BRENNAN CENTER FOR JUSTICE

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

Dear Director Muhlhausen:

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

Like many other civil rights organizations, the Brennan Center supported the Act for its potential to both reverse outdated drug sentencing laws and significantly expand the federal prison system's commitment to rehabilitation.[1] These complementary goals will both help reduce mass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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.   PATTERN Creates Significant Racial Disparities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

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

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