" – a brief, temporary tally of the population. In fact, they were still locked down as of Saturday afternoon – going on 48 hours. And despite numerous corrections officers corroborating the lack of heat in certain areas throughout the week (and the week before), the warden continued to deny any problems. On our tour that afternoon we saw many of the same problems Ms. von Dornum had seen the night before: frantic, scared people locked in pairs in tiny, unlit cells. Some cells had heat; others did not. One cell registered 50 degrees on a portable thermometer.

The next day, on the heels of the press attention and the vigorous prodding of Chairman Nadler and Representative Velazquez, the power was restored. In the wake of the debacle, at the request of Chairman Nadler and Representative Velazquez, the Office of the Inspector General of the Department of Justice (IG) investigated the incident. The IG Report confirmed and even amplified many of the problems. But its ultimate recommendations fell well short of real accountability.

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

[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

[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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September 13, 2019

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Director
National Institute of Justice
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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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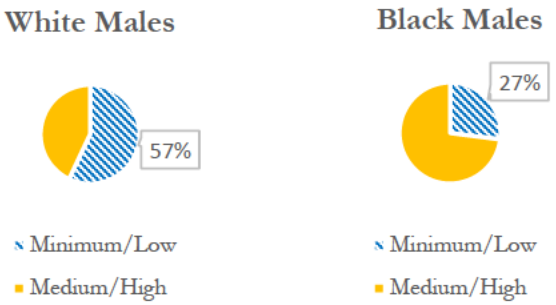
report (DOJ Report) confirms the need to assess PATTERN for accuracy and bias. For example, reported data indicates PATTTERN will have a racially disparate impact, particularly on black males. As illustrated in the charts below, based on the DOJ Report, white males are far more likely than black males 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).

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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

[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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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.

[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

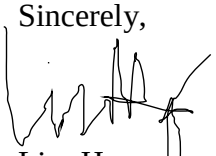
imposed by Congress" because "agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (citations 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.

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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.

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

[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

[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.

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

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.

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.

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

Our Standards: *The Thomson Reuters Trust Principles.*

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.

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."

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.

"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.

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
Posted Date: September 25, 2019

Amendment_001.pdf (64.74 Kb)
Description: Amendment 001

Contracting Office Address:
320 First Street, NW
Washington, District of Columbia 20534

Place of Performance:
Oklahoma
United States

Primary Point of Contact.:
Kevin J. Hoff,
Contract Specialist
khoff@bop.gov
Phone: (215) 521-7355

ALL FILES

Solicitation 1

Sep 25, 2019

- 01_15BRRC19R00000247_S
- 02_15BRRC19R00000247_S
- 03_15BRRC19R00000247_S
- 04_15BRRC19R00000247_S
- 05_15BRRC19R00000247_F
- 06_15BRRC19R00000247_E
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- 08_15BRRC19R00000247_S
- 09_15BRRC19R00000247_S
- 10_15BRRC19R00000247_S
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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
  1:39 pm

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.