



**Written Statement of
Norman Reimer, Executive Director**

**On behalf of the
National Association of Criminal Defense Lawyers**

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

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

October 17, 2019

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

Retroactive Application of the Fair Sentencing Act

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

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

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

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

Risk and Needs Assessment

Transparency

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

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

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

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

General Concerns

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

Criminal History

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

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

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

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

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

Disproportionate Emphasis on Youth at Time of First Conviction

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

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

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

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

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

Inadequate Recognition of Evidence of Rehabilitation

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

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

Undue Weight to Infractions

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

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

Programming

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

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



NORMAN L. REIMER
Executive Director

October 8, 2019

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

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

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

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

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

I. Requested Records

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

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

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



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



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



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

II. Application for Waiver or Limitations of All Fees

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

III. Miscellaneous

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

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

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

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

Sincerely yours,

Norman L. Reimer